Antonio Carlos Wolkmer. Professor and Coordinator of the Master's Degree Program in Human Rights and Society at UNESC-SC and professor at the Post-graduate Law School at UNILASALLE-RS. Retired professor at PPGD/ UFSC. PhD in Law and member of the Research Group CLACSO (Argentina/Equador): "Pensamiento Jurídico Crítico" ("Critical Law Thought"). Member of the International Political Science Association (IPSA, Canada). Member of the Argentinean Association of Legal Sociology and from RELADES – Red Latinoamericana de Derecho y Sociedad ("Law and society Latin-american network"). CNPq Researcher (Level 1-A) and CAPES' Adviser. Visiting professor at Post-graduate departments in universities in Brazil and abroad (Argentina, Peru, Colombia, Chile, Ecuador, Venezuela, Costa Rica, Puerto Rico, Mexico, Spain and Italy). Author of several books, among them: *Direitos humanos e filosofia jurídica na América Latina* (Org.) [*Human Rights and Juridic Philosophy in Latin-america* (ed.)], Rio de Janeiro: Lúmen Júris, 2004; *Constitucionalismo, Descolonización y Pluralismo Jurídico en América Latina* [*Constitutionalism, Decolonization and Legal Pluralism in Latin America* (ed.)], Aguascalientes (Mexico): Cenejus; Florianopolis: NEPE/UFSC, 2015; *Teoría Critica Del Derecho desde América Latina* [*Law Critical Theory in Latin America*], Mexico: AKAL, 2017; Pluralismo Jurídico. Fundamentos de una Nueva Cultura del Derecho. [*Legal Pluralism: bases for a new law culture*], Madrid: Dykinson, 2018.
Contact: acwolkmer@gmail.com

PLURALISM AND SOCIAL LAW THEORY FROM A LATIN-AMERICAN PERSPECTIVE

Antonio Carlos Wolkmer
UNESC-SC and UNILASALLE-RS

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Abstract

The proposal of the present article highlights some theoretical-practical tendencies that are influencing, in the last decades, the field of the political philosophy and the theory of the law. As a product of insurgent democratic social movements and their resistance struggles, alternative paradigms and new institutional knowledge emerged in the Andes region, such as Ecuador (2008) and Bolivia (2009). Therefore, the text aims to demonstrate, first, tradition, ruptures and advances in Latin American constitutionalist theory to conclude, bringing the reference of pluralism and its contribution to the decolonization and social reordering of law theory.

Keywords

Latin constitucionalism, legal pluralism, decolonization, social theory

Resumen

La propuesta del presente artículo destaca algunas tendencias teórico-prácticas que están influenciando en las últimas décadas el campo de la filosofía política y de la teoría

del Derecho. El producto de movimientos sociales democráticos insurgentes y de sus luchas de resistencias, emergió en la región de los Andes, paradigmas alternativos y nuevos saberes institucionalizados en constituciones como la de Ecuador (2008) y de Bolivia (2009). Por lo tanto, el texto objetiva demostrar, primero, la tradición, rupturas y avances en la teoría constitucionalista latinoamericana para concluir, trayendo el referencial del Pluralismo y su contribución para la descolonización y reordenación social de la teoría del Derecho.

Palabras clave

Constitucionalismo latinoamericano, pluralismo jurídico, descolonización, teoría social

Introduction

This paper explores its subject divided in three moments: 1. Introduction; 2. Tradition and Ruptures in the Constitutionalist Theory in Latin America; 3. The Role of Pluralism in the Decolonization and in the Reordering of Social Law Theory.

Such inputs will be discussed as possible responses in order to advance new perspectives for the Politics and Law in Latin-American societies which are still going through processes of decolonization and of the affirmation of their own identities, as well as the self-determination as plurinational Nations.

Firstly, one should consider the new challenges that arise from Political and Law perspectives in parallel to transformations which trespass the knowledge processes and relationships that have been structuring human life in societies at the beginning of the 21st century. Some of the innovative tendencies in the context of social organization and their normative system have been coming from experiences in societies which are going through decolonization processes, more specifically, in what has been called the Global South. As such, new perspectives enable to introduce other references which privilege the community power and the needs of new collective subjects which emerge within this scenario. Hence, it is important to underline their own political dynamics that have been introducing social changes and that are connected to democratic movements in Latin America, as well as reflecting the political-constitutional order. A prime example of that is the constitutionalism that emerged from Ecuador's (2008) and Bolivia's (2009) constitutions, which have been stimulating and legitimizing new perspectives on alternative paradigms and intercultural dialogues that challenge canonical knowledges.

It can be argued that until nowadays the European conquest of the Americas is still reflected in the social relationships in the region. With this conquest, new modes of life and of perception arrived, taking part in the construction of a historical reality and of institutions which are typically derived from an eurocentric modernity: that is, related to this eurocentric modernity in the sphere of knowledge, human life, in the forms of social organization and in the human relationship with the natural environment. In the field of Law, there was an incorporation of a state juridic monism, liberal constitutionalism, privatist legalism and an understanding of nature as an object to be economically regulated.

The current changes in the Latin-american political-constitutional scope propose a new form of juridical organization connected to ancestral costumes, as well as to current issues, highlighting an epistemic syncretism. The arguments brought forward

by this paper intend to underline some of the changes connected to the Andean constitutions of Ecuador and Bolivia, which are perhaps the ones that developed this theme the most.

Henceforth, what is proposed with this article is a methodological explanation, within a historical-descriptive and critical perspective, of how the values brought forward by the Andean cosmovision and by the paradigmatic guidelines of a transformative type of constitutionalism, in which the guiding referential is the political-juridical plurality within an ecocentric dimension, are intertwined with the intercultural principles of the 'buen vivir,' with the juridical dimension of nature, with a revision of common goods and with a plurinational political reality. Such elements favor a deconstruction of concepts, categories and representations associated with formally discursive versions of hegemonic socio-juridical knowledges, opening up alternative proposals for a more decolonial social theory within the scope of Politics and Law.

Tradition and Ruptures in the Latin-american Constitutional Theory

In the search for decolonial socio-juridical knowledge one has to critically reflect upon canonical and colonizing knowledge and practices. One should consider that within the societal and institutional scenario that politically dominated the Latin-american countries in the beginning of the 19th century there was a propitious context for the expansion, within the scope of Law, of the political-juridical doctrine of a colonizing and liberal Constitutionalism of an elitist, segregating and monist bias. Even if the emancipation of the colonies, which happened during this period politically represented a limitation to the metropolis' absolutist power, it ended up consolidating guarantees and security for the white, *criollo* and property-owner minorities in the recently freed countries. These minorities looked to legitimize themselves as a hegemonic power in the new political and institutionalized model of a peripheral capitalist development. The ideological profile of this imported Western Constitutionalism translated not the values of a local elite, while also excluding the majority of demographic segments who could not be absorbed by the post-independency colonizing model (such as the Native Indigenous populations, the Afro-american communities and peasant workers). It also ended up ideologically expressing and joining lines of a economical liberalism, the dogma of free enterprise, the centralization of

government's power and bureaucracy, the monist conception of the State ruled by law and the supremacy of properties' rights.

Furthermore, the incorporation of the capitalist form of production and of the individualist liberalism ideal had an important function in the process of consolidation of the State Law (that is, the State legitimizes itself as the only legislative ruler) and in the specific development of the Public Law of the old Iberian colonies. It should be recognized that the liberal individualism and the Enlightenment's ideology of the Human Rights permeated the Hispanic America in the 19th century, trespassing fundamentally agrarian and segregationist societies, sometimes also pro-slaver, in which the urban and industrial development was almost nonexistent. In these societies, a great part of the population did not have a citizenship status and were not protected by the Constitution. Within this colonial logic, marked by the monist culture of 'assimilation' in which cultures are constitutionally standardized by the official model, neither diversity nor the preservation of nature were respected, and, even less so, the remote traditions connected to a common-law legal pluralism and ancestral knowledge of the original populations (Wolkmer, 2013a, pp.19-21).

Seldom in the region's history the colonizing Constitutionalism represented by liberal, individualist, formalist and excluding Constitutions authentically expressed the needs of its major social segments, such as those from the Native, Afro-descendents and peasant populations, and, later the urban movements. As well as the historical absences of their legitimate antecedents others were added: in the 20th century there was a delayed recognition of the importance of the natural environment, biodiversity, sustainable development, and politics, of preservation and protection of the natural goods policies.

Henceforth, this article underlines the importance of the Pluralist Constitutionalism that emerged contemporaneously in Latin-american countries such as Ecuador and Bolivia, which theoretically broke with the colonialism of power and with its political and juridical tradition of liberal and individualist basis. Distancing themselves from the euro-centric matrix of thinking Law and State, new Constitutions of alternative cosmovision started to be projected. These unfolded from a valorization of the Native Indigenous universe and from a re-founding of political institutions, recognizing the needs of original cultures which were overviewed and of identities that were radically denied their own history. Within this context, it is timely to introduce the discussion of the theoretical and practical landmark of the pluralism within the scope of the State and of Law, enabling and problematizing ruptures with colonial

and euro-centric matrixes, as well as stimulating alternative inputs which can redefine new epistemes and redirect them towards a more decolonial social theory within the scope of politics and Law.

The role of Pluralism in the decolonization and in the reordering of the Social Law Theory

To reveal the colonizing forms of representation that are part of the modern Law theory, especially the ones related to a liberal-individualist tradition, it is necessary to underline the recent epistemological contributions of the Global-south which are breaking with classical ethnocentric rationalized truths and universalist paradigms.

Within this context, the epistemological and methodological referential of Pluralism is introduced, most notably as a central concept that prioritizes the issue of diversity and difference.

In its widest sense, the classical Pluralism means 'the existence of more than one reality, of multiple forms of action and a diversity of the social and cultural fields, each of them with their own particularities and involving a variety of autonomous phenomena and heterogeneous elements that are not reducible within one another' (Wolkmer, 2015a; Wolkmer, 2015b). Hence, the Pluralism shows that the State power is not the only and exclusive source for Law. Such conception minimizes, excludes and denies the monopoly of legal rule making by the State, recognizing the production of other forms of regularization, generated by political instances, intermediate organisms or social organizations containing a certain degree of autonomy and their own identity. Beyond the traditional formulations of pluralism (which are part of juridical sociology, politics and anthropology) it is important to note that within a spectrum of diverse interpretations there is the juridical pluralism of participatory communitarian practices, 'from bottom to top', as an expression of informal, parallel or alternative Law. Within this kind of pluralism there are experiences of normativity that go beyond the State, such as communitarian justice, Indigenous justice, and the 'quilombola' justice of the Afro-descendents, as well as the peasant rounds, itinerant justice and other practical experiences.

Once the issue of pluralism has been introduced and contextualized, it is important to advance and underline its presence in contemporary experiences and lived processes in some Latin-american countries which have been developing the episteme of a Constitutionalism of the pluralist and transformative kind. The innovation of the Pluralism in the

Southern region of America is reflected in the manifestation of the juridical variation of the Constitutionalism. That is, a pluralist constitutionalism as a State 'funding principle.' It is relevant to recognize the institutional legality of the pluralism in the politics and law, underlined for the first time by the region's Constitutionalism -more specifically, in the Ecuador's and Bolivia's constitutions. These constitutions consecrate and reinforce the political and juridical pluralism as their ground principles, prescribing not only a plurinational State model, but, above all, a project of decolonial legality for pluricultural societies. Bonaventura Santos argues that it is in this sense that the pluralism as a 'structuring principle' surpasses the conceptual apparatus of the new Constitutionalism, which implies a plurinational State that aggregates different nations and cultures. The main idea is that there is not only one concept of nation, but two concepts, that is, the civic-geopolitical nation and the ethnic-cultural one, which adds to a plurality. The monocultural logic of the modern State disappears and the State becomes multicultural (Santos, 2010, p. 72).

Such theoretical aspects of the rise of Juridical Pluralism in the last decades in the context of Latin America help the recognition and consolidation of the emergence of a new type of Constitutionalism – which can be termed Pluralist Constitutionalism. The Pluralist Constitutionalism, established in the region from political changes and new processes of social struggle, have had, mainly, in the constitutions of Ecuador (2008) and Bolivia (2009) the strategic space of inspiration and legitimization for propelling the development of paradigms of rupture within the scope of new collective social forms (such as from the original peoples, Native Indigenous and Afro-descendents) and the rights to natural common goods (such as the ones reflected on the multicultural State, diversity and interculturality).

The development of some of these guiding axes, which were foreseen and consecrated in the rising Constitutionalism in Andean countries, implicates challenges for the assimilation and the process of their real materialization. The challenges for societies going through decolonization processes are how to carry an effective and plural concretization of new epistemological paradigms conceived and projected for beyond the traditional institutionalization and the juridical standards. The issue is how to develop concrete methodological strategies able to introject, face and respond to new representations, logics, conceptualizations, cosmovisions and complexities.

Taking this concern into consideration, a pluralist proposal of a transformative Constitutionalism has been introduced and gained force, problematizing the possibilities of a new Social Law theory from the viewpoint of the South.

These constructions which began the so-called 'Popular democratic cycle,' in a way that showcases the innovative and decolonizing character of new institutions, determine the configuration of a new political-constitutional paradigm, of participatory, plural and intercultural character. The context in which such a cycle emerges legitimize the radical application of the new paradigm by States from the South which still find themselves shaped by ethnocentric, monists and elitists transplants from the European modernity. This application responds to concrete historical needs of subjects excluded from their own history.

However, the outbreak of the decolonial process of social struggle in Latin America, which culminated in the Pluralist Constitutionalism, should be recognized fundamentally in the constitutions of Ecuador (2008) and Bolivia (2009) (Wolkmer; Melo, 2013; Wolkmer, 2016, pp. 121-123; Verdum, 2009; Noguera Fernández, 2008). For some commentators, such political texts express a Communitarian Plurinational Constitutionalism identified with another paradigm of State of Law, one that is neither universal or unique and that, instead, co-exists with experiences of 'traditional knowledge' of plurinational societies (such as the indigenous, communal and peasant), with practices of judicial egalitarian pluralism (that is, coexistence of diverse legal instances in equal hierarchy: State ordinary jurisdiction and Indigenous/peasant jurisdiction) and, finally, with the recognition of collective rights and common goods connected to nature.

It seems clear that the political changes and new social processes of social struggles in Latin-american States generated not only new political statutes which materialized new rising social actors, plural realities and challenging biocentric practices, but, equally, in light of the cultural diversity of 'minorities,' of the unchallengeable strength of Indigenous populations in the continent, of the politics of sustainable development and of the protection of natural common goods, they bring forward a new juridical paradigm, that of the Pluralist Constitutionalism, a synthesis of an Indigenous, autochthonous and mestizo Constitutionalism (Wolkmer, 2015b).

The stage of a great decolonial impact for the emergence of a new kind of Latin-american Constitutionalism was configured by Ecuador's 2008 constitution and its bold 'biocentric/ecocentric turn,' which recognized nature's own rights and the rights of the development of a 'buen vivir'. The repercussions of greater impact and recognition are present in the seventh chapter of the second title about principles (arts. 12-34) and in the 'buen vivir' rights regime (arts. 340-394), as well as in the dispositives on 'biodiversity and natural resources' (arts. 395-415), that is, on 'nature's rights.'

Certainly, by recognizing nature's rights, beyond the usual subjects of the juridical modernity and independently from human's valuation, the 2008 Constitution proposes the realization of 'a radical change in comparison to other Latin-american constitutional regimes' (Gudynas, 2009; Wolkmer, 2016, p.123).

This perception that emerges from an Andean cosmovision unfolds into a potentialization of survival material basis that respect culture and promote a 'buen vivir,' in which the human dignity is a life's reference, with quality and under ongoing construction.

> The new constitution is pioneer in that it recognizes nature's rights. There are many articles that establish this right and that propose a development model to the country in harmony with nature and environment. The nature's rights are closely tight to the proposal of a new development regime, the well living regime or sumak kawsay. The well living implies harmony: of the being with themselves, with others and with nature. It makes sense the incorporation of nature as a subject with rights since without it the life of human beings is not possible (Acosta 2013; Martínez, 2009, p. 37).

The aims of the 'buen vivir' (well living) as a representation of an alternative sustainability are defined in the art. 276 of Ecuador's constitution. One of them states the aim of 'recovering and preserving nature, maintaining a health and sustainable environment, as well as guaranteeing the access to and quality of water, air and soil, and the benefits of natural resources.' Consequently, this determines obligations to be fulfilled by the State and people, collectively (arts. 277 e 278). (Gudynas, 2009, p. 119). According to Eduardo Gudynas, going towards the direction of the 'use of natural resources to attend needs of life,' the aims of the 'buen vivir' are close to certain critical positions connected to the sustainable development or even a 'deep ecology.' Two aspects of the 'buen vivir' have more direct shared traces with sustainability, that is: first, the proposition that 'human beings should use resources and the richness of the environment,' however, this relationship between humans and nature should be inserted in 'a new context' since this use should serve to the 'buen vivir' (Gudynas, 2009, p. 120). Hence, the vision of the 'buen vivir' is an integral one, including natural and social environment. A 'buen vivir' can not exist without a protected and preserved nature' (Gudynas, 2009, p. 46).

Besides the Ecuadorian Constitutionalism one should equally recognise how Bolivia's 2009 Constitution also brought about an Andean cosmovision, recognizing the

people's sovereignty, which is expressed not only in the statement of their fundamental right to life, but in the materialization of the right to water and food.

As such, it is evident the indispensable change at a planetary level in relation to common goods, promotes a real commitment of a pluriversal citizenship with the preservation of common goods as a defense of Life in its plenitude.

Henceforth, these are some of the regulatory landmarks about the environmental thematization and the politics related to the mandatory Human Right to water, its impacts and the unfolding of the more recent constitutional theory in some Andean countries.

More than outlining the scope of what can be called a constitutionally institutionalized pluralism, it is a new Law of a communitarian plurinational and decolonial type. In this sense, Bartolomé Clavero remarks that 'the 2009 Bolivian Constitution is the first constitution in the Americas that establishes the basis for the access to rights and power for all, adopting an integral and congruent anti-colonialist position, the first one to decisively break with the typically American constitutional colonialism or the colonial constitutionalism since the independency times' (Clavero, 2009, p. 2). This is a formal underlining of what came to be a 'refounding' of the Bolivian State, markedly Indigenous, anti-colonialist and plurinational.

Summing up, the brief analysis of aspects of the Pluralist Constitutionalism from the perspective of the South underlines some points that come from the tradition of Andean populations and from its ancestral culture, such as the Indigenous Law, the intercultural knowledge, the ancestral plurinationality, the judicial egalitarianism and the rights to common goods related to nature (such as the environment, natural resources, water and land).

Conclusion

To critically rethink the modern, individual-liberal, Enlightenment-based construction of the traditional conceptions around the Political and Law Theory, involves the pedagogic effort of bringing a historical praxis of transformation to the discussion. This praxis is based on actions of struggles and the recognition of rising sociabilities, promoting ongoing 'processes of social construction of another reality.'

The emergent and alternative paradigm that has been produced from the South breaks with the scientific universalist cartesian model of an Enlightenment and anglo/

eurocentric tradition, introducing new epistemological and methodological references to rethink and reorder, in a wide sense, the social structure and its relationships (society), and the dynamics of normative processes in their plural sources (Law).

The construction of a critical thought of resistance to colonialism that departs from a decolonial world-periphery (from the perspective of subaltern knowledge) does not imply a total negation or radical rupture with other rational and universalist forms of knowledge inherited from the Enlightenment and produced by the ethnocentric modernity (European and North-american), but a dialectic process of assimilation, transposition and reinvention (Wolkmer, 2014, p. 241; Maia, 2011).

Hence, it is indispensable to assimilate the appeal for new grammars and new knowledge that enable an alternative language of difference, contextualizing, as argued by Castro-Gómez and Grosfoguel, 'the complexity of gender, race, class, sexuality, knowledge and spiritual hierarchies within geopolitical, geocultural and geoeconomic processes of world-system. With the aim of finding a new language for this complexity, we need to look 'outside' our paradigms, focuses, disciplines and fields of knowledge. We need to establish a dialogue with non-Western forms of knowledge since these generate a totality in which everything is related, nonetheless, with new theories of complexities' (Castro-Gómez; Grosfoguel, 2007, p.17; idem, Connell, 2007).

The challenge is to re-signify a Social Law Theory that, without stopping to be inserted within the current cultural processes of globalization and interlocution with 'hegemonic' matrixes from the North, can also turn to the local, peripheral, the 'other,' without losing its own identity and autonomy. This means that inside its hegemonic and cosmopolitan spaces the classical and universalist themes which shape and dominate colonized social and juridical sciences open up to a recognition of new potentialities of knowledge and life's relationships, taking into account not only the Latin-american reality, but other non-Western social experiences (Connell, 2007; Alatas, 2001; Comaroff, 2011).

Summing up, the challenge that remains is how to use new epistemological sources taken from the recent Latin-american Constitutionalism and from the emergence of a juridical pluralism from the perspective of decolonial studies to advance towards a rupture position without losing the democratic and constructive dialogue that enables not only a cosmovision connected to another type of life development (the *buen vivir*), but also, and above all, able to germinate seeds for a new Social Law Theory.

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