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ANTONIO CARLOS WOLKMER

Rethinking Practices of Legal Pluralism in Latin America

This paper aims to discuss Legal Pluralism from a transformative perspective as a product of community practices exercised by social collectivities that seek to address fundamental needs. In this perspective, the problem is to verify if the institutionalized pluralism in the Andean region (the constitutions of Ecuador and Bolivia) is qualified as a transforming legal pluralism, autonomous from state and with an authentic community profile. Even though this premise can be admitted, the essential question is: to what extent are its strength, validity and efficiency satisfactory inside the political-legal institutions? The result is the duality recognition of the legal pluralism that not only traditionally coexists with the State but is characterized as "subaltern" and limited by impositions of a monist culture that renews itself by keeping colonial remnants. For the discussion, a theoretical-reflective methodological approach with a critical and socio-legal content was employed, along with a specific bibliography.

Keywords: community practices; Latin-American constitutionalism; legal pluralism; Political Constitution of Bolivia (2009); Political Constitution of Ecuador (2008).

Introduction

To bring new perspectives to the fore, coming not only from colonial experiences but also from peripheral societies of dependent capitalism which are marked by the "incorporation" of the modern north-Eurocentric theory of Law (of political liberal-individualist tradition), it is important to frame the most recent socio-legal productions arising from the global South. These referred productions have come onto the scene and are breaking with traditional and universalist formulations of the classic paradigms belonging to the hegemonic imperial culture of the West (see Santos *et al.*, 2021).

Therefore, it is worth returning to the theme of pluralism, which in the field of normativity began to be explored in more depth in the mid-1950s and 1960s through research produced in processes of postcolonialism and in academic discussions, initially taken on by anthropologists (Hooker, 1975;

Woodman, 1985; Gluckman, 1997; Nader, 1997; Benda-Beckmann, 2002) and, later, by sociologists (Santos and van Dunen, 2012; Araújo, 2014).

Thus, Legal Pluralism gained strength as a key concept to discuss multiple normative systems, which have their own logic in the same social space of (re)production and circulation, questioning "centralism" and formalism of State law. This does not preclude legal pluralism's incorporation by State law or its interrelations, as well as the autonomous existence of underlying normativity.

Legal pluralism, as a broad manifestation present in different times, comprises many trends with different origins and multiple characterizations. It thus becomes quite complex to indicate a particular uniformity of fundamental principles given the great diversity of models, authors, and interpretations that exist, which, in its defense, encompass conservative, liberal, and radical nuances to corporatists, institutionalists, democrats, socialists, etc. (Wolkmer, 2023: 454). This scenario, which is open, dense, and heterogeneous, does not make it impossible to admit that the main center into which legal pluralism converges is the denial of the State as the sole source of Law.

This conception minimizes, excludes, or denies the State's monopoly on the creation of legal norms. It prioritizes the production of other forms of regulation that are generated by communities, identities, intermediate bodies, or social instances provided with a certain degree of autonomy and their own identity. Pluralists tend to relativize the omnipotence of modern formalist-centralism, characterized by the idea that absolute law, in a sense of obligation and with official recognition, is that which emanates from State power, expressed in the written and publicized form of law.[1]

Across the wide horizon of diversified interpretations, and beyond traditional formulations of pluralism (legal sociology, politics, and anthropology), it is important to elect and operationalize a certain paradigm of normative pluralism. That is, legal pluralism as the insurgency of community and participatory normative practices experienced and/or produced by groups that are excluded and not covered by institutionalized hegemonic law, which is linked to and legitimized by state political power.

It is the option for legal pluralism, existing preferably in peripheral societies of dependent capitalism, such as those of Latin America, understood "from the bottom up", as an expression of autonomous, parallel, or alternative insurgent normativity. In this type of pluralism, there are experiences of normativity that go beyond the coloniality of the State, such as some Latin

[1] See Wolkmer (2006: 637-638).

American practices of community justice (urban and agrarian), indigenous justice, the *quilombola*[2] justice of Afro-descendants, peasant rounds, itinerant justice, official or not, and numerous other experiences of customary legality and normativity produced by peasant communities (Sanchez Botero, 1999; Yrigoyen Fajardo, 2006; Machicado, 2009; Ardila Amaya, 2016b; Wolkmer *et al*., 2016).

Latin American experiences are not an exclusive phenomenon of the region. The production of agreements and conflict resolutions independent from the State's jurisdiction can be identified specifically in the research carried out by anthropologists into the normative plurality of Africa (ancestral and tribal normativity against the law of Western colonization is investigated, for example, by Gluckman, 1997): in South Africa, with its "popular courts" under the old apartheid regime (Nina, 1995), and in Ghana and Nigeria (Woodman, 1985). Similarly cited in Asia are legality and justice in relation to Anglo-Saxon Common Law, in the case of India, Pakistan, and Malaysia; or Dutch colonization in West Sumatra (Indonesia) (Benda-Beckmann, 2002), and classical investigations of local and colonial law in Southeast Asia (Hooker, 1975).

In this theoretical-descriptive incursion, it is worth highlighting the resumption of legal pluralism in some countries of the Andean region, which expressly materializes and reveals a community tradition of local laws, customary rules, indigenous original practices, and multiethnic regulatory uses. It is a matter of interpreting such an insurgent process as an expression of an ancestral legal pluralism with its own identity, one of community-based, participatory and autonomous nature.

Thus, Legal Pluralism is being widely explored, considering the constituent processes that come from the historical struggles of the region and which resulted mainly in the constitutions of Ecuador and Bolivia (Noguera Fernández, 2008; Santos and Grijalva Jiménez, 2013; Wolkmer and Wolkmer, 2015). This tendency "from underneath", produced by indigenous peasant movements and popular insurgent movements,[3] in contrast, is opposed to a vertical legal pluralism, "from above", be it a "subaltern" internal legal pluralism, one of "concealment" (Yrigoyen Fajardo, 2016; Copa Pabón, 2017), or as a product of globalized *lex mercatoria*, neoliberal reason and transnational groups (Twining, 2003; Hernández Cervantes, 2014).

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[2] *Quilombola* is the Portuguese term for the descendants and remnants of communities of fugitive Afro-descendants during the period of slavery in Brazil. These communities were called *quilombos*.

[3] They are social segments present in the social stratification which are on the margins of the centers of power.

This is what the present reflective contribution – which makes no claim to being neutral – here proposes: from the constitutional legitimacy of legal pluralism, conceive Legal Pluralism as new publicized procedures, giving shape to what has already existed in the historicity of countries with a strong indigenous and peasant tradition, regulated by plural normativity and autonomic justice[4]. Bearing in mind these premises, the objective is to seek the approximation, the proof, and/or the contrasts of these experiences of Latin American empirical constitutionality of the theoretical-descriptive proposal for a legal pluralism characterized as "community-participatory"[5].

1. Colonial and Modern Trajectory of Legal Pluralism in Latin America

When investigating the colonial past, it is possible to identify a coexistence of Latin American normative experiences: the system of *colonizing, flexible and monist legal pluralism*, institutionalized or oligarchic, which can be found in the Portuguese-Hispanic colonization processes, and an *autonomic community legal pluralism*, which had its development and representation based in the normativity of the customary tradition of original peoples from that region.

Firstly, colonizing legal pluralism can be a certain type of legal monism expressed throughout colonization and adapted to the circumstances of Latin America. It is the foreign legislation applied to the colonies during the long period of colonial administration by the Metropolises – be it Spain or Portugal. It is a matter of "transplanting" a Eurocentric pattern onto the region, which results from the imposition of the great official codes and their modalities of organizing state justice (Ots y Capdequi, 1969; Watson, 1993; García-Gallo, 2008; Bonilla Maldonado, 2009).

In fact, this expressed not only the Spanish culture but also the Western European hegemony of the Roman-Germanic matrix, which was manifested by the *Fueros Reales* (1255), *Código de las Siete Partidas* (1256-1263), *Ordenamiento de Alcalá* (1348), *Leyes de Toro* (1505) and the supreme work in the view of the formalists of the Spanish Empire, that is, the *Recopilación de Leyes de las Indias* (1680).

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[4] Legal Pluralism refers to the condition of autonomy, a form of free exercise by a people of self-determination, self-affirmation, and self-definition. Thus, autonomic justice implies a system of normativity and jurisdiction with its own identity based on its traditions, customs, and cultures, independent of institutionalized law, or of political forces and external agents linked to the State (see López Bárcenas, 2002: 40).

[5] This is the proposal of Legal Pluralism designed as a product of community practices, exercised by social subjects who seek to fulfill their fundamental needs through participatory processes, establishing processes that legitimize insurgent and autonomous normative manifestations in the face of State Power. The proposal for this "community-participatory legal pluralism" is developed in Wolkmer (2018).

However, one must consider the protective laws of indigenous peoples, which were not widely effective, such as the *Ley de Burgos* (1512) and the *Leyes Nuevas* (1542). This took effect from the Spanish conquest of Latin America, marked by invasion, conquest, and exploratory colonization, which brought with them violence, genocide, and the destruction of the great Mayan and Aztec cultures in the Yucatan, mainly; and, in the south, of pre-Colombian cultures, the Incas, as well as the Quechuas, Aymarás, Guaranis, Charruas, Mapuches and many other original collectives.

This also took place in Brazil, since Portuguese legislation was applied to the colonial territory, especially through the *Ordenanças Reais Lusitanas*, which were enforced for more than 300 years, until the mid-19th century, remaining after the independence process (1822).

In a broad field of practices and applications, autonomic community legal pluralism is another expression of normativity that must be recognized throughout colonization. Extending beyond the indigenous law that was preserved in the colonization process, it includes other communal normative procedures as products of plural manifestations in southernmost America. Thus, the very particular existence of the normative system of missionary reductions included countries like Paraguay, Argentina, Brazil and Uruguay. On the other hand, the presence of Afro-descendant communities in South America cannot be omitted since they were authentic spaces of refuge and protection for black slaves (Moura, 1987; Wolkmer *et al.*, 2016; Nascimento, 2019).

The rich experience represented by the communities that were administered by the Society of Jesus is, without a doubt, a relevant experience from a political, social, and anthropological point of view. However, one must ask: what type of communities were these, and what were their social and political structures and their regulatory system?

Some interpretations point out that they would represent a form of "indigenous community socialism", and for others, like the Swiss Clovis Lugon (1977 [1949]), an experience that served for the book he wrote under the title *La République communiste chrétienne des guaranis, 1610-1768*. All literature in the fields of history, sociology, and politics about these missionary communities is noteworthy (Kern, 1982; Melià and Nagel, 1995; Colaço, 2000; Caten, 2003). Without delving into the discussion regarding "evangelical colonialism" (Höffner, 1986), it is only necessary to prioritize the matters taken up in their Law, their administration of justice, their penalties, and how conflict resolution was carried out.

Thus, what was the source of legitimacy for locally applied normativity, and what kind of authority was responsible for these legal issues? Was it a

customary law or a mix of regulations coming from Iberian colonialism? Also, how to place the rules of canon law cultivated by Jesuit priests? To what extent was there a confluence of certain rules of Spanish, Portuguese, canon law, or customary indigenous law?

Therefore, it is extremely important to bear in mind the forms of justice practiced by these missionary collectivities in resolving internal conflicts regardless of the state jurisdiction imposed by the imperialist policies of the colonizing metropolises.

Also, in the context of community-based legal pluralism in the colonial period, it is possible to recognize legal practices in the territorial spaces belonging to slaves of Afro-descendant origin, developed in the Caribbean, on the southern coast of the Colombian Pacific, and especially in Brazil. It is a rich experience of how these *quilombola* communities lived and what their type of internal normativity was. Within this context, what were the rites used in the resolution of conflicts, the forms of sanction, and the internally preserved repair procedures?

These are some historical and community experiences of achievement concerning pluralism in the Portuguese-Hispanic colonies and of the different and predominant forms of justice among the peoples of Mexico, Guatemala, Ecuador, Bolivia, and Peru (Correas, 2003; Yrigoyen Fajardo, 2003; Sieder and Flores, 2011; Hayes Michel, 2016), as well as in the *quilombola* territories, occupied by slaves who were previously violently uprooted from their communities of origin on the African continent, and deported to European possessions in Latin America, serving as the production base of capitalist expansionism (Klein, 1987; Moura, 1987; Davis, 2001 [1966]).

Thus, it is significant to rescue all these remnants of what could be characterized as a trajectory of community legal pluralism, present in the region, coexistent, but not necessarily subordinated to the power of the State in the evolution of the colonial period, both in Hispanic America and in Portuguese America.

Such rescues and transpositions of certain original normative practices reveal the reiterated and permanent exercise of legal pluralism in Latin America. However, the pluralism present throughout the colonial period was maintained and preserved with the independence of the former Portuguese-Hispanic colonies throughout the 19th century. This historical continuity is present in the contemporary scenario, where the normativity of the native peoples and peasants has preserved an effective system of justice and autonomic rights of ancestral tradition of their own.

When speaking of these manifestations, it becomes important to bring examples of well-known indigenous communities, located mainly in Mexico and represented by inexhaustible pluri-ethnic wealth, which have historically developed internally regulatory cultures in various regions, such as Guerrero (community police), Michoacán (self-defense groups against police and drug trafficking) and Oaxaca (communal justice practices); also, in Chiapas, with the democratic decentralization expressed in the *caracoles* (Correas, 2003, 2009a, 2009b; Aragón Andrade, 2016).

In addition, a privileged scenario for such processes is consistently seen in other parts of Latin America, starting with Central America (Guatemala) in the application of customary Mayan law (Sieder and Flores, 2011), and traveling south, with the practices of community popular justice in Colombia (Ardila Amaya, 2016b), and even farther south, as in the multiple experiences in Chile and the Pacific coast, with the Mapuches (Mella Seguel, 2007), and the peasants and *ronderos* in the interior of Peru (Yrigoyen Fajardo, 2002). Likewise, exercises of a plurality of regulations can be seen in the *piqueteros* in Argentina, and in the "landless" social movements and non--state procedures in the *favelas* of Rio de Janeiro, in Brazil, all composing a privileged insurgent and complex scenario of normative plurality present in Latin America (Wolkmer, 2018: 167-177).

In addition to the hegemony of the indigenous and peasant normative system, there is another modality of the plural practice of decentralized and popular regulation in Latin America: community justice, which has taken on different expressions of materialization of justice (through mediation and conciliation in equity, for instance) with the aim of resolving certain conflicts in urban or even rural centers, alternatively to and faster than judicial procedures solely linked to the State. These conflict resolution practices can be identified with certain strong (informal) or weak (formal) procedures of legal plurality.

In fact, community justice can be considered one of the most expressive legal pluralism procedures in Latin America, given its plural, autonomous, consensual, and informal character for conflict resolution (Ardila Amaya, 2016a). Beyond this form of normative plurality, there are many others that result from self-regulating social processes of multiethnic groups, local identities, popular organizations, professional associations, and intermediate bodies, among others (Wolkmer, 2018).

Since the first decades of the 21st century, the theme of legal pluralism has gained relevance, being recognized at the same time in socio-legal discussions occurring in Latin America for reordering local institutions driven by political processes, social changes, and constitutions such as those of

Ecuador[6] and Bolivia[7], approved respectively in 2008 and 2009, generating a "new" model for constitutionality.

Thus, legal and political pluralism is projected in the region not only as a "founding principle" of the State but also as a possible "instrument of decolonization" (Araújo, 2016: 104).[8] The rigid duality between State and Society regarding the activity of normative production was minimized, opening up distinct spaces that interconnect themselves in the materialization of the Andean normative system because its basic principles (art. 1 of the Constitutions of Ecuador and Bolivia) prescribe a plurinational State model, constitutionally formalizing the composition of different nations and cultures (see Santos and Exeni Rodrigues, 2013; Santos and Grijalva Jiménez, 2013; Arkonada, 2012; Santos, 2010).

2. On the Recognition and Distinctions of Legal Pluralism

Arising now is another question: how to examine and punctuate a non-Eurocentric and unconventional interpretation of legal pluralism, both considering the presence of classificatory cuts that can be distinguished (within their limits), ambiguities, and controversies, and highlighting and advancing towards the proposition of legal pluralism of a community and participatory content, and doing such from a point of view of the dependent capitalist Latin American periphery.

There are many distinctions that can be found in classic works by sociologists and anthropologists who specialize in Law (Pospisil, 1967; Vanderlinden, 1972; Moore, 1973; J. Griffiths, 1986; A. Griffiths, 2002; Benda-Beckmann, 2002, 2014); however, amongst so many exponents, the linear cycle of Sally Engle Merry should be highlighted, where the contours of "classic legal pluralism" and "new legal pluralism" are presented. According to Merry (2007), the former will mainly represent anthropological research on colonial and post-colonial societies, with respect to the intersections between European and native rights that date from the end of the 19th century to the processes of decolonization following World War II. What the author called "new legal pluralism" corresponds to the late 1970s, when "scholars

[6] Republic of Ecuador (2008), *Constitution of the Republic of Ecuador*. Accessed on 12.02.2021, at https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html. For the original version, see https://www.gob.ec/sites/default/files/regulations/2020-06/CONSTITUCION%202008.pdf.

[7] Plurinational State of Bolivia (2009), *State Political Constitution*. Translated by Max Planck Institute. Accessed on 12.02.2021, at https://www.constituteproject.org/constitution/Bolivia_2009. For the original version, see https://www.minedu.gob.bo/index.php?option=com_content&view=article&id=1525:constitucion-politica-del-estado&catid=233&Itemid=933.

[8] All quotes from languages other than English in the present article are translated by the author.

of socio-legal law became interested in applying the concept of legal pluralism to non-colonized societies, especially in the industrialized countries of Europe and the United States" (Merry, 2007: 95).

Considering Merry's chronological categorization, when examining the impacts of globalization on local and national infra-state normative systems (legal hybridization), Boaventura de Sousa Santos (2001: 139) goes further by proposing a third period, that is, "legal pluralism of globalization" that includes the complex inter-relationships of "transnational and supra-state legal systems which coexist in the world system with state and infra-state legal systems".

After presenting these proposals so popularized in academic circles, it is appropriate to propose theoretical differentiations based on the specificities of the contemporary Latin American context without succumbing to reductionism but rather via open propositions that present interactions and complementarities.

In this sense, one cannot forget André J. Hoekema's (2002) distinction regarding "internal legal pluralism", in which he refers to the relationship between the rights of indigenous communities and the state legal system. Based on this concept, the referred author presents the coexistence between *social legal pluralism* and *formal legal pluralism*. The former is not recognized by official law, while the latter is represented by two modalities that can be complementary: *unitary legal pluralism* ("official law that unilaterally determines the legitimacy and application of other recognized normative systems") and *egalitarian legal pluralism* (there is "an egalitarian simultaneity of all legal systems", resulting in "indigenous law replaces national law", where "its applicability is prevalent") (*ibidem*: 70-72).

In addition to these well-known distinctions, one can also bring to contemporary discussion other forms of plurality that oppose, coexist or interact with each other. Faced with this reality, it is possible to see a first possible differentiation, a more "empirical" one, between a *state legal pluralism* and a *community-type legal pluralism*. Therefore, to conceive a state legal pluralism is to refer to the special justices that are regulated by the State or which are within the State, and this hegemonic instance of power allows for the coexistence and the overlap of these jurisdictions with ordinary justice. By way of example, the courts of arbitration in sports along with ecclesiastical or religious justice (in Christian, Islamic, and Jewish traditions) can be cited as typical forms of regulation or plural modalities functioning within the State, which it routinely recognizes and coexists with. These jurisdictions have their own internal autonomies within the sphere of the State; likewise, it is possible to include other mechanisms here, such as the

conflict of jurisdiction between state agencies (López Cuéllar, 2015), and/or the application of own rules exercised by migratory currents in the interior, regardless of the jurisdiction of the State.

Legal pluralism, on the other hand, hereby referred to as *community legal pluralism*, implies pluralistic practices in the sense recognized by Griffiths (1986: 8) as "stronger" or more "authentic", which comprise a diversity of procedures with autonomy or relative autonomy vis-à-vis the State, which, in Latin America, develops and is present in indigenous courts and in their special jurisdictions, in peasant patrols, militias, and paramilitary groups, in community, popular and informal justice, land occupation movements, the law of urban poor neighborhoods, slums, and camping regulations (Wolkmer, 2018).

The institutional formalization of many of these advances is present, as previously mentioned, in the "new" Latin American constitutionalism from the beginning of the 21st century, and of which the Constitutions of Ecuador (2008) and mainly Bolivia (2009) are paradigmatic examples.

Continuing, regarding the peripheral Latin American scenario, one characterized by a model of dependent colonial capitalism, there is the need to present another more "political" differentiation, one that is present in the contrast between a conservative, oligarchic, and colonizing legal pluralism and a counter-hegemonic legal pluralism, which can be characterized as an insurgent, transformative and decolonial manifestation. Conservative legal pluralism is embodied in the acceptance shown by some sociologists in Latin America of a pluralism "from above", that is, vertical, and thus a manifestation produced and disseminated by capitalist economic globalization. This pluralism is generated in the context of the big transnationals, the central economic blocs that obviously receive support from the countries of the global North, which impose themselves on the peripheral countries of the South and in the processes of decolonization. It is an international imposition, which, if contradicted, may result in a threat of economic blockade or even military invasion, a phenomenon that is also considered by some as a "neo-feudalization" of law in the realm of globalization. It is a new *lex mercatoria*, a phenomenon of plurality that has been interpreted by authors such as Alfonso Julios-Campuzano (2009), in Spain, and André-Jean Arnaud (1981), in France. Likewise, the phenomenon of the globalization of law and its complex production as a systemic legal pluralism, as a dimension of "autopoiesis", discussed by Gunther Teubner (1992).

This contribution to understanding a legal pluralism typical of globalization (Santos, 2002; Twining, 2003), different from the functionalist or liberal perspective of many European theorists in Latin America, was critically

investigated by Aleida Hernández Cervantes (2014), from Universidad Nacional Autónoma de México. In her Ph.D. thesis, she endeavored to understand and question legal pluralism as a transnational legal production of globalization and its techniques of deregulation and self-regulation, as well as their impacts on the economies of developing countries. This imposition was revealed as a strategy of the new cycle of world capitalism and of neoliberal reason. The application of its principles in the realm of Law reinforces the defense of supranational legal practices, the decentralization of the administration of justice, the deregulation of social rights, the defense of a flexible law, and the law built on the negotiating table through commercial agreements or pacts. It is a new operational logic that formulates another *lex mercatoria*. This type of legal pluralism meets the attempts of "neo-colonialism" or "neoliberalism" of the countries of advanced central capitalism (global North), definitively excluding the "periphery" (countries comprising the global South).

Counter-hegemonic normative plurality emerges to oppose colonizing legal pluralism and should be interpreted as a horizontal manifestation practiced by a wide range of social collectives, the product of claims for rights due to needs not being met by institutionalized powers, generated in conflicts, social struggles, correlations of forces and demands for justice.

The basic condition for this decolonial concrete achievement implies the use of normativity that is outside the sphere of the State, based on open underlying practices, built by the community and in a participatory way, and that absorbs and transforms needs and demands for "new" rights. This pluralism of horizontal normativity distances itself from the old plural formulations of the liberal tradition, detaching itself from the individualistic and competitive representation of bourgeois nature (Wolkmer, 2018).

This counter-hegemonic legal pluralism which is characterized here as a community and participatory legal pluralism is distinguished from an elitist, colonizing, and ethnocentric conception; it is configured as a normative mechanism not necessarily institutionalized through insurgent and instituting processes of subaltern segments, marginalized and excluded from ordinary state procedures. Such an experience of confrontation or egalitarian coexistence between the indigenous justice system and the ordinary (state) justice system must be proven in the context of peripheral--dependent capitalist societies, such as those in Latin America.

The next segment of this work will show how to project the possibilities of theoretical and political-constitutional framing of this community and participatory Legal Pluralism, whether full or partial, from the specific analysis of the Bolivian Constitution of 2009, characterized as the most "pluralist"

product of contemporary constitutionalism in the region. The problem to be discussed is whether institutionalized pluralism in the region, especially in the Bolivian Constitution of 2009, is qualified as a legal pluralism with an authentic community and autonomous profile, as well as whether its application and exercise are egalitarian, complete, and effective.

3. The Horizons for Rethinking Legal Pluralism Through a Community and Participative Perspective

Without going into the description, analysis, and theoretical foundations of the so-called community and participatory Legal Pluralism – which has already been developed in our work published in Portuguese (Wolkmer and Wolkmer, 2015) and Spanish (Wolkmer, 2018) –, it is important to empirically and constitutionally bring the privileged sociopolitical space of evidence, demonstrating the extent to which legal pluralism, considered community and autonomous, is formally present or not, as well as its effective application in the context of the Constitutions of Ecuador and Bolivia.

For this purpose, it should first be noted that the legal pluralism here proposed, that is, according to the perspective of decolonization, is structured through some socio-political and epistemological conditions that cannot be seen as closed and rigid, but rather, as flexible, relational and complimentary. These are assumptions that allow for the resizing of pluralism as an operational concept, considering its theoretical, practical, and institutional dimensions, which were present in some contemporary constitutional experiences in Latin America but which can also be recognized in post-colonial settings or not.

The presence and interaction of certain factors are central to the dynamics of plural normativity understood as community and participatory, which thus includes: 1) new collective normative subjects, 2) a system of fundamental needs, and 3) a participatory, decentralized, and democratic public space (Wolkmer, 2018: 205-240).

It examines, therefore, the extent to which this formalized legal pluralism, whose assumptions are inserted directly into the legal dogmatics of Andean constitutionalism through the constitutional texts of 2008 (Ecuador) and 2009 (Bolivia), expresses an authentic or not authentic community normativity. Next, the discussion concludes by seeking to highlight whether this plurality has empirical-material validity and is fully effective despite having a community, transforming, and autonomous content when compared to the State.

The first constitutive factor is to recognize a concrete, insurgent, and non--abstract subject from the Western Cartesian universe, embodying the whole conception of a historical subject, of a collective and instituting identity that

generates legal production which is interconnected by common values and identities. These new ways of sociability, configured in the region by the original peoples, are recognized and become the centralized subjects in the Andean Constitutions. Confirmation is contemplated in the Ecuadorian Constitution, in article 10 ("persons, communities, peoples"), article 11, item 1 ("individually or collectively") and article 56 ("Indigenous communities, peoples and nations, the Afro-Ecuadorian people"). Likewise, the Bolivian constitutional text enshrines the collective subject in its articles 2 ("indigenous peoples") and 14, III ("everyone [peoples] and all collectives").

Based on this recognition of who the collective identities are, we seek the basis for the demands for rights and the justification for their claims that legitimize the actions in the exercise of their customary jurisdictions, which makes it imperative to specify your basic needs for life to the full. Therefore, a second factor constituting the plurality here discussed is fundamental human needs.

The issue is to know what the real needs are (Heller, 1978 [1974]), not reducing them only to material and economic needs since others compose the demands of the original collectivities, such as cultural, pluri-ethnic, intercultural, autonomic. The matter of needs is found within the scope of fundamental rights, the rights to good living and communities and nationalities. The 2008 Political Constitution of Ecuador highlights, in the chapter related to the rights of *buen vivir*, that is, the right to water (art. 12), to food (art. 13), to education (art. 26), to housing (art. 30) and to health (art. 32). The 2009 Bolivian Constitution has fundamental needs and guarantees regarding the right to life (art. 15), to water and food (art. 16), to education (art. 17), to health (art. 18) and to housing (art. 19 and 20, I).

Finally, a third constitutive element integrated with the issue of insurgent collectivities in the Andean context (the representation of indigenous and peasant peoples) and their fundamental needs related to *buen vivir* is to introduce the space of participatory local power in decentralized autonomous governments, that is, the relational and interactive exercise of community intercultural democracy, which is the basis of the state structure that is constituted as plurinational (Acosta, 2013).

From this democratic and horizontal decentralization, plurinationalism will advance to distance itself from the liberal-individualist political forms produced by colonization. Another paradigm is built in the direction of forms of plural, relational, and intercultural coexistence in harmony with nature as this is a way to experience the "common" from ancestral traditions (Estermann, 1998), interacting in communal, participatory, and autonomous relationships. Such advances can be constitutionally confirmed, in the

Constitution of Ecuador, in its provisions about the institutionality of an "intercultural and plurinational secular state" (art. 1), its processes of autonomous and decentralized governments (art. 3, item 6; art. 238), communal territorial organization (art. 60), and principles of participation. Within the framework and organization of the Bolivian State, although it provides for representative and participatory practices, its constitutional emphasis innovatively formalizes community democracy, an authentic expression of the original forms of organization of nations and indigenous peasant peoples (art. 11, II; art. 83; art. 210, III; art. 211, I; art. 241, I and II; art. 269, I and II).

These findings regarding what is institutionalized in the constitutional texts and what is proposed as a community and participatory legal pluralism allow us to point out that, in fact, in these specific Latin American constitutions, there are strongly characterizing elements of what can be considered a communitarian normative plurality, but its application and its effectiveness have been very weak and lack the strength to resist the tradition of the monist State culture.

Conclusions

In the theoretical discussion presented, legal pluralism was outlined as a product of community practices, exercised by social collectivities that seek to fulfill their fundamental needs, incorporating and materializing insurgent and autonomous normative experiences in the face of State power, motivated by the *raison d'être* of human life in tune with nature.

To prove the facticity and validity of this normative plural modality, it was necessary to turn to two contemporary constitutional processes in Latin America, mainly the Constitutions of Ecuador and Bolivia. Thus, the formalization of the community tradition of Legal Pluralism is implicitly contained in the Ecuadorian constitutional text in Article 171 when it provides for the autonomy of indigenous communities to exercise jurisdictional functions, as well as the relationship between indigenous jurisdiction and ordinary jurisdiction.

However, for the first time in all Latin American tradition, principles of legal and political pluralism, in an explicit and very "strong" way, are contained in the Constitution of Bolivia when it clearly states that "ordinary jurisdiction and rural native indigenous jurisdiction enjoy equal status" (art. 179, II).

From the constitutional formalization of legal pluralism, it is concluded that the great news brought from one of the southern regions is not the result of empirical anthropological investigations in colonial spaces, or theoretical and doctrinal discussions and interpretations from the ethnocentric

academic world, but, now, the recognition of another way of instituting the Law, (re)signifying it through existing secular normative practices of the original peoples that were made positive and endorsed by their own collectivities.

Therefore, regarding the theoretical contribution as a guiding axis, it was verified that the previously proposed elements for community legal pluralism are contemplated in some of the legal devices, thus, the analysis of the texts and their articles offer subsidies for the assertation that these constitutions consecrate principles of a community-based, autonomous legal pluralism.

However, in less than two decades, the sociopolitical evolution and institutional trajectory in the region has brought to light a discrepancy between its considered innovative constitutional principles (compared to the retrospective tradition of elitist and conservative Latin American constitutionalism) and its empirical-material validity and complete effectiveness. Certainly, there were no profound structural changes (at the economic, political, and social levels) nor the elimination of colonizing, authoritarian, and conservative elites, who recycle old practices of exclusion and discrimination (Rivera Cusicanqui, 2010), as already analyzed in Wolkmer and Wolkmer (2022).

In Latin America, this identification provides several critical readings. Among them, the interpretation made by Santos (2018: 12), for whom many of the advancements integrated into the constitutions of Ecuador and Bolivia, "[...] are not being carried out in practice, but are rather being subverted and undermined by the dominant political practices"; "[...] governmental policies and national legislation have been contradicting, often explicitly, what is stated in the constitutions of both countries, a process that has been designated by constitutional lawyers and political sociologists as deconstitutionalization".

As for the specific theme of legal pluralism, the result is the recognition of a normative duality that affects the same contradiction that reaches a large part of the political-institutional achievements, that is, there is no effective response in the courts and in legal life. At the national level, there is no absolute and concrete application of the advancements achieved since it has not been implemented in a broad and effective way, persisting as a legal pluralism that not only traditionally coexists with the State but is characterized by being "subaltern" (Yrigoyen Fajardo, 2006; Paz, 2014: 260; Copa Pabón, 2017: 156) and limited in the face of the impositions of a monist culture impregnated with colonial remnants.

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Antonio Carlos Wolkmer
Programa de Pós-graduação em Direito e Sociedade, Universidade La Salle | Programa de Pós-graduação em Direitos Humanos, Universidade do Extremo Sul Catarinense
Av. Vitor Barreto, 2288, 9010-000 Canoas/RS, Brasil
Contact: acwolkmer@gmail.com
ORCID: https://orcid.org/0000-0003-1958-8433

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Repensando práticas de pluralismo jurídico na América Latina

O artigo tem como objetivo discutir o pluralismo jurídico em perspetiva transformadora enquanto produto de práticas comunitárias, exercidas por coletividades sociais que buscam atender necessidades fundamentais. Assim, o problema é verificar se o pluralismo institucionalizado na região andina (Constituições do Equador e da Bolívia) se qualifica como um pluralismo jurídico transformador, autónomo do Estado, e com perfil comunitário autêntico. Ainda que essa premissa possa ser admitida, a questão essencial é: até que ponto sua força, validade e eficácia são satisfatórias dentro das instituições político-jurídicas? O resultado é o reconhecimento da dualidade do pluralismo jurídico, que não só tradicionalmente convive com o Estado, como se caracteriza como "subalterno" e limitado pelas imposições de uma cultura monista que se renova, mantendo resquícios coloniais. Utilizou-se para a discussão um aporte metodológico teórico-reflexivo de conteúdo crítico e sociojurídico, com bibliografia específica.

Palavras-chave: Constituição política da Bolívia (2009); Constituição política do Equador (2008); constitucionalismo latino-americano; pluralismo jurídico; práticas comunitárias.

Repenser les pratiques du pluralisme juridique en Amérique latine

L'article vise à discuter le pluralisme juridique dans une perspective transformatrice en tant que produit de pratiques communautaires exercées par des collectivités sociales qui cherchent à répondre à des besoins fondamentaux. Le problème est donc de vérifier si le pluralisme institutionnalisé dans la région andine (Constitutions de l'Équateur et de la Bolivie) peut être qualifié de pluralisme juridique transformateur, autonome de l'État, avec un authentique profil communautaire. Même si cette prémisse peut être admise, la question essentielle est la suivante : dans quelle mesure sa force, sa validité et son efficacité sont-elles satisfaisantes au sein des institutions politico-juridiques ? Le résultat est la reconnaissance de la dualité du pluralisme juridique, qui non seulement coexiste traditionnellement avec l'État, mais est qualifié de « subalterne » et limité par les impositions d'une culture moniste renouvelée, en maintenant les des vestiges coloniaux. Pour cette discussion, une contribution méthodologique théorico-réflexive de contenu critique et sociojuridique a été utilisée, avec une bibliographie spécifique.

Mots-clés: Constitution politique de l'Équateur (2008); Constitution politique de la Bolivie (2009); constitutionalisme latino-américain; pluralisme juridique; pratiques communautaires.