**Revista Jurídica** vol. 02, n°. 69, Curitiba, 2022. pp. 655 - 674

# IS A DECOLONIAL LAW POSSIBLE? EPISTEMOLOGIES OF THE SOUTH AND CONSTITUTIONAL LAW

# *UM DIREITO DESCOLONIAL É POSSÍVEL? AS EPISTEMOLOGIAS DO SUL E O DIREITO CONSTITUCIONAL*

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## ABSTRACT

**Objective:** The paper analyses the developments of legal-epistemic thinking with the understanding of decolonial thinking as an instrument to rethink the global South narrative. Moreover, the study aims to provide addresses the research gap between theories of knowledge.

**Methodology:** Theoretical contributions and reflections are based on the socio-historical field and aim to ascertain the universality inherent to them, as well as the consequences of the globalization of Western thought. Therefore, the study explores law through its socio-cultural characteristics and to explain some of its limitations in the face of the global South reality, focusing on Latin American reality.


[Received/Recebido: Fevereiro 19, 2022; Accepted/Aceito: Maio 15, 2022]

**Results:** The paper suggests a reflection on the limits and scopes of Law and the same to be applied to decolonial thinking, as it is understood to have incompleteness in the discourse. Therefore, the study does not aim to reach a consensus either. The reflections produced are useful because the jurist cannot ignore the power dynamics contained in social construction of the law. The jurist has to consider, in a reflexive manner, the incompleteness of the modern law paradigm, and is able to understand the importance of their work and scientific research.

**Contributions:** The study addresses a topic still unfamiliar to the academic world, by adopting a novel approach that bridges decolonial thinking as a tool to offer criticism and provide another perspective on the possible scopes of law.

**Keywords:** Buen Vivir; Decolonial Law; Latin American Law; New Latin American Constitutionalism; Southern epistemologies.

## RESUMO

**Objetivo:** O artigo analisa os desenvolvimento do pensamento jurídico-epistêmico com a compreensão do pensamento decolonial como instrumento para repensar a narrativa sul global. Além disso, o estudo tem como objetivo proporcionar o endereço da lacuna de pesquisa entre teorias do conhecimento.

**Metodologia:** As contribuições teóricas e reflexões baseiam-se no campo socio histórico e visam a apurar a universalidade inerente a elas, bem como as consequências da globalização do pensamento ocidental. Por isso, o estudo explora o direito por meio de suas características socioculturais e explica algumas de suas limitações diante da realidade sul global, com foco na realidade latino-americana.

**Resultados:** O artigo sugere uma reflexão sobre os limites e escopos do Direito e o mesmo a ser aplicado ao pensamento decolonial, como se entende ter incompletude no discurso. Portanto, o estudo também não pretende chegar a um consenso. As reflexões produzidas são úteis porque o jurista não pode ignorar a dinâmica de poder contida na construção social da lei. O jurista tem que considerar, de forma reflexiva, a incompletude do paradigma do direito moderno, e é capaz de entender a importância de seu trabalho e pesquisa científica.

**Contribuições:** O estudo aborda um tema ainda desconhecido do mundo acadêmico, adotando uma nova abordagem que faz a ponte entre o pensamento decolonial como ferramenta para oferecer críticas e fornecer outra perspectiva sobre os possíveis escopos do direito.

**Palavras-chave:** Buen Vivir; Direito Descolonial; Direito Latino-Americano; Novo Constitucionalismo Latino-Americano; Epistemologias do Sul.


[Received/Recebido: Fevereiro 19, 2022; Accepted/Aceito: Maio 15, 2022]

## 1 INTRODUCTION

Historically, the legal approach of the law in South American countries is from a Western philosophy that created a legal-epistemic thinking. Colonialism continues to live in the legal system of this region, although the colonies have ceased to exist for centuries. In this sense, the Law perpetuates these pre-existing exclusions and oppressions, and this paper aims to explain the reasons for this perpetuation. It demonstrates that law seeks to mirror the thinking of the global North and results in the denial, exclusion, and oppression of the Latin American identity. As a consequence, the epistemologies of the global South are thus considered as inferior to the global North.

The paper analyses the developments of legal-epistemic thinking with the understanding of decolonial thinking as an instrument to reexamine the global South. In order to guide the unveiling of the South, critical Latin American literatures greatly contribute to decolonial thinking. These literatures allow a reflection of the most varied themes and forms of knowledge and demonstrate the possibility and existence of counter-hegemonic philosophical, political, and methodological assumptions. To this end, the paper analyses epistemological origins of human rights and human dignity that come from constitutionalism. The New Latin American Constitutionalism is examined as an insurgent and decolonizing paradigm for Law.

This article considers whether decolonial thinking could offer criticism and provide another perspective on the possible scopes of law. The central hypothesis of this study concerns the ability of decolonial thinking to give autonomy to the Latin American individual, for the individual to understand their development within their contexts and socio-historical-cultural processes. The study seeks to reveal the reasons and consequences behind the oppression and silencing in popular struggles. This process is visible in Latin American constitutions, in particular in the Bolivian and Equator Constitution, that aim to reflect of the global North's line of thought in normative provisions and institutions. In following Latin American frameworks, the


[Received/Recebido: Fevereiro 19, 2022; Accepted/Aceito: Maio 15, 2022]

paper considers the possibility of utilizing a Latin American philosophy to reach answers otherwise not explained due to limitations in the modern paradigm.

That being said, the study does not intend to employ radicalism of decolonial thought nor does it reject all products from the global North. The paper suggests a reflection on the limits and scopes of Law and the same to be applied to decolonial thinking, as it is understood to have incompleteness in the discourse. Therefore, the study does not aim to reach a consensus either.

The reflections produced are useful because the jurist cannot ignore the power dynamics contained in social construction of the law. The jurist has to consider, in a reflexive manner, the incompleteness of the modern law paradigm, and is able to understand the importance of their work and scientific research. In particular, the legal researcher can be the denouncer of the oppressions legitimized by her/his own system of law. For this purpose, decolonial thinking is one of the appropriate instruments, which is why the present study opted for its analysis, aiming to reach new legal-epistemological reflections.

The first section begins with a brief reflection on the law and addresses its history as a demystifying element and demonstrating that it is a social phenomenon. Theoretical contributions and reflections are based on the socio-historical field and aim to ascertain the universality inherent to them, as well as the consequences of the globalization of Western thought. Therefore, the study seeks to explore law through its socio-cultural characteristics and to explain some of its limitations in the face of the global South reality, specifically the Latin American reality.

The second section utilizes decolonial thinking as a theoretical-methodological tool to reveal epistemological silenced realities. Based on epistemologies of the South (SANTOS, 1997; 2000; 2004; 2010) inserted in the current constitutions of Bolivia and Ecuador, this part substantiates the possibility to offer a new understanding of law (DUSSEL, 1977; WOLKMER, 2001; ACOSTA, 2016).

The third section considers the reasons behind seeking a decolonial law and seeks to investigate the intersections of several epistemological biases from which its


[Received/Recebido: Fevereiro 19, 2022; Accepted/Aceito: Maio 15, 2022]

interdisciplinary character emerges, based on literature review. Moreover, the study aims to provide theoretical complementation and discourses between theories of knowledge.

## 2 BRIEF REFLECTIONS ON THE LAW

It is known that, not infrequently, the law legitimizes oppressive practices. The drop in reliability of political representatives, questions about democratic legitimacy, and the institution of policies of setbacks to human rights culminates in a scenario of democratic erosion (SOUZA NETO,2021, p. 255-274).

Typically, in the Constitutional State of Law, power must be subject to the Constitution and the law. Therefore, in a globalized world, with problems such as terrorism, climate change, migration, and pandemics, one of the main debates that concern the field of constitutional law, and the international human rights law, is that the misuse of powers exceptions by the different governments, entails serious violations of the democratic principle, the rule of law and human rights (TOBÓN, 2021, p.1 – 35).

The truth resides in the fact that "*the existence of elaborated electoral procedures to select and elect representatives who, in a certain period, are going to lead social interests (including public policies) in their own way*" (QUADROS, 2020, p. 384-406).

There is a fine line between politics and law, especially when faced with dilemmas involving social movements whose main object of dissent falls on property and economics. Throughout history, social groups have come together against setbacks and in favor of new rights, while socio-economic-cultural interests acquire new guises to benefit a small portion of the population. In order to understand these guises, it is necessary to analyse aspects of modern science, law, and philosophy.


[Received/Recebido: Fevereiro 19, 2022; Accepted/Aceito: Maio 15, 2022]

Faced with this challenge, it is imperative to ask: is there a Latin American law or are we replicators of Western philosophy and science? Is a decolonial law possible?[1]

In order to guide the unveiling of the South, critical Latin American theories greatly contribute to decolonial thinking. These theories allow a reflection of the most varied themes and forms of knowledge and demonstrate the possibility and existence of counter-hegemonic philosophical, political, and methodological assumptions.

The main theoretical references of this thought come from the Modernity and Coloniality Project composed of studies by Aníbal Quijano, Enrique Dussel, Catherine Walsh, Boaventura de Sousa Santos, Freya Schiwy, José Saldívar, Nelson Maldonado-Torres, Fernando Coronil, Javier Sanjinés, Margarida Cervantes de Salazar, Libia Grueso, Marcelo Fernádez Osco, Edgardo Lander, and Arturo Escobar.

Decolonial thinking demonstrates its capability of giving autonomy to the individual in order to understand the development of historical and social processes in Latin America. In addition, decolonial thinking contributes and gives greater possibility for the respect of various popular struggles that resist historic processes of oppression and silencing (FLORES, 2009). When the law is linked to social memories, it is able to develop a sense of identity, belonging, alterity, and the search for changes, especially to those who are excluded and invisible. Consequently, it is possible for a Latin American individual to decolonize itself and its surroundings.

Decolonizing is a process of questioning and having a critical attitude towards a subject, be it a law, a teaching, a book, or a speech. It is about seeking to identify the ideology behind interests. This encompasses the revealing of knowledge, culture, and economics that are imposed on us from a monocultural logic (that of the

1 Liberation theology (DUSSEL, 2007; BRAGATO; CASTILHO, 2014) and dependency theory (DOS SANTOS, 2015) are related to the issues behind these questions. Examples of people who sought to unveil the individual and the Latin American world: Gustavo Guterres, Camilo Torres, Arturo Roig, Horacio Cerutti, Enrique Dussel, Milton Santos, Darcy Ribeiro, Paulo Freire, Florestan Fernandes, Orlando Fals Borda, Celso Furtado, José Julián Martí Pérez, Mercedes Sosa, Augusto Boal, Glauber Rocha, Mario Benedetti, Ernesto Sabato, Gabriel García Márquez, Jorge Amado, Pablo Neruda, Rubén Darío, and Oscar Correa. These thinkers are commonly criticised for seeking a non-universal peripheral philosophy, unlike the local Greek, German, and European philosophy, which is mostly regarded as a superior and universal formula to societies.


[Received/Recebido: Fevereiro 19, 2022; Accepted/Aceito: Maio 15, 2022]

West), that legitimises itself with absolute or transcendental foundations oriented to disqualify the different and to devalue the other forms of life and identities.

## 3 A DECOLONIAL ANALYSIS OF CONSTITUTIONALISM, HUMAN RIGHTS AND HUMAN DIGNITY

An inquiry on the potential decolonisation of law is necessary, as it is essential to reflect on the epistemological roots of modern law even though constitutionalism has a contractualist approach. Thus, it is essential to reflect on the epistemological roots of modern law.

For five centuries, since the maritime and commercial expansion, the understanding of Europe as the cradle of civilisations, of philosophy, and of law, has spread throughout the world. Constitutionalism, human rights, and human dignity have dictated norms, knowledge, and science that reflect the global North.[2] The consequences are of an imperialist and colonialist character. There are many facets of oppression and domination, and several of them have been neglected by scientific studies of law. According to Santos (2000, p. 126),

> The natural rationalist law of the 17th and 18th centuries is also part of this process, insofar as it served to legitimize both the *enlightened despotism* and the liberal and democratic ideas that led to the French Revolution, starting, therefore, from the model of rationality described. Therefore, there is a contradiction between natural rights considered as universal as a form of social emancipation. In this way, both the Kantian turn, as well as the Enlightenment reasoning, liberal constitutionalism and, later, the internationalization of human rights are part of the same colonizing facet. The improvement of human rights through the Welfare-State served as a form of capitalist management, since the welfare state was responsible for the management of inequalities and for the theory of human rights the management of exclusion.

The history of constitutionalism exhibits excessive concern for the form of law, so much so that it is a detriment to itself. Positivism does not include value in the

2 For further details on these issues see the studies by Parola (2017) and Bello (2018).


[Received/Recebido: Fevereiro 19, 2022; Accepted/Aceito: Maio 15, 2022]

law and has separated law and moral. After the Second World War, there was a rapprochement between rights and moral through the post-positivist ideology. This form of thinking protected the values contained in fundamental rights of a Eurocentric nature, resulting in self-violation when faced with sociocultural pluralism.[3]

While theorists are concerned with the distinction between principles and rules in which these are inserted, they don't realize that they remain within a Western thought context. According to Santos (2000) Western epistemology is based on a system of distinctions between visible and invisible that divide social reality into two distinct universes: “on this side of the line” and “on the other side of the line”. The distinction occurs to the extent that “the other side of the line” disappears as reality, taking place only as absence, invisibility, and non-existence. The main characteristic of this thought is the impossibility of co-presence on both sides of the line. The most accurate representations are modern knowledge and law, which form the two main global abyssal lines of modern times and are interdependent. These reasons for the collapse of positivism are similar to those of post-positivism, as both allow barbarism in the name of the law and are unable to reconcile the positivist law with social reality. Thus, the constitution is more of a political document than an emancipatory legal instrument. Constitutional reforms risk reflecting political views rather than contributing to the development of emancipatory legal instruments.

At the heart of this problem is Westernism, which is supposed to be an epistemic source of knowledge. The idea of Westernism as superior to the others, despises knowledge of the world and other spiritualities, and classifies them as inferior to the imposed scientific reason of Western man. This results in the rationalisation of the science of the right to a universal vision of values, models, and

3 Lenio Streck (2012) starts from the premise that neoconstitutionalism emerged from World War II, preferring to call it “Contemporary Constitutionalism”. There are three milestones in the evolutionary process of contemporary constitutional law: historical, philosophical, and theoretical. The historic landmark corresponds to the Fundamental Law of Bonn (German Constitution, 1949), effective before the fundamental rights contained in the Italian Constitution of 1948, through the establishment of the Federal Constitutional Court in 1951, with the reconstitutionalisation taking place in Brazil in 1988; the philosophical concerns the post-positivist ideal. As for the theoretical, it relates to the application of constitutional law, and demonstrates three relevant characteristics: the recognition of the normative force of the Constitution, the expansion of the Constitutional Jurisdiction, and the development of a new dogmatic of constitutional interpretatio (BARROSO, 2005, p. 6).


[Received/Recebido: Fevereiro 19, 2022; Accepted/Aceito: Maio 15, 2022]

definitions that reflect the very existence of the European. It is precisely in the perception of the Other as 'primitive', 'barbaric', 'archaic', 'traditional', 'simple' or 'wild' that the West has been producing the image and its own reaffirmation. The Western colonial concept of modernity placed Latin America in a peripheral place, labeling the continent as 'underdeveloped' or 'under development', showing an 'ontology of the totality'.

With regard to human rights and human dignity, both a regulatory policy and an emancipatory policy have been shown at the same time (SANTOS, 1997). The conception that human rights are universal because they belong “to all human beings as human beings, that is, because, regardless of their explicit recognition, they are inherent to human nature”, (SANTOS, 2010, p. 443) means that human beings do not have rights, but because they are humans they have universal characteristics inherent to the nature of humans. In other words, the human being under this perspective is understood as a void, as a non-being. An example of such formal exercise and standardization of human beings as mere “right holders” comes with the Universal Declaration of Human Rights in 1948. Thus, the essence of the humans, their identity and epistemological characteristics were universalized, ultimately resulting in the image of the global North.

Therefore, the universality of understanding about human nature is based on rights that refer to a Western legal thinking, even more so, to a liberal Western brand. For example, the Universal Declaration of Human Rights of 1948 was elaborated without the participation of the majority of the peoples of the world. Those who do not identify themselves or do not fit this conception of human rights risk to be left out from mechanisms of human rights protection.

The characteristics of the human being are not only in the human features, since there are also human differences that depend on socio-cultural contexts. Without a social-cultural context, the human is an object, an emptiness. Therefore, there is no such thing as 'human dignity' or universal 'human rights', but dignities and conceptions of rights of the meaning of universal by various cultures, and accordingly, making the universality of human rights and human dignity extremely


[Received/Recebido: Fevereiro 19, 2022; Accepted/Aceito: Maio 15, 2022]

controversial. All cultures and knowledge systems are incomplete and different, showing the premise of dialogue and translation. There is a necessity for an intercultural hermeneutic and critical rethinking of supposed universalisms or wholes.

The method used for intercultural translation, suggested by Panikkar (2004), is diatopic hermeneutics. According to Santos (2000), this method explains a need, an aspiration or a practice in a given culture so that it becomes understandable and intelligible to another culture. Therefore, it is necessary to make the epistemologies of the South known, so that they are no longer seen and described as inferior to those of the global North.

Through diatopic hermeneutics, the awareness of mutual need is expanded to the maximum, so as to always favor dialogue with other epistemologies. Likewise, it makes it possible to substantiate the incomplete side of Western culture that establishes rigid dichotomies to the individual and society, such as: "scientific culture/literary culture, scientific knowledge/traditional knowledge, man/woman, culture/nature" (SANTOS, 2000, p. 739).

The following part analyses the example of the Bolivian and Ecuador Constitutions, to better explain how the epistemologies of the South can be used as a way to modify the approach of the law of the North and show a prudent answer[4] to questions that modernity was not able to resolve.

The redefinition of law based on counter-hegemonic conceptions is capable of breaking dichotomies, even redefining the basis of modern constitutionalism: human dignity (FLORES, 2009). Dignity is the essence of the protection of human rights and is understood as most essential to people. This notion justifies the necessary redefinition of the basic assumptions of rationalist-contractualist naturalism, given its intimate relationship with colonialism. Consequently, there are no more definitions of the core rights, as there are diverse cultural conceptions intertwining them and the possible meanings of what is meant by Well-living (*Buen*

4 Santos refers to the epistemological transition that occurs between the dominant paradigm of modern science and the emerging paradigm as "Prudent knowledge for a decent life" (SANTOS, 2004).


[Received/Recebido: Fevereiro 19, 2022; Accepted/Aceito: Maio 15, 2022]

*vivir* in the Bolivian constitution) or dignified life (*Vida digna*), and configuring a system of alternatives.

In order to move towards a decolonial transformation, an intercultural dialogue on human dignity and human rights is necessary. For the achievement of this objective, it is necessary to: 1) overcome the debate on universalism and cultural relativism, being that "Against relativism, it is necessary to develop political criteria to distinguish progressive policy from conservative policy, disarming capacitation, emancipation from regulation." (SANTOS, 1997, p. 21); 2) cosmopolitan transformation of human rights, which implies the understanding that all cultures have conceptions of human dignity, but not all of them conceive it in terms of human rights, even if they have similar or mutually intelligible concerns or aspirations; 3) understanding that all cultures are incomplete and problematic in terms of human dignity; 4) understanding that all cultures have different versions of human dignity, whether they are broader or not in relation to others, whether there is a certain reciprocity or not; and 5) understanding that all cultures tend to distribute people and social groups between two competitive principles of hierarchical belonging: the principle of equality and the principle of difference (SANTOS, 1997).

## 4 NEW LATIN AMERICAN CONSTITUTIONALISM: A STEP TOWARDS A DECOLONIAL LAW?

The New Latin American Constitutionalism seeks the renewal of several normative and institutional sectors and seeks to challenge hegemonic legal systems and knowledge. It underlines the need to think about a legal paradigm *from the South*, which implies opening up more to popular participation, especially those populations historically silenced. The new Constitutionalism brings about new possibilities such as the expansion of forms of citizenship, greater popular participation in the political sphere, and institutions and rights that reflect the needs of Indigenous Peoples, Afro-descendants, and women. It is an attempt to change the *status quo*, referred to elsewhere, and to no longer suppress and silence the


[Received/Recebido: Fevereiro 19, 2022; Accepted/Aceito: Maio 15, 2022]

epistemologies of the South. Thus, the New Latin American Constitutionalism is based on the search to renounce to post-colonial categories[5] and to implement decolonial characteristics.[6]

The New Latin American Constitutionalism can be understood as a transition process, as it has not yet caused epistemological disruptions necessary for the socio-historical reality of the South. Even so, it configures a differential project based on customs within the Latin American reality. At the epistemological level, the new Latin American Constitutionalism brings novel conceptions of the world when consecrating Indigenous cosmologies and aims to protect *Pachamama* in Constitutions, such as in Bolivia and in Ecuador (PAROLA, 2019). *Pachamama* is the highest deity of the Andes and the protector of nature, whose name in Quéchua means Mother Earth.

This spiritual being demands respect and cooperation from other beings. The consecration of *Pachamama* for the first time in the Constitution of Ecuador aims to respect the ecological natural cycles, which implies rejecting capitalism and its utilitarian theory of natural resources (ZAFFARONI, 2010). Biocentric stance approach, in recognizing Nature as a subject of rights, demonstrates an ethical alternative to accepting that the environment has intrinsic ontological value (ACOSTA, 2016).

The constitutions of Bolivia (2007) and Ecuador (2008) fall within the framework of the New Latin American Constitutionalism, named by Fajardo (2011) as a plurinational constitutionalism. The Indigenous epistemologies, enshrined in both constitutions, allow a critical review of Western constitutional dogmas that are considered to be intangible and demonstrate an alternative to the dominant economic, political, and social development. The inclusion of the concepts of *Sumak Kawsay* and *Suma Qamaña* to protect *Pachamama* shows this possible alternative.

5 Post-colonialism is a period after colonisation with countries declaring independence, but still marked by strong dependence between colonisers and ex-colonies.

6 Decolonialism is a critical thought based on the notion of rupture of all forms of colonialism existing in post-colonialism, like the classic Ecocentric critical theory. Walter Mignolo (2009) and Catherine Walsh (2008) adopt the terminology “decolonialism”. Enrique Dussel, Anibal Quijano, and Castro Gomes are examples of critical authors who seek a Latin American perspective. The search for this critical theory based on Latin American identity results in the investigation of the main characteristics of our continent: alterity, plurality, and interculturality.


[Received/Recebido: Fevereiro 19, 2022; Accepted/Aceito: Maio 15, 2022]

*Sumak Kawsay* and *Suma Qamaña* are Indigenous values that cannot be translated into colonial languages. The closest meaning would be *Buen Vivir*. However, they/these concepts have no connotation to a very utilitarian life. *Sumak Kawsay* was enshrined in the Ecuadorian Constitution and it is a Quechua expression, a traditional Andean language. *Sumak* means the ideal, the beautiful, the good, fulfillment, and fullness; *Kawsay* means living, dignified life, and harmony and balance between the universe and the human being (ACOSTA, 2016). The *Suma Qamaña* is a similar expression from the Bolivian ethnic group Aimará. The expression refers to *Buen Vivir* in relation to the idea of looking at the past, living in the present, and to project the future as a dream of full life (ZAFFARONI, 2010). The Bolivian constitution does not have a biocentric character, although it includes Indigenous cosmovisions, it grants non-Western-based thinking and it also encompasses the classic idea of progress based on the appropriation of Nature. Even so, in the process that breaks paradigmatic these are the most advanced constitutions in this sense.

These constitutions break away from Western models by incorporating non-Western-based knowledge into their texts and aim to protect *Pachamama*. Thus, they are inserted in the paradigm of the New Latin American Constitutionalism because they provide a paradigmatic shift by moving away from the anthropocentric Western constitutional model to enforce a biocentric dignity.[7]

Moreover, in the new constitutions, 'progress' is not defined as knowledge brought in from the global North. In the *Buen Vivir conception*, civilisational advancement is one that provides a guarantee of life for human, non-human beings, and for future generations[8]. The purpose for this concept is to achieve intergenerational equity for all living beings. These ethical considerations are close to

7 According to Zaffaroni (2012), biocentrism affirms the right to dignity for all living beings, including non-humans. Therefore, it is an alternative to the anthropocentric normative model.

8 It is important to mention that the justification for the protection of Nature based on intergenerational law and sustainability are not sufficiently capable of guaranteeing rights or ensuring life for all beings. This is because the natural “amount” that should be left to future generations is subjective and insufficient to predict the needs of the future. As for sustainability, Bosselmann (2015) makes a relevant criticism of the principle as it is strongly marked by a liberal bias. In addition, both intergenerational law and sustainability have anthropocentric interests as their objective for environmental protection.


[Received/Recebido: Fevereiro 19, 2022; Accepted/Aceito: Maio 15, 2022]

the proposals of strong sustainability[9] and deep ecology that recognise the interdependence between humans and nature (BOSSELMANN, 2015). However, the definitions of human and nature differ greatly in that the former is strongly marked by a liberal approach and the latter is restricted to a Western conception of Nature.[10] The epistemologies of the South provide the opportunity to learn a new perspective on life. Thus, the positivisation of *Sumak Kawsay* and Suma *Qamaña* establishes a new constitutional epistemological milestone. The insertion of Indigenous cosmologies in constitutional texts enables Amerindian countries to meet Latin American desires.

Societies that have been invisible can be integrated through mechanisms of popular participation as it is provided by the Bolivian constitution (article 411). Thus, the modern idea of democracy that is essentially representative is overcome, by establishing other parameters of what is legal or not legal and by pushing away hegemonic tendencies from the global Western order. Consequently, there is a breach of the standard of legality that reproduces legal monism by denying that the "State is the only center of political power and the exclusive source of all production of law." (WOLKMER, 2001, p. XV). According to Tapia (2007), the State assumes a position that reflects more accurately the social reality, and the insurgency of the new requests from the population configures a new broadly plural legal order.

Thus, there is a necessary redefinition not only of the functions of law, but also of hegemonic conceptions of fundamental rights that break away from Western concepts of human rights. In doing so, this redefines the basis of modern

9 Strong sustainability is an ecological approach to sustainable development. It differs from weak sustainability that places environmental sustainability, social justice, and economic prosperity on par.

10 It is not the objective of this study to deepen these questions, limiting itself to mentioning that many of the attempts to substantiate Nature are within the paradigm of modernity (Kantian, anthropocentric, liberal or Western). Notions and terms contained in these attempts are closely linked to a western conception of law and nature. They do not allow for different meanings, whereas it is possible in the epistemologies of the South. The same can be said about “common goods”, which according to Svampa (2016, p. 140-141) “the reference around common goods is closely associated with that of territory. Thus, it is not exclusively a dispute over natural resources but a dispute for the construction of a certain type of territoriality based on the protection of the common; (natural, social and cultural heritage)”. Even though “common good” proves to be an effective instrument for the right to autonomy and the territory of traditional peoples, it is far from protecting nature. The very notion of “environmental injustice” (FENSTERSEIFER, 2010) does not refer to injustice to Nature itself. Instead, it is related to environmental degradation and pollution that mainly affects individuals and social groups with low economic power.


[Received/Recebido: Fevereiro 19, 2022; Accepted/Aceito: Maio 15, 2022]

constitutionalism and the concept of human dignity. By encompassing non-hegemonic conceptions of fundamental rights, it also possibly breaks with rigid definitions of human dignity that represent the basis of modern constitutionalism (FLORES, 2009). This is because human rights include a very restricted profile: white, proprietary, and heteronormative. Anything that does not fit in this profile is on the fringes of citizenship, including people, as Indigenous people, who have a different notion of land as a being that has to be respected, rather than a resource that can be exploited[11]. The same occurs with human dignity, because its essence varies according to what each person understands as primordial. Thus, there is a critical revision of the scope and basis of the assumptions of jusnaturalism that rationalizes what is right to a single vision and culture derived from the social contract of Western origin, showing an intimate relationship with colonialism when faced with other forms of being and living (FLORES, 2009).

As a consequence, there are no more rigid definitions of the meaning of human rights. Diverse cultural conceptions intertwine them and the possible meanings of what is meant by *Buen vivir* or dignified life configures a system of alternatives.

## 5 CONCLUSIONS

The constitutions of Bolivia and Ecuador bring reflections on the law not only because they represent a desire and need for recognition of the populations that were historically silenced, but also because it points out possible alternatives to Western legal thinking. The project of a new Latin American Constitutionalism came from popular pressure that has as outcome the re-foundation of States. The transformation of colonial, capitalist, patriarchal and monocultural States into plurinational and intercultural States was a transition to a new form of social, political,

11 The Indigenous way of living depends on the possession of their traditional lands. The Earth is considered their mother, their food, their identity, and their way of life. However, the State continues to deem Indigenous Peoples as unproductive individuals who hinder the progress and economy of the country.


[Received/Recebido: Fevereiro 19, 2022; Accepted/Aceito: Maio 15, 2022]

and economic organization. In the project, it was acknowledged that alternatives could be found in marginalized, excluded, and invisible epistemologies, especially those of Indigenous movements. Therefore, this proposal goes far beyond a re-foundation of the State. It is a project that aims to overcome colonialism, neocolonialism,[12] and the notion of developmentalism[13] at the local, regional and international level.

The project came from Indigenous movements with other social segments that pressed for the proposal of a plurinational and intercultural State. Once the constitutions were approved, several studies were carried out from different perspectives as the colonial practices continued to repeat their ploys. In fact, the views and conceptions of the proposed epistemologies of the South are ignored and continue to uphold the Western epistemological view on nature, life, and being. In this sense, these constitutions are formalities and preparations for a state transition process and are considered to be experimentation or transitions constitutions. Therefore, the road to the realization of this social project continues to develop, albeit being a long process.

The constitutions of Bolivia and Ecuador are a real attempt to answer the legal and social dilemmas of modernity: the colonial and imperial heritage. Although Latin America continues to adopt Western conceptual frameworks, such as the

12 Neocolonialism, is defined by Sandra Halperin as " the control of less-developed countries by developed countries through indirect means. The term *neocolonialism* was first used after World War II to refer to the continuing dependence of former colonies on foreign countries, but its meaning soon broadened to apply, more generally, to places where the power of developed countries was used to produce a colonial-like exploitation for instance, in Latin America, where direct foreign rule had ended in the early 19th century. The term is now an unambiguously negative one that is widely used to refer to a form of global power in which transnational corporations and global and multilateral institutions combine to perpetuate colonial forms of exploitation of developing countries. Neocolonialism has been broadly understood as a further development of capitalism that enables capitalist powers (both nations and corporations) to dominate subject nations through the operations of international capitalism rather than by means of direct rule."

13 Theresa Wong (2017) explains that "Developmentalism is an approach to national economic development that emphasizes the intervention of the state. Current applications of developmentalism stem largely from post-World War II aid projects inspired by modernization theories and targeting the "underdevelopment" of newly decolonized states. Developmentalism has been applied to long-term development planning in developmental states such as South Korea and Singapore. Developmentalism has been criticized for having a linear view of progress and for neglecting deeply rooted power inequities in the world system that are the root of underdevelopment and dependency".


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adoption of legal constitutional documents, the systems are subject to paradigmatic changes.

The New Latin American Constitutionalism, in which these constitutions are inserted, does not come from political elites and dogmas contained in doctrines of law. On the contrary, they are models that originated from the social struggles of subordinated people and with projects that reflect epistemologies of the oppressed, vulnerable, marginalised, and invisible social strata. Therefore, new constitutionalism can transform the *status quo*, as long as people are able to organise political groupings, and a legal change will only be emancipatory if it correctly reflects the social reality.

## REFERENCES

ACOSTA, Alberto. ***O bem viver****: uma oportunidade para imaginar outros mundos.* Tradução Tadeu Breda. São Paulo: Autonomia Literária. Elefante: 2016.

BARROSO, Luis Roberto. ***Neoconstitucionalismo e constitucionalização do direito****: o triunfo tardio do Direito Constitucional no Brasil.* Net, Rio de Janeiro, nov. 2005. Jus Navigandi. Disponível em: http://jus.com.br/artigos/7547/neoconstitucionalismo-e-constitucionalizacao-do-direito Acesso em: 10.01.2017.

BELLO, Enzo. ***A cidadania no constitucionalismo latino-americano***. 2. ed. Rio de Janeiro: Lumen Juris, 2018.

BITTAR, Eduardo C. B. ***Metodologia da pesquisa jurídica****: teoria e prática da monografia para os cursos de direito*. 11. ed. São Paulo: Saraiva, 2013.

BOSSELMANN, Klaus. ***O princípio da sustentabilidade****: transformando direito e governança.* Tradução Phillip Gil França. São Paulo: Revista dos Tribunais, 2015.

BRAGATO, Fernanda Frizzo; CASTILHO, Natalia Martinuzzi. A importância do pós-colonialismo e dos estudos descoloniais na análise do Novo Constitucionalismo Latino-Americano. *In:* VAL, Eduardo Manuel; BELLO, Enzo (Orgs.). ***O pensamento pós e descolonial no Novo Constitucionalismo Latino-Americano*** [recurso eletrônico]. Caxias do Sul, Educs, 2014, p. 11-25.

DALMAU, Rubén Martinez; SILVA JÚNIOR, Gladstone Leonel da. O novo constitucionalismo latino-americano e as possibilidades da constituinte no Brasil. *In:* RIBAS, Luiz Otávio (Org.). ***Constituinte exclusiva****:* um outro sistema político é


[Received/Recebido: Fevereiro 19, 2022; Accepted/Aceito: Maio 15, 2022]

possível. p. 22-23. Disponível em: http://www.plebiscitoconstituinte.org.br/sites/default/files/material/Livro%20Juridico%20Constituinte%20Exclusiva%202014.pdf Acesso em: 08.jul.2018.

DOS SANTOS, Theotonio. ***Teoria da dependência:*** *balanço e perspectivas. Obras escolhidas.* V.1. Florianópolis: Insular. Reedição ampliada e atualizada, 2015.

DUSSEL, Enrique*.* ***Filosofia da libertação na América latina****.* Tradução Luiz João Gaio. 2. ed. São Paulo: Loyola, UNIMEP, 1977.

FENSTERSEIFER, Tiago. A responsabilidade do estado pelos danos causados às pessoas atingidas pelos desastres ambientais associados às mudanças climáticas: uma análise à luz dos deveres de proteção ambiental do estado e da proibição de insuficiência na tutela do direito fundamental ao ambiente. *In:* ***CONGRESSO INTERNACIONAL DE DIREITO AMBIENTAL 14***. São Paulo: Imprensa Oficial do Estado de São Paulo, 2010. p. 389-420.

FLORES, Joaquin H. ***A (re)invenção dos direitos humanos***. Tradução Carlos R. D. Garcia; Antonio H. G. Suxberger; Jefferson A. Dias. Florianópolis: Fundação Boiteux, 2009.

HALPERIN, Sandra. **Neocolonialism**, Encyclopaedia Britannica, Available at https://www.britannica.com/topic/neocolonialism

MIGNOLO, Walter. ***La idea de América Latina*** *(la derecha, la izquierda y la opcion decolonial). Crítica y Emancipación*, (2): 251-276, primer semestre, 2009.

PANIKKAR, Raimon. Seria a concepção de direitos humanos uma noção ocidental? *In:* BALDI, César Augusto (Org). ***Direitos humanos na sociedade cosmopolita****.* Tradução: Roberto Cataldo Costa. Rio de Janeiro: Renovar, 2004. p. 205-238.

PAROLA, Giulia. O modelo teórico da democracia ambiental: uma introdução à obra. *In:* AVZARADEL; Pedro C. S.; PAROLA, Giulia; VAL, Eduardo Manuel (Orgs). ***Democracia ambiental na América Latina****: Uma abordagem comparada*. Rio de Janeiro: Multifoco, 2017, p. 81-110.

PAROLA, Giulia; NOGUEIRA, Thaiana C.; BRITTO, Thomas M. C. Legal pluralism: an approach from the new Latin American constitutionalism and the jury of the indigenous court. *In:* ***Revista de Investigações Constitucionais*****.** Vol. 6, nº 3,| setembro/dezembro 2019, Curitiba, 2019. p. 621 - 645. Disponível em: https://revistas.ufpr.br/rinc/article/view/69579/40598 Acesso em 26.05.2020.

QUADROS, Doacir Gonçalves de; MAZAROTTO, Eduardo Brugnolo. Democracy, Public Policies and Judicial Cotrol: Is There a Way to Reconcile Them?. ***Revista Jurídica***, v. 3, n. 60, Curitiba, 2020, p. 384-406.


[Received/Recebido: Fevereiro 19, 2022; Accepted/Aceito: Maio 15, 2022]

SANTOS, Boaventura de Sousa. ***A crítica da razão indolente****: contra o desperdício da experiência.* São Paulo: Cortez, 2000.

SANTOS, Boaventura de Sousa. ***A gramática do tempo****: para uma nova cultura política*. 3ª ed. São Paulo: Cortez, 2010.

SANTOS, Boaventura de Sousa. (Org). ***Conhecimento prudente para uma vida decente****:* um discurso sobre as ciências revisitado. São Paulo: Cortez, 2004.

SANTOS, Boaventura de Sousa. Por uma concepção multicultural de direitos humanos. *In:* ***Revista crítica de ciências sociais***. nº 48, junho 1997, p. 11-32. Disponível em: http://www.boaventuradesousasantos.pt/media/pdfs/Concepcao_multicultural_direitos_humanos_RCCS48.PDF Acesso em 01.09.2017.

SOUZA NETO, José Laurindo de; FOGAÇA, Anderson Ricardo; PORTO, Letícia de Andrade. *Em Direção a um Constitucionalismo Fraco: Fundamentos para uma Sociedade Autocompositiva*. ***Revista Jurídica***, v. 5, n. 67, Curitiba, 2021, p. 255-274.

STRECK, Lenio Luiz. *Neoconstitucionalismo, positivismo e pós-positivismo. In:* ***Garantismo, hermenêutica e (neo)constitucionalismo****: um debate com Luigi Ferrajoli.* FERRAJOLI, Luigi; STRECK, Lenio Luiz; TRINDADE, André Karam (Orgs.). Porto Alegre: Livraria do Advogado, 2012.

SVAMPA, Maristella. Extrativismo neodesenvolvimentista e movimentos sociais: um giro ecoterritorial rumo a novas alternativas? *In:* DILGER, Gerhard; LANG, Miriam; PEREIRA FILHO, Jorge. (Orgs.). ***Descolonizar o imaginário****: debates sobre pós-extrativismo e alternativas ao desenvolvimento.* Tradução: Igor Ojeda. São Paulo: Elefante, Autonomia Literária e Fundação Rosa Luxemburgo, 2016. p. 140-173.

TAPIA, Luis. ***Una reflexión sobre la idea de Estado Plurinacional****.* Buenos Aires. CLACSO, 2007.

TOBÓN, Mari Luz; MENDIETA, David; GASPARETTO JUNIOR, Antonio. *Los Modelos Constitucionales de los Estados de Excepción em Época de Crisis Global.* ***Revista Jurídica****,* v. 3, n. 65, Curitiba, 2021, p. 1-35.

WALSH, Catherine. ***Interculturalidad, plurinacionalidad y decolonialidad****: las insurgências político-epistémicas de refundar el Estado*. In: *Tabula rasa*. nº 9, 2008, p. 131-152. Disponível em: http://www.revistatabularasa.org/numero-9/08walsh.pdf. Acesso em: 23.08.2017.


[Received/Recebido: Fevereiro 19, 2022; Accepted/Aceito: Maio 15, 2022]

WOLKMER, Antonio Carlos. ***Pluralismo Jurídico****: fundamentos de uma nova cultura no Direito.* 4ª ed. São Paulo: Alfa Omega, 2001.

YRIGOYEN FAJARDO, Raquel Zonia. El horizonte del constitucionalismo pluralista: del multiculturalismo a la descolonización. *In:* GARAVITO, César Roberto (Comp.). ***El derecho en América Latina:*** *un mapa para el pensamiento jurídico del siglo XXI.* Buenos Aires: Siglo Veintiuno, 2011, p. 139-184.

ZAFFARONI, Eugênio Raúl. La natureza como persona: pachamama y gaia*. In*: VARGAS, Chivi; MOISES, Idón (Coords.) ***Bolivia – nueva constitucion política del Estado****: Conceptos elementales para sudesarrollo normativo*, La Paz*,* 2010.

ZAFFARONI, Eugênio Raúl. ***La pachamama y el humano****.* Buenos Aires: Ediciones Madres de Plaza de Mayo, 2012.

WONG Theresa. **Developmentalism, Wiley Online Library 2017**. Available at https://onlinelibrary.wiley.com/doi/abs/10.1002/9781118786352.wbieg0185


[Received/Recebido: Fevereiro 19, 2022; Accepted/Aceito: Maio 15, 2022]