

PACHA MAMA AND SUMAK KAWSAY: THE CONSECRATION OF AN ENVIRONMENTAL CONSTITUCIONALISM

Jaime Leonidas Miranda Alves¹

1 INTRODUCTION

The evolution of Law accompanies- with reasonable delay the evolution of the complexity of the social relations in its attempt of acting actively like a mechanism of social control. In this sense, it is observed the overcoming of the natural right, 'substituted' by the positive right, and subsequently the linguistic turning that led to the abolition of the positivistic theory shears of the neoconstitucional law.

Although theories around the best interpretation / application of the Law continue being developed, the problem of the legal protection of the radiation of fundamental rights, it still exists, which demands, in certain form, a break with classic systems in the direction of imposing to the legal science a new paradigm.

It is in this sense that the defenders talk about Latin-American constitutionalism, ramification of the neoconstitucionalism that teases in the overcoming of the European concept of the only State (in cultural values), and imposes a new cultural architecture of the States, just in the direction of several social groups to secure, in its efficacy aspects, to guarantee the axiom of fundamental rights.

In the last years, as an answer to the social movements, Bolivia and Ecuador modified their institutional architectures in order to recreate States that were closer to its reality. In this sense, a true epistemological rereading was observed, in which the dominant official knowledge was denied, in the search of the recognition of the native visions, own to these different States. In this range, there was truthful meaning of the theoretical field of treatment of the fundamental rights, specially with the philosophical construction around the rights of the nature, which received constitutional seat with the positivation of principles, as the pacha mama and the sumak kawsay. It suits, finally, to question if such a linguistic turning can be had like advancement, mainly in what concerns the efficacy challenges of these rights.

2 THE NEW CONSTITUTION OF BOLIVIA AND THE PROTECTION OF THE NATIVE VISIONS

Before mentioning about the innovatory aspects that marked the new Constitution of Bolivia, it instils to do a short comment about the movement that worked like fuse of the state-owned reorganization: the War of the Gas.

War of Gas was the name given to popular revolts occurred in 2003 in Bolivia like answer to the privatization of strategic sectors. The revolt was caused by the political decision in exporting natural gas for Chile, at one moment in which great percentage of the Bolivian families - standing out to almost native entire population - was still cooking to the firewood, on account of the absence of an internal politics that was supplying the gas. Conformable it teaches Pisarello (1999,

¹ jaime_lmiranda@hotmail.com

p. 8), what it followed was the promulgation of a Constitution that was comprised in its heart with the struggle for the defense of the native visions.

In this respect, Brandão (2013, p. 95, our translation):

It is not at random that the native population has strong intervention in these Constitutions, since there were the most explored populations - so much physically how much in the epistemical field - and they found in the Constitucionalism the form of making its rights positive and of disputing the institutions.

It is latent, consequently, what Latin America was passing for was a moment of recognition of the native rights and of a political changes of the Law through the protection to the multiethnic and pluricultural aspects.

The 1st article of the Bolivian Constitution - promulgated after approbatory referendum - declares that Bolivia is a Social Unit State of right plurinational, communitarian, freely, autonomous and decentralized, independently, sovereign and interculturally, established in the plurality and in the political, economical, legal, cultural and linguistic pluralism, inside the integrative process of the country.

Of this reading, the preoccupation of the constituent remains incontrovertible in reinforcing the multicultural aspects in the new Bolivian State. In the same sense, Brandão (2013, p. 95) comments that, of the “400 articles of the wide Bolivian Constitution, 80 make references to the native people, which are defined by the Constitution as human communities that share of cultural identity, the language, the tradition, the history”, besides the religion, own institutions, territory, finally, the whole vision that, before been forgotten, received constitutional seat.

So, the Bolivian Constitution establishes the protection to native practices and knowledge, as well as to its political, legal and economical system, recognizing, for its time, the collective protection on territories and protecting the communitarian property, like that one what comprehends the original indigenous territory (BRANDÃO, 2013, p. 95-96).

In this path, the native traditional knowledge are lifted up to the field of the intellectual, historical and cultural property, constituted by true national inheritance protected constitutionally. Likewise, teaches Brandão (2013, p. 96) the new Constitution arranges what in the educative centers will be respected the spirituality of the native people, as well as stipulates duty of the superior education in taking into account the universal and collective knowledge of the native people, inclusive as regards the perpetuation of several dialects.

Interesting to point out, in this good occupation to understand what in fact it means the refoundation of a State under pluriculturals bases, the epistemically content of the 8th article of the Bolivian Constitution that affirms there are moral principles of the Bolivian society the ama qhilla, ama llulla, ama suwa (do not be lazy, do not be lying, do not be thieving), suma qamaña (to live well), ñandereko (harmonious life), teko kavi (good life), ivi maraei (land without evil) and qhapaj ñan (way or noble life).

The insertion at constitutional level of native dialect is a totally incompatible fact with the standards of the Modern Constitutional State, which it seems to indicate, in a first moment, that the studied phenomenon treats, in fact, of a new constitutional moment.

It is necessary to mention that, nevertheless the fact of the Bolivian Justice to take as central organ a Pluricultural Constitutional Court, which inclusive has mixed composition, consti-

tutionally established the equivalence between the ordinary justice and several forms of solution of conflicts of native origin.

In this form, each native community can establish its court itself, with judges elected between the residents and whose decision have the privilege of doing material *res judicata*, cost saying, the matter cannot be re-discussed in the common justice.

More recently, while deciding on a question of competence, the Pluricultural Constitutional Bolivian Court based the sentence on cultural and anthropological criteria, establishing different legal bases between the Common Justice and the Native Justice, contributing to the consolidation of a multifaceted, communitarian model of jurisdiction, without hierarchy and marked out in the protection to the fundamental rights and to the plurinationality of the people.

The Plurinacional Constitutional court, in its Third Room; by virtue of the authority that awards the Political Constitution of the State Plurinacional of Bolivia and the art. 12. 7 of the Law of the Constitutional court Plurinacional, in review, it resolves: TO APPROVE partly the Resolution 01/2012 of January 27, student to fs. 40 to 41 pronounced by the Judge Segundo de Instrucción in the Penal of the department of Chuquisaca; and consequently, it determines: 1st TO GRANT the requested tutelage, with regard to all the rights denounced like harmful, arranging the cessation of any act opposite to the paradigm of living well developed in the present Judgment. 2nd TO ORDER to the Unit of Decolonization of the Constitutional court Plurinacional, in coordination with General secretariat, to proceed to the translation of the present Judgment to the Quechuan and Aymara, languages used by the rural original indigenous people of Poroma in accordance with the expert report student in precedents. 3rd TO ORDER to the Unit of Decolonization of the Constitutional court Plurinacional, the socialization of the present Judgment in the rural original indigenous Poroma people. 4th TO ORDER Secretary-General of the Constitutional court Plurinacional, the diffusion of the present mistake for capturing an understanding melt you as for the rolls of the plural control of constitutionality as regards decisions of the Indigenous Justice native peasant (BOLÍVIA, 2012, our translation).

Advancing in the epistemological investigations, Montayo (2013, p. 156) hoists the understanding of which the Bolivian Constitution inaugurated the plurinational constitutionalism in so far as *“es claro que uno de los aportes centrales del proceso boliviano es haber colocado en primer plano la noción de plurinacionalidad.”* So, a true rereading and state-owned rearchitecture has been with the overcoming of the national State.

This piece of epistemology changes, affirms the author (2013, p. 157) is supported by two great dimensions: for the rights concession to the autonomous native people to the territory, to the land and to the natural resources, and the second aspect, which refers to the direct representation of the population in the public powers (*cogobierno*).

Despite the challenges in implementing the policies of inclusion contained in the Bolivian Constitution, it is certain that these modifications are solid in what concerns the search for the construction of a pluricultural and more democratic State, established in the cultural-ethnic respect to the differences.

3 THE CASE OF ECUADOR: THE REDEMPTION OF PACHA MAMA AND SUMAK KAWSAY

The constitutional reconstruction occurred in Ecuador comes as a response to more than one decade of native social movements, which were coming like answer to the colonial exclusion period.

In this sense, Fernández (2014, p. 273) points to the elements that legitimized the search for a political reform. They are: i) the state-owned national and monocultural system, what was not reflecting the social relations of the time; ii) the system of exclusion that took as a parameter the legal disregard for the native people and too many minorities; iii) the capitalist system been based on the exploration of the man and of the field; iv) the system of teaching, which was raising uncritical and submissive individuals; v) the racist social system, which was characterized by stereotypes creation; vi) the system of patriarchal family, in which rights were not granted to women and; vii) for legal-political end, the imported theory of Europe, which reality does not coincide with the multicultural societies.

Soaked by the feeling of multiculturalism the people of Ecuador approved in 2008, through referendum, a new constitutional Letter, in the eagerness to deepen its state-owned architecture.

The constitutional proposal consisted in giving beginning to the construction of a new political paradigm, greatly modifying the forms of social, political and economical organization and, with that, escaping from the pillars of the neocolonialism (FÉRNANDEZ, 2014, p. 274).

The Ecuadorian Constitution stood out for, besides protecting in more spacious way the native multi-visions, having certainly brought in its text the life-centric vision. It be worth saying, one speaks in the nature as subjects of rights.

Such is obvious when reading article 71, in verbis:

Article 71. The nature or Pacha Mama, where does it multiply and the life happens, has a right the one that respects herself integrally its existence and the maintenance and regeneration of its vital cycles, structure, functions and evolutive processes. Every person, community, village, or nationality will be able to demand of the public authority the fulfillment of the rights of the nature. To apply and to interpret these rights, there will be observed the beginnings established in the Constitution in what will be relevant. The State will stimulate the natural and legal persons and the collective beings so that they protect the nature and promote the respect to all the elements that form an ecosystem.

Echeverria (2011, p. 104) comments the reflexes of the commands contained in the new Constitution of Ecuador. For the author, the new Constitution ratifies and systematizes the important prescriptive evolution as regarding the environmental question. More than that, it enlarges the constitutional protection in the direction of recognizing and guaranteeing the rights of the nature, standing out because it is actually the first Constitution of the world to do it.

It is in this theory construction about a green constitucionalism that there come to life the principles of Pacha Mama and Sumak Kawsay, supporters of this new political thought.

About Pacha Mama (goddess land), Ferreira (2013, p. 408) point out that its positivization in the constitutional text of Ecuador represents the recognition by positive right of the plurinationality, in so far as it goes on to refute the search for a “development based on the radical antropocentrism and on the economic growth to any cost. The humanity must be put in the arms of Pacha Mama, become complete with it, in order to to promote the rights of the nature” (FERREIRA, 2013, p. 408, our translation) and in this scenery, the native people are the protagonists in the struggle for the recognition of the nature’s rights..

In what concerns the positivization of Sumak Kawsay, Tortosa (2009, p. 5) points out that this innovation of the Ecuadorian constitutional text comes to carry out two objectives: it gives distinction to the world vision forgotten in the process of colonization and construction of social identity; and also re-secures the compromise with the sustainable development, recognizing the mistakes of the wild capitalism.

The new Constitution of Ecuador, as well as Bolivian Constitution, broke with the individualist logic that was ruling up to that time in the constitutional theories after they introduced the necessity of there being protected the native multi-visions and the rights of the nature, seeing the society from several peripheric reality. These constitutional transplants are extremely clear with the positivization of Pacha Mama and of Sumak Kawsay (GARGARELLA, 2009, p. 5; 2011, p. 300).

Imperious to detach the lesson of Brandão (2013, p. 99), for whom the Constitution of Ecuador appears seriously worried with the project of transformation of the society and, in this process, inserts new elements to the constitutional theory.

The reconstruction that took place in Ecuador with the incorporation of the native multi-visions, at the same time, demolished the ideal of monocultural, State, a truly standard to the Right in the modern society. First of all, affirms the author (BRANDÃO, 2013, p. 100), the modifications that took care of Ecuador “finish by symbolizing the force of that what were restrained for the itstory and for the Right.”

Santos (2012) replies that Ecuadorian Constitution represented a truly important pass in the direction of the recognition of the rights of the native people, maintaining its identity, inclusive in what concerns the conservation and the development of its knowledge, here treated like intellectual property and, besides, cultural inheritance.

Still about the principles of the refoundation of the Ecuadorian State, it is necessary to say that these new constitutional standards are been given life in the jurisprudence. Proof of that is the publication of the sentence referring to the process n. 0072-14 CN, in which the Constitutional Court decided that, in treating native questions, the Penal Code deserves an intercultural interpretation. The multiculturalism comes to life, here, not only an order of increase, but like hermeneutic support.

4 PACHA MAMA AND SUMAK KAWSAY: THE CONSECRATION OF AN ENVIRONMENTAL CONSTITUCIONALISM

Based on the exposed, it is discussed Latin-American constitucionalism as an alternative contained to the efficacy challenge of the fundamental rights.

In this sense, it is analyzed the legal protection of the fundamental rights in Brazil - like parameter of the neoconstitucionalism and its challenges - and the innovations contained in Bolivia and Ecuador law systems, as an epistemological epicenter.

As to the civil basic rights, it is certain that the great innovation brought by the new Latin-America constitutionalism refers to the protection with multicultural approach, in so far as they are recognized the freedom of belief - considered as a cultural inheritance - the property, individual and collective, of the native groups, the full access to the justice, with the creation of native Justices with exclusive competence regarding the person and autonomous in detriment to the ordinary Justice.

The mechanisms contained in Latin-America constitutionalism on behalf of the guarantee of the efficiency of the civil fundamental rights come in the worry of acting like an integrative element - or in the words of Neves (2009), bridges of transition - when the very effectiveness of the principle of the dignity of the human person was reached.

Like take place in *terrae brasillis*, the discussion around the social rights in Bolivia and Ecuador relapses into its efficacy challenges.

With effect, the new Latin-America constitutionalism brings in its bulge a proposal of efficiency, existent in the material plan and, to that, adopts series of constitutional innovations.

The crisis that attacks the points of efficiency of the social rights is justified by Crorie (2013, p. 33) having in mind that the protection of the positive dimensions of all the rights and freedoms demand resources for part of the Public Power.

Of this action, it does not leave economic crisis of representing the cause of a crisis of social rights. According to Crorie (2013, p. 33-34, our translation) "in this measure, it is an if to say that all the fundamental rights suffer the consequences of the crisis, be economical, social and cultural rights, be right, of freedoms and its guarantees."

The neoconstitucionalism identifies the necessity in there to defend the social rights as logical consequence of the constitutional interpretation and the judicial proactivity finds as an alternative to the question of the fundamental rights, that however, comes up against the limits of the constitutional distribution of competences.

For its time, soaked of the challenges that move the post-modern society, the new Latin-America constitutionalism, first recognize the social rights to several cultural groups while protecting the native multi-visions and, in the indirect form, it modifies the architectures of state-owned-politically, in the end of making possible the direct participation of the people in the decision of the acts of government and, consequently, in the control and inspection of the public allowance.

About the legal protection of the social rights, Radaelli (2012, p. 3) emphasizes that the Bolivian Constitution systematized the fundamental rights coupling them in two categories: substantiate rights and the super substantiate rights, being this composed by the social, collective rights, the relative to the life and environmental protection.

Different situation takes place in the Constitution of Ecuador, in which it is not used terms like fundamental, individual or social rights, just to avoid a system made by hierarchical standards in studies or in jurisprudence. In this sense, there is mentioned only the recognition of human rights (RADAELLI, 2012, p. 4).

It instills to say that it characterizes the new Latin-America constitutionalism “the conciliation between individual and collective rights in a way to guarantee distribution of income and social justice.” (RADAELLI, 2012, p. 11).

In the same range, the recognition of the social rights in the new Latin-America constitutionalism is soaked by the theory of the fence to the retreat, so that, to avoid reforms of neoliberal hallmark in the constitutional texts, restricting the rights recently conquered, the Ecuadorian and Bolivian Constitutions adopted principles of the progressive rights, removing the possibility of social retreat.

Radaelli (2012, p. 7) points to the adoption in the new Constitutions of programmatical and ruling models, in such a way that the States are linked to the justiciability of the rights, especially the social ones, which are written in Constitutions and start to depend on the development of programs, public policies and specific budget.

In the synthetic form, it innovated the new Latin-America constitutionalism when recognized the social rights to several ethnic groups and increased the possibility of the population to supervise the public spending.

About the diffuse right to the environment, it was seen previously that the new Latin-America constitutionalism - and here, in the special form the Constitution of Ecuador stands out - it proposed an evolution epistemic while settling, for first time the right of the nature.

One speaks, consequently, in environmental rights as an ideal conquered from the constitutionalization of the social and economic rights and, mainly, from the recognition of the fraternity as a hermeneutic element. As Santilli (2005, p. 34) explains:

The environmental protection was built on basis of the idea of which the environmental public policies must include and wrap the local communities, holders of knowledges and of practices of environmental handling. More than that, it was developed on basis of the conception of which, in a poor country and with so many social inequalities, a new development paradigm must promote not only the strictly environmental sustentabilidade - in other words, the sustentabilidade of sorts, ecosystems and ecological processes - just as the social sustentabilidade - in other words, it must contribute also to the reduction of the poverty and equity. Besides, the new paradigm of development extolled by the environmental must promote and value the cultural diversity and the consolidation of the democratic process in the country, with spacious social participation in the environmental management.

Like seen previously, the new Latin-America constitutionalism rescued the ideals of Bien Vivir (Sumak Kawsay or Suma Qamaña), with its variants made positive in the new Constitutions of Ecuador and of Bolivia.

According to Almeida and Nogueira’s lesson (2012, p. 11), the integration of the bien vivir in the new constitutions and its interrelation with the pacha mama points to the search for a new paradigm as regards the substitution of the individuality for the community; come like criticism to the capitalism and to a neoliberalism, and man-nature proposes a systemic vision of the tie, in the form to reinforce the development of this epistemological turn.

In this prop, it breaks with the dominant epistemology in the modernity, and start to understand the society like one it adds up of “ecology of knowing” (ALMEIDA; NOGUEIRA, 2012, p. 12).

The recognition for the Right of the native multi-visions teases in the consecration of the individual rights, but, in the indirect form, represent significant exchange in the collective protection, in so far as it is reverted “the logic of the cultural, ethnic and social diversity of visions on the environment and on the development, incorporating, nevertheless, the ideal of the *buen vivir*, with the purpose of moderating the social inequalities” (ALMEIDA; NOGUEIRA, 2012, p. 12) and also like possible solution to the environmental problem that shows up.

What is realized is the necessity of the Right in rebuilding its institutes on account of the challenges that characterize the contemporaneousness and, perhaps the biggest of them, refer just to the environmental question. And therefore, Almeida and Nogueira (2012, p. 13) point to Crisis of the State and of the modern Right like the crisis that took away of the center of the science the individual, patrimonial subjectivity based on the free demonstration of will, going on to take as a primary approach the public order, the subject of right and the collective protection, as sum of individual rights.

These modifications own to the legal culture and to the philosophy of the Right, were shown to short steps, when new is Latin American constitutionalism, in this path, from the recognition of the right to the nature like rampart of the whole outline of basic rights.

One of the great innovations, in the protection of the *pacha mama* and of the *sumak kawsay*, it consists of the fence contained in the Ecuadorian Constitution (article 74) of which they are still when the installment of environmental services, its production, use or use was acquired by individuals.

4 CONCLUSION

Innovated the new Latin-America constitutionalism when several ethnic groups recognized the social rights to and increasing the possibility of the population, in the service full of the reflexes of the democracy, in supervising the public spending.

One speaks, consequently, in environmental rights like ideal conquered from the constitutionalization of the social and economic rights and, mainly, for the recognition of the fraternity like element hermeneutic.

Like seen previously, the Latin-american constitutionalism rescued the principles of *Bien Vivir* (*Sumak Kawsay* or *Abridgement Qamaña*), with its variants made positive in the new Constitutions of Ecuador and of Bolivia.

And therefore, the doctrine points to the called crisis of the State and of the modern Right like the crisis that took away of the center of the science the individual, patrimonial subjectivity based on the free demonstration of will, and went on to take as a primary approach the public order, the subject of right and the collective protection, as sum of individual rights.

Likewise, the Constitution of Bolivia (article 341) establishes the right that has the people in participating, through prior consultations, of the environmental management, having still straight basically to the information on all the potentially harmful decisions to the way.

It is possible to notice, on basis of everything exposed one, that the modifications in the Constitution of Bolivia and Ecuador allow to speak in consecration of fundamental rights, so much in the prescriptive-theoretical plan with the recognition of the right to the nature and the protec-

tion of the native multi-visions, as in the plan of facts with the preoccupation around the social rights and consequent appearance of organs of control and inspection of the public policies.

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