

**AN END WITHOUT MEANS? KEY CONCEPTS OF LATIN AMERICAN
NEW CONSTITUTIONALISM AND THE POLITICS OF
ENVIRONMENTAL PROTECTION**

**UM FIM SEM MEIOS? CONCEITOS-CHAVE DO NOVO
CONSTITUCIONALISMO LATINO-AMERICANO E A POLÍTICA DE
PROTEÇÃO AMBIENTAL**

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ABSTRACT

The Latin American new constitutionalism that inspired the Constitutions of Ecuador (2008) and Bolivia (2009) is grounded in the idea that human beings are merely one species among many. Nature, in this conception, has a legal standing that can be enacted by any physical or juridical person acting in its interest. However, a closer reading of key concepts and of the writings of politicians and thinkers advocating Latin American new constitutionalism reveals tensions and contradictions between its utopian aspirations and their implementation through legislation. This paper inquires, adopting a diachronic perspective, and inspired by the History of Concepts, into its key notions, such as *buen vivir*, *sumak kawsay*, *Pacha Mama*, the State, and development, and offers a critical review of the concept's capacity to be translated into the legal system and legal practice. The analysis shows that the Latin American new constitutionalism has not succeeded in breaking with dominant concepts of the State, market economy, and development.

KEYWORDS

Mother Earth. Constitution. Environment. State. Development.

RESUMO

O Novo Constitucionalismo Latino-Americano, que inspirou as Constituições do Equador (2008) e da Bolívia (2009), fundamenta-se na ideia de que o ser humano é apenas uma espécie entre muitas. Nessa concepção, a natureza possui personalidade jurídica e pode ser representada por qualquer pessoa física ou jurídica que atue em seu interesse. Contudo, uma leitura mais atenta dos conceitos centrais e dos escritos de políticos e pensadores que defendem o Novo Constitucionalismo Latino-Americano revela a existência de tensões e contradições entre sua dimensão utópica e sua implementação prática por meio da legislação. Inspirado pela História dos Conceitos e adotando uma perspectiva diacrônica, o artigo examina noções centrais como *buen vivir*, *sumak kawsay*, *Pacha Mama*, Estado e desenvolvimento, oferecendo uma avaliação crítica da capacidade desses conceitos de serem traduzidos para o sistema jurídico e para a prática jurídica. A análise demonstra que o novo constitucionalismo latino-americano não logrou romper com concepções dominantes de Estado, economia de mercado e desenvolvimento.

PALAVRAS-CHAVE

Mãe Terra. Constituição. Meio ambiente. Estado. Desenvolvimento.

INTRODUCTION

Global warming, the destruction of the forests and particularly the Amazon, floods, drought and large-scale pollution of rivers and groundwater are just some of the current environmental problems that are widely recognized but for which there are no simple solutions to be found, much less implemented. Along with fundamental questions discussed in relation to Nature¹ and human beings by authors like Peter Singer (1975), Leonardo Boff (2004), and Bruno Latour (2017), the past few decades have seen the development of concepts such as the commons (Ostrom, 1990; Ostrom, Gardner, and Walker, 1994; Rodgers et al., 2010; Wall, 2014) and the New Economy of Nature (Daily and Ellison, 2002; Joseph W. Bull et al., 2013), that aim to offer political and economic solutions to ecologically sustainable development. In this context, it is not surprising that Pope Francis' first Encyclical Letter was also dedicated to environmental questions as the key to preserving the planet (Franciscus, 2015).

In Latin America, some States have adopted new constitutional and legislative frameworks that recognize Nature as a legal actor (Hermitte, 2011, p. 173-212). Latin American new constitutionalism, mainly represented by the constitutions of Ecuador (2008) and Bolivia (2009), is based on the idea that man is no longer considered the centrepiece of Nature, but rather, one species among other living things. In this conception, Nature possesses a legal personality that permits for any physical or juridical person to act in Nature's interest. However, this concept, along with other key concepts of the Ecuadorian and Bolivian constitutions, raises various questions, which so far have not been resolved in practice, and which are often ignored in current legal, political and academic debates: — What is the significance of notions such as *buen vivir*, *sumak kawsay*, and *Pacha Mama*? What are the origins of these notions, who introduced them in the respective constituent assemblies, and how were they interpreted by them? Additionally, how do these concepts, which often remain obscure in the academic literature (Wolkmer, Augustin and Wolkmer, 2012, p. 51-69; Zaffaroni, 2011), relate to other key concepts such as the State, citizenship, sustainability, development, (post)colonialism, equity, solidarity, and the dignity of life, among others? What type of State is being imagined by advocates of these constitutions? If the key concepts of this new constitutionalism are part of a rediscovered heritage – or “invented tradition”² – that considers Nature a cosmological actor,

¹ Nature, will appear, throughout the text, written in capital letters because the Latin American new constitutionalism constitutes a breach with anthropocentrism and postulates not only the rights of Nature, but understands Nature as an actor that has its own agency.

² According to Hobsbawm and Ranger (1992, p. 1), “‘Invented tradition’ is taken to mean a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past”.

then it is important to ask where these concepts stem from, how they changed over time and how they are being interpreted by contemporary social, political and legal actors³. Furthermore, the question of the implementation of the rights of Nature is left open by the constitutions of Ecuador and Bolivia. In practice, who can initiate a legal process on behalf of Nature, and how? What are the administrative and legal mechanisms that permit such action? Could it be, in the end, that the State – through its judiciary – holds a monopoly over the interpretation of the agency of the *actor* Nature?

The goal in this paper is to present and to reflect upon some of the key concepts of Latin American new constitutionalism related to the concepts of the environment and environmental protection. At this stage in the research, a thorough deconstruction of all these notions is not intended, but rather, the aim is to point to the existing contradictions and potential of this still very heterodox bundle of discourses and ideas comprising the phenomenon called Latin American new constitutionalism. The questions raised here will hopefully help to stimulate further debates.

The starting point for this analysis was given by the mere observation that the very basic categories, or, concepts, of Latin American new constitutionalism are anything but clearly defined. Therefore, the methodological approach of this study is based on Conceptual History. Concepts are here understood as words that reunite multiple significations, i.e. they are characterized by polysemy. They are dynamic and embedded in social, political and historical contexts. According to the German historian Reinhart Koselleck (1985, p. 78), successful political concepts – such as the ones that fundament the Latin American new constitutionalism – permit the construction of a *horizon of expectation*, which allows for them to function as a canvas of projection for different actors and interests. Certainly, not every utopia inscribed into a constitution needs to come into being, and not all the values that constitute a society need to turn themselves into law. However, because new constitutionalism has this explicit vocation – articulated in the Constitutions of Ecuador and Bolivia – to be put into practice, the paper proposes to inquire, across time, and inspired by the History of Concepts, into its key notions, such as *buen vivir*, *sumak kawsay*, *Pacha Mama*, and to critically reflect upon the concept's capacity to be translated into the legal system and legal practice. The analysis starts in 2008-2009, when both Constitutions of Ecuador and Bolivia were published. Since then, a large group of social actors have reverberated their innovations on environmental debates. Contributions by scholars like Zaffaroni, Gudynas, and Acosta, politicians such as Rafael Correa, and even jurists in selected court decisions, form a diverse group of discourses that define the very object of study.

³ The notion “invented” does not carry a pejorative connotation. Every culture is adapted, reinterpreted and renovated in a continuous process.

1 THE NOTIONS OF *BUEN VIVIR*, *SUMAK KAWSAY*, AND *PACHA MAMA*

The environment and environmental protection are at the core of Latin American new constitutionalism. The constitutions, legislation and governmental plans of Ecuador and Bolivia include various concepts inspired by the indigenous groups' cultures that are characterised by eco- or biocentrism as opposed to anthropocentrism. The key notions that illustrate almost the entire movement – although with different emphases – are *buen vivir* (or *sumak kawsay*, in the Quechua language) and *Pacha Mama*. These notions carry a baggage of connotations with them, forming concepts of *good living* and *Mother Nature* that are hard to translate and that are therefore equally difficult to define not only in academic terms but also in legislation and politics.

The notion of *buen vivir* (or *sumak kawsay*) proposes a new way to observe and interact with Nature. *Buen vivir*⁴, in English, means “good or harmonious living” in relation to the cycles of Mother Nature, the cosmos, life, history and all forms of existence (Vanhulst, 2015, p. 239, translation ours). The semantics of the concept imply that *buen vivir* is a guiding principle for life, abundance and action. It can therefore be conceived of in opposition to the concept of the Welfare State, institutionalized and maintained since the post-war period based on the notion that the politics of consumption promotes development and progress⁵. *Buen vivir*, on the other hand, proposes an ethics that must guide the State in its relations to human beings and Nature. It is a holistic view of the world focused on the protection of all living beings, not only humans. Using the terms of Alberto Acosta, it is a “civilizational proposal” (Acosta, 2016, p. 76, translation ours) and “an ethic to the community” (Acosta, 2016, p. 83-84, translation ours). Eugenio Zaffaroni considers *buen vivir* to be “the true constitutional ecology” (Zaffaroni, 2011, p. 111, translation ours), particularly because it is based on the ancient culture of indigenous peoples who resisted the historical processes of colonialism and neocolonialism and continue to advocate for direct communication between humans with Nature. Undoubtedly, *buen vivir* criticizes the hegemonic belief of limitless capitalism. *Buen vivir* proposes

⁴ Acosta (2016) and Jiménez (2011) show that other indigenous communities in Latin America possess similar conceptions of *buen vivir*, such as “*suma qamaña*” in Aymara, “*ñandereko*” in Guaraní, “*shiir waras*” in Achuar, and “*küme mongen*” in Mapuche.

⁵ According to Acosta (2016, p. 46, translation ours), “[...] after the Second World War, when the Cold War started, in the midst of the appearance of nuclear terrorism [...] the discourse of ‘development’ established – and consolidated – a dichotomic structure of domination: developed – under-developed, poor – rich, advanced – delayed, civilized – wild, center – periphery”. Original: “[...] depois da Segunda Guerra Mundial, quando começava a Guerra Fria, em meio ao surgimento da ameaça e do terror nuclear, o discurso sobre ‘o desenvolvimento’ estabeleceu – e consolidou – uma estrutura de dominação dicotômica: desenvolvido-subdesenvolvido, pobre-rico, avançado-atrasado, civilizado-selvagem, centro-periferia”.

a rupture and is therefore a consistent ideology of resistance to capitalism in the 21st century.

The second concept refers to Mother Nature, which is the closest translation of *Pacha Mama* in English. Indigenous peoples in the Andean region invoke this divinity to remember their origins and to project a possible future in harmony with Nature. However, it is important to note that *Pacha Mama*, as a female divinity, does not exactly have the power of creation, but rather offers protection (Acosta, 2016, p. 117). That is why *Pacha Mama* is a reference to the rights of Nature in Latin America and must be seen not only as an element of Andean mysticism but also as a possible epistemological rupture with modern concepts based on anthropocentrism. For instance, Zaffaroni considers this divinity as an archetype possibly found in many other cultural expressions around the globe, which suggests that *Pacha Mama* has a universal character⁶.

2 NEGATIVE DEFINITIONS, OR WHAT LATIN AMERICAN NEW CONSTITUTIONALISM REJECTS

The discourses of *buen vivir* and *sumak kawsay* centre on the following paradigms: modernity, capitalism, anti- and/or post-colonialism, (sustainable) development and the State. Depending on the various interpretations of what should be the focus of Latin American new constitutionalism, social and political actors and academics either adhere to or reject one or more of these concepts, or they may discard them all.

In fact, Latin American new constitutionalism can be characterized by its heterogeneity and the difficulty of defining in precise terms, or rather, the ability to avoid defining, the goals and means for applying policies that would lead to the realization of a society based on *buen vivir*⁷. There is heterogeneity even within the works of Alberto Acosta and Eugenio Raúl Zaffaroni. Alongside the hegemonic name “New Latin American Constitutionalism” (Zaffaroni, 2011, p. 113, translation ours), they use the following names for the same subject: “*neoconstitucionalismo transformador*” (Acosta, 2016, p. 157), “*neoconstitucionalismo latinoamericano*” (Zaffaroni, 2011, p. 21, 23),

⁶ To explain this universal conception, Zaffaroni (2011, p. 123, translation ours) states that “[...] the incorporation of Pacha Mama into constitutional law would be no less than a universal archetype that exists in every human being as a result of subsequent experiences of survival of the species along the evolutionary process. Instead of causing an underrated incorporation, this thesis – if correct – would certainly elevate it”. Original: “La incorporación de la Pacha Mama al derecho constitucional sería nada menos que la de un arquetipo universal existente en todo humano como resultado de las experiencias de supervivencia de la especie a lo largo de la evolución. Lejos de provocar una subestimación de esta incorporación, esta tesis – de ser correcta – la exaltaría”.

⁷ Zaffaroni (2015, p. 26) advocates against strict terminological limits when he writes “Latin America” instead of “South America” or only “America”. It is important to point out that “new constitutionalism” and “neoconstitutionalism” are different juridical movements with different historical origins, despite their similarity. The first is considered a contemporary Latin American movement. The latter emerges in Europe after the Second World War and is basically considered an answer to the legal-positivist movement.

“*constitucionalismo latinoamericano*” (Zaffaroni, 2015, p. 99), “*constitucionalismo andino*” (Zaffaroni, 2011, p. 108)⁸. Various authors state that this fuzziness can be regarded as a factor of flexibility that has allowed for a wide reception and use of the concept by different groups and individuals, both locally and nationally as well as internationally (Vanhulst, 2015, p. 235).

According to Reinhart Koselleck, concepts are vocabularies that contain a multiplicity of meanings. A concept is always polysemic and can only be interpreted, not defined exactly. The different -isms (liberalism, communism, etc.) supply social actors with the means to locate themselves in political and social space but they also constitute that very space (Koselleck, 1985, p. 78). Therefore, according to Koselleck (1985, p. 74), “[w]ithout common concepts there is no society, and above all, no political field of action”. He states that the less defined a new concept remains, the greater its potential for integration and invention because different individuals and groups can project different ideas and expectations onto the same concept. In this sense, new constitutionalism can be interpreted as a concept that claims legitimacy through (invented) tradition and at the same time carries a notion of a revolutionary and universal new concept.

The work of Alberto Acosta, for example, makes it clear to the reader what the concept of *buen vivir* is not, according to the opinion of the author, who conceives *buen vivir* as a utopia. For Acosta, some examples of current reality that do not belong to new constitutionalism include individualist ethics; a mono-cultural and centralist State; the destruction of quality of life when economic and environmental crises occur; a capitalist economy based on markets, poverty, discrimination, sustainable development and *green capitalism*. Acosta rejects the idea of development entirely, arguing that this concept dominates the world’s major institutions as though there were no other possibilities for the future. He sees *buen vivir* as “an alternative to development” (Acosta, 2016, p. 75, translation ours), not an alternative of development. Whereas conservative discourses may incorporate sustainable development and the *green economy*, which are concepts usually related to environmental law, Acosta vigorously rejects this hegemony of capitalist economics. According to him, it is impossible to reconcile these economic concepts with a true guarantee for the rights of Nature. Radically opposed to any development theory – he likens development to imperialism (Acosta, 2016, p. 45) – Acosta proposes an alternative based on Andean culture⁹.

Moreover, the concept of the State itself is debated. Acosta (2016) argues that new

⁸ This list is not exhaustive and illustrates the problems that can be caused by the naming of the concept in the juridical world because the more imprecise the concepts of this legal movement, the more difficult it is to define the measures to guarantee the rights of Nature.

⁹ For contemporary critics of the concept of development, see Cowen and Shenton (1995), Escobar (2007), Ribeiro (2008), Zhouiri, Laschefski, and Barros (2005).

constitutionalism is only possible if the principles of the modern (Nation) State are questioned and reviewed. According to him, “The plurinational State is not a hybrid. [Rather,] there needs to be a different State, in the sense of another society and another life project – the *buen vivir*”¹⁰ (Acosta, 2016, p. 154, translation ours). This alternative is also called the plurinational State, and in promoting this idea, Acosta relies primarily on the work of Boaventura de Sousa Santos (1988, 2003).

Not only does the plurinational State break with anthropocentric ways of defining the State, but it also proposes decentralizing the State’s decisions to become a force of resistance against all forms of authoritarianism (capitalist or socialist), to consolidate and expand collective rights, and also to respect the different nationalities or communities that may coexist within a single State’s territory (Keating, 2001; Tapia, 2015)¹¹. Within this concept, indigenous peoples represent only one among countless groups included in the plurinational State.

3 LEGAL DEFINITIONS OF THE KEY CONCEPTS

The Constitutions of Ecuador and Bolivia form a framework for the implementation of environmental policies. *Buen vivir*, *Pacha Mama* and plurinationalism are some of the terms incorporated in the Constitution of Ecuador (2008), whose preamble proclaims “*Buen vivir*, el *Sumak kawsay*” as a “A new form of public coexistence, in diversity and in harmony with Nature, to achieve the good way of living” (Constitution [...], 2008). The concept of *buen vivir* is given prominence in the constitution, which defines the rights of *buen vivir* in Title II, Chapter II, and includes a “*Buen vivir plan*” in Title VII that contains 75 articles on biodiversity, social and cultural rights and the promotion of traditional knowledge, among other issues. Despite the concept of *buen vivir* being conceived in public and academic discourses as an alternative to development (which is considered a tool of neo-colonialist and capitalist Western hegemony), the proper idea of development figures prominently in Title VI called, in original, “The development regime” (“*el Régimen de Desarrollo*”). Article 275 defines this development regime as one of *buen vivir*:

The development structure is the organized, sustainable and dynamic group of economic, political, socio-cultural and environmental systems which underpin the achievement of the good way of living (*sumak kawsay*). / The State shall plan the development of the country to assure the exercise of rights, the achievement of the objectives of the development structure and the principles enshrined in the Constitution. Planning shall aspire to social and territorial equity, promote cooperation, and be participatory, decentralized, deconcentrated and

¹⁰ Original: “O Estado Plurinacional não é um Estado híbrido. Tem de ser outro Estado, no sentido de outra sociedade e outra proposta de vida – ou seja, o Bem Viver”.

¹¹ On the indigenous environmental rights from a procedural perspective and how these rights might be articulated in legislation, see Eichler and Navarro, 2023.

transparent. / The good way of living shall require persons, communities, peoples and nationalities to effectively exercise their rights and fulfil their responsibilities within the framework of interculturalism, respect for their diversity, and harmonious coexistence with nature (Constitution [...], 2008).

It is worth noting that article 275 defines the State as the organ that plans development and pursues the task of reaching the goals established for the country's development, even though planning is designed to occur in a decentralized and participatory manner. This participation is very much embedded within the State structure, for development plans are being worked out by a National Planning Council (*Consejo Nacional de Planificación*) that includes the representation of different levels of government and civil society (art. 279)¹². The general obligations of the State are defined in article 277:

The general duties of the State in order to achieve the good way of living shall be: 1. To guarantee the rights of people, communities and nature. 2. To direct, plan and regulate the development process. 3. To make and implement public policies, and to control and sanction any breach thereof. 4. To produce goods, to create and maintain infrastructure, and to provide public services. 5. To boost the development of economic activities through a legal system and political institutions that promote, foster and defend said activities in observance of the Constitution and the law. 6. To promote and bolster science and technology, the arts, ancestral wisdom and, in general, activities resulting from the creative initiative of communities, associations, cooperatives and the private sector (Constitution [...], 2008).

As for citizens, their obligations consist of actively taking part in civil society and producing, exchanging and consuming goods and services with consideration for social and environmental responsibility:

To achieve the good way of living, it is the duty of people and communities, and their various forms of organization: 1. To participate in all stages and spaces of public management and national and local development planning, and in the execution and control of the fulfillment of development plans at all levels. 2. To produce, exchange and consume goods and services with social and environmental responsibility (Constitution [...], 2008, art. 278).

In the Bolivian Constitution, the idea of *suma qamaña* or *buen vivir* is also present, but there are some significant differences between Ecuadorian and Bolivian new constitutionalism. In Bolivia, the economy is conceived as a mixed, *plural* economy intended to promote both capitalist and non-

¹² Constitution [...] (2008, art. 279): "The decentralized national system of participatory planning shall organize planning for development. The system shall be comprised of a National Planning Council, which shall bring together the different levels of government, with public participation, and shall have a technical secretariat coordinating it. The objective of this Council shall be to issue the guidelines and policies that direct the system and to approve the National Development Plan. The council shall be chaired by the President of the Republic. In decentralized autonomous governments, planning councils shall be chaired by their highest representatives and their membership shall be provided for by law. Citizen councils shall be bodies for the discussion and creation of long-term strategic guidelines and agreements that shall provide guidelines for national development".

capitalist forms of exchange (art. 306)¹³. The idea of development, again, appears in accordance with the idea of *buen vivir*¹⁴. As for Nature, unlike in Ecuador, it is not considered an actor possessing rights by the constitution. However, in December 2010, the Bolivian Government passed a law recognizing the Rights of Mother Nature (*Madre Tierra*) (Bolivia, 2010), the idea being that the obligations and duties of the plurinational State and society, anchored in the constitution, guarantee respect of these rights¹⁵. From a juridical point of view, this recognition of the rights of Nature is weaker than in the Ecuadorian case, given that a constitution has more weight in the legal hierarchy than a simple law. According to Cletus G. Barié, the Bolivian concept of *buen vivir* is a more reflexive and philosophical one¹⁶, whereas the Ecuadorian concept has a more normative and state-centred character (Barié, 2014, p. 24-25).

4 THE VARIOUS DISCOURSES OF NEW CONSTITUTIONALISM

As shown in the preceding chapters, Latin American new constitutionalism is by no means a homogeneous doctrine or movement. Rather, various discourses, policies and politics exist in parallel with one another. Among these, Julien Vanhulst, following the typology proposed by Antonio Luis Hidalgo-Capitán (Cubillo-Guevara, Hidalgo-Capitán, and Domínguez-Gómez, 2014), differentiates between three main currents of *buen vivir* based on their approach to modernity and sustainability: the “indigenous”, “socialist” and “post-structuralist” currents (Vanhulst, 2015, translation ours). According to this author, the discourses of *buen vivir* are characterized by four constitutive elements: 1) the idea of harmony with Nature (including its abiotic components); 2)

¹³ Bolivia [...] (2009, art. 306): “I. The Bolivian economic model is plural and seeks to improve the quality of life and the well being of all Bolivians”.

¹⁴ Bolivia [...] (2009, Preamble): “[...] A State based on respect and equality for all, on principles of sovereignty, dignity, interdependence, solidarity, harmony, and equity in the distribution and redistribution of the social wealth, where the search for a good life predominates; based on respect for the economic, social, juridical, political and cultural pluralism of the inhabitants of this land; and on collective coexistence with access to water, work, education, health and housing for all”.

¹⁵ Bolivia [...] (2009, art. 1): “Bolivia is constituted as a Unitary Social State of Pluri-National Communitarian Law (Estado Unitario Social de Derecho Plurinacional Comunitario) that is free, independent, sovereign, democratic, inter-cultural, decentralized and with autonomies. Bolivia is founded on plurality and on political, economic, juridical, cultural and linguistic pluralism in the integration process of the country”. Bolivia [...] (2009, art. 2): “Given the pre-colonial existence of nations and rural native indigenous peoples and their ancestral control of their territories, their free determination, consisting of the right to autonomy, self-government, their culture, recognition of their institutions, and the consolidation of their territorial entities, is guaranteed within the framework of the unity of the State, in accordance with this Constitution and the law”.

¹⁶ Bolivia [...] (2009, Preamble) is emblematic: “In ancient times mountains arose, rivers moved, and lakes were formed. Our Amazonia, our swamps, our highlands, and our plains and valleys were covered with greenery and flowers. We populated this sacred Mother Earth with different faces, and since that time we have understood the plurality that exists in all things and in our diversity as human beings and cultures. [...] We have left the colonial, republican and neo-liberal State in the past”.

recognition of the principles and values of marginalised/subordinated groups; 3) a State that guarantees the satisfaction of basic needs (such as education, health, food and water), social justice and equality; and 4) democracy. Furthermore, Vanhulst identifies two basic ideas, which he calls cross-cutting, for they intersect the “indigenous”, “socialist” and “post-structuralist” camps: 1) a criticism of a Eurocentric modernity, and 2) the proposal of *buen vivir* as a new type of political and intercultural project (Vanhulst, 2015, p. 238, translation ours).

This typology can be adhered to with some reservations. First, the concept of the State is a very controversial and one that could also be classified as a cross-cutting. Second, there is a concept of consumerism latent in the discourses that is not articulated very clearly by the different advocates of Latin American new constitutionalism, one that is also related, to varying degrees, to the discourses of what a society based on *buen vivir/sumak kawsay* should be.

To demonstrate the importance of these concepts, let us first describe the main characteristics of the “indigenous”, “socialist” and “post-structuralist” currents. The “indigenous” concept of *buen vivir/sumak kawsay* that sees *buen vivir* not only as a value but also as a principle that should guide individual action, arose in the 1990’s as a reconstructed or reinvented principle for the defence of and fight for indigenous and non-indigenous rights against neoliberal politics. In the context of the end of authoritarian military regimes in Latin America, indigenous communities organised at national level (such as the *Confederación de Nacionalidades Indígenas de Ecuador* (CONAIE) in Ecuador or the *Confederación de Pueblos Indígenas de Bolivia* (CIDIB) in Bolivia) became essential actors in the process of new State construction. Their voices were increasingly heard, even internationally, because the idea of an indigenous cosmovision was compatible with global social movements that campaigned against globalization or for human rights and environmental issues (Vanhulst, 2015, p. 238, 240).

More recently, indigenous groups and movements have organised themselves across national borders in the *Confederación Andina de Organizaciones* (CAOI). The Cusco Declaration of June 2006 contains the principal claims of the movement: the construction of plurinational States, the defence of natural resources, respect for the collective rights of indigenous communities and self-determination of their settlements (Vanhulst, 2015, p. 240-241).

As observed by Vanhulst, the discourse of *buen vivir* is derived directly from these movements but is also renewed by them. It is therefore a dynamic concept that is socially defined and subject to continuous redefinitions and critiques (Vanhulst, 2015, p. 241). In academic discourse, this *indigenous* current stresses the importance of indigenous peoples’ self-determination and indigenous cosmovision. Some advocates of the current (Macas, 2014; Maldonado, 2014) tend to use the term *sumak kawsay* instead of *buen vivir* because they consider the latter phrase to be corrupted or distorted

by Eurocentric ideas. They see the Andean cosmovision as an alternative to the concept of development. In the same line of thinking, Eugenio Zaffaroni embraces this essentialist – if not romanticising – vision in that he rejects the development of scientific models to ground the ideology of *buen vivir* because he considers such efforts to constitute an aggression against Andean cultural traditions (Zaffaroni, 2011, p. 113-114).

What Vanhulst calls the “socialist” current of *buen vivir* can be characterized as the politics of anchoring the values of Andean cosmovision in legislation and putting environmental policies into practise by both local and central governments. Such policies and politics can be initiated by indigenous movements, local and international environmental organizations and other grassroots movements, as well as by central governments. The policies implemented vary from the establishment of parks and the creation of juridical and administrative mechanisms for the protection of the environment to projects against industrial mining. This “socialist” current does not consider the concept of *buen vivir* as conflicting with an idea of economic growth and development. This becomes particularly clear in the preamble of the Ecuadorian Constitution, which mentions both the “rights of *buen vivir*” and a “regime of development” (Constitution [...], 2008)¹⁷. It is interesting to note that the very same preamble also states that it is the State that plans development¹⁸. However, in the 2013-2017 national plan (*Plan Nacional para el Buen vivir 2013-2017*), the idea of *buen vivir* appears in sharper contrast to neoliberal economics and Eurocentrism. The idea of infinite economic growth is being abandoned and replaced by a notion of progress that is compatible with life corresponding to the ideas of *buen vivir*. This *buen vivir* therefore presents itself as a concept linked to development that prioritizes questions of social equity and views sustainability only as a subordinated concept.

Furthermore, as noted by Vanhulst, this plan introduces a new semantics linking the concepts of *buen vivir* and socialism. *Buen vivir* therefore becomes a “*socialismo del buen vivir*” in the service of the political movement called *Movimiento Alianza PAIS*, a coalition represented by former Ecuadorian president Rafael Correa (Vanhulst, 2015, p. 244). One might argue here that labelling *buen vivir* as a socialist concept means adhering to traditional concepts of the State and economy. As such, the concept becomes one that legitimates existing power structures.

The “post-structuralism” current is essentially an academic one that tends to reject the notion

¹⁷ Vanhulst (2015, p. 243) points out that *buen vivir* and development are considered interchangeable notions in the “Plan Nacional para el Buen Vivir 2009-2013”.

¹⁸ Constitution [...] (2008, art. 275): “The development structure is the organized, sustainable and dynamic group of economic, political, socio-cultural and environmental systems which underpin the achievement of the good way of living (*sumak kawsay*). / The State shall plan the development of the country to assure the exercise of rights, the achievement of the objectives of the development structure and the principles enshrined in the Constitution”.

of development, which is considered an imperialist, neo-colonialist and Eurocentric concept. Like the other two currents, this one is also by no means unitary. Vanhulst differentiates between a group of radical anti-modernist thinkers and a more moderate group in favour of dialogue and pluralism. Radicals consider the concept of *buen vivir* to be an analogous translation of *sumak kawsay*, which facilitates the recovery of the ancient traditions of indigenous settlements and a break with contemporary forms of symbolic colonialism. Academics aim to decolonize their own thinking and to revive indigenous knowledge and lifeways against the concept of development. Whereas this first current remains confined within itself, the moderate current aims at deconstructing the development paradigm without seeing this as necessarily incompatible with modernity. Authors like Leonardo Boff, Alberto Acosta and Eduardo Gudynas insist on the fact that *buen vivir* is a concept under construction that does not permit itself to be limited exclusively to the realities of the Andean regions, but should instead seek dialogue and allow for pluralistic voices to be raised among the critics of sustainable development¹⁹. These academic versions of *buen vivir* demonstrate similarities with post-development theories that are directly related to post-structuralism (Escobar, 2010, p. 1-65; Ziai, 2007). Their protagonists are linked to various environmental and social movements and believe that various appropriations of *buen vivir* can coexist in a pluralistic world. They are bio-centric and understand the relationship between human beings and Nature as based on reciprocity (Vanhulst, 2015, p. 251).

5 THE PLURINATIONAL STATE: A STATE-CENTERED OR A POST-COLONIAL MODEL?

Given the heterogeneity of New Constitutionalist ideas, it is no surprise that actual State politics in Bolivia and in Ecuador do not necessarily correspond to the norms and objectives formulated in their respective constitutions or governmental agendas. The concepts of plurinationalism and the State, as well as core definitions of the economy (capitalist, non-capitalist, anti- or pro-development, consumer- or sustainability-oriented) are at the very heart of discrepancies that can be observed between discourses and practices.

The Bolivian Constitution highlights the idea of a political, economic, juridical, cultural and linguistic pluralism and that of a plurinationalism constituted by all Bolivians. It makes explicit

¹⁹ Gudynas and Acosta (2010, p. 103, translation ours) define *buen vivir* as “[...] an opportunity to construct a different society sustained by a diverse and harmonious co-existence of human beings with nature, based on the recognition of different cultural values that exist in each country and in the world”. Original: “[...] oportunidad para construir otra sociedad sustentada en la convivencia del ser humano en diversidad y armonía con la naturaleza, a partir del reconocimiento de los diversos valores culturales existentes en cada país y en el mundo”.

mention of indigenous nations, rural settlements and intercultural and afro-Bolivian communities²⁰. Bartolomé Clavero asserts that the Bolivian Constitution's innovation lies in the establishment of the Plurinational Constitutional Tribunal (*Tribunal Constitucional Plurinacional*, TCP) whose task it is to bind together the various jurisprudences in a plurinational State. Jurisprudence provides, according to this concept, one of the sources of law (Clavero, 2012).

In Clavero's view, to respect the constitution, the cultural values of indigenous people must have a cross-cutting influence on jurisdiction. He asserts that the development of the Bolivian Constitution does not yet provide an adequate framework for indigenous communities and that the final decisions need not be made by a central institution, if the idea of the construction of a plurinational State is to be taken seriously. At the same time, he states that contemporary jurisprudence should not be guided by the existing jurisprudence, but rather, the *Tribunal Constitucional Plurinacional* should create jurisprudence inspired by plurinationalism, thus constituting a clear break with the previous legal system (Clavero, 2012, p. 45). Therefore, Clavero appears to suggest a confinement of the plurinational Bolivian State, in terms of justice, within itself. Would this plurinational State then represent just another form of construction of a Nation State?

One of the features of new constitutionalism is that it postulates a new, although fuzzy, idea of a State. In the Constitutions of Ecuador and Bolivia, the State is explicitly defined as guaranteeing greater participation by the population and acknowledging the diversity and rights of different communities. Thinkers such as Alberto Costa go even further and argue that the State of *buen vivir* needs to be radically rethought. However, in light of recent politics, it is worth asking whether there is not – despite governmental rhetoric – a weakening of civil society, which is embedded and absorbed into the State and therefore not able to articulate itself independently.

Clavero (2015, translation ours) argues that Latin America experienced a process of what he calls “*descolonización en falso*”, or false decolonization, in the second half of the eighteenth century and in the first half of the nineteenth century. He states that the colonization of indigenous peoples continued, and continues through the present, now by means of State domination legitimized by constitutions that adopted European concepts. Clavero considers Bolivia to be an example of what has occurred in a number of Latin American States that proceeded to acknowledge indigenous peoples' rights without confronting the process of decolonization that ought to begin with the national constitution itself (Clavero, 2015, p. 650-651). He therefore asks whether a State can decolonize itself and proceeds to severely criticise the Bolivian government, which in his view projects an image of

²⁰ Bolivia [...] (2009, art. 3): “The Bolivian nation is formed by all Bolivians, the native indigenous nations and peoples, and the inter-cultural and Afro-Bolivian communities that, together, constitute the Bolivian people”.

itself abroad through its constitution that does not correspond to the realities of its domestic politics (Clavero, 2015, p. 656).

This type of *colonialism by the State* manifests itself in paternalistic and autocratic discourses, such as the rhetoric used by President Correa (2007-2017). Correa was elected in 2007 as an ally of indigenous movements that were proposing *buen vivir* socialism, but his administrations increasingly distanced themselves from environmental protection, promoting the idea of development and (re-)initiating mining²¹ and industrial projects that had been initially abandoned. By 2009, Correa was already referring to indigenous movements in pejorative terms, stating that infantile leftist, environmentalist and indigenous movements posed the biggest threat to the government's political project because they were opposed to his plans to expand mining (Ordoñez, 2010, p. 89-90).

6 DOES LATIN AMERICAN NEW CONSTITUTIONALISM PROTECT AGAINST THE MONETIZATION OF NATURE?

Regarding the ambitions of New Constitutionalists and the actual application of policies, there is an important question that remains unsolved by legislation and court decisions: that of legal sanctions for environmental damages. This topic is directly related to the current trend of monetization of Nature because legal decisions that focus on pecuniary sanctions reinforce the idea that (financially measurable) prices can be assigned to natural resources and natural elements. A recent example of society's adoption of such notions is offered by the case of the Doce River in Brazil. Following a collapse of a dam containing toxic waste from mining, large parts of the Mariana region in the Province of Minas Gerais were flooded, and serious consequences were also felt in the neighboring region of Espírito Santo. Apart from human casualties, local flora and fauna were also killed. It is of course impossible to restore the previous state of Nature, but public discourses on the catastrophe have since the beginning concentrated on the question of the size of the sums to be paid as reparations by the mining company and the dam construction company. People are informed about these numbers, but far less so about the consequences for Nature. This certainly has to do with the way environmental legislation functions, but it equally reveals the adherence of large parts of society to the logic of the monetization of Nature (Losekann and Mayorga, 2018).

Classical economics, applied to environmental matters, has approached natural resources largely based on financial market laws (the economy of scarcity), such as, for example, price regulations according to shortages of food or feedstock. The New Economy of Nature, on the other

²¹ On neo-extractivism, see Acsehrad (2021), Broad and Fischer-Mackey (2017), and Svampa (2019).

hand, considers Nature as an economic asset (Daily and Ellison, 2002). One of the key aspects of this *ecological economy* is the idea of compensation, which does not in practise mean halting pollution and destruction, but rather compensating for harm done. Therefore, biodiversity and Nature itself are being transformed into a means of obtaining profits. Natural resources have become commodities systematically categorized according to their financial values.

Considering that the language of Nature has been permeated by economic notions, such as assets, compensation, sustainability, development, etc., recent discourse about the rights of Nature in Latin American new constitutionalism can be understood as a counter-concept to market-driven logics (Fatheuer, 2014, p. 26-28). This conflict of concepts became clear during discussions at the Rio+20 Conference and has been gaining force internationally. It is worth highlighting that these discussions appear not only in legal documents or governmental plans but also in the field of public opinion, such as the international press (Collwell, 2016; Rousseau, 2016)²².

The new constitutionalism of *buen vivir* presents itself as an alternative to the New Economy of Nature and the monetization linked to such thinking. The Constitutions of Ecuador and Bolivia encompass two different legal concepts, namely, “environmental law” and the “rights of Nature”. According to Acosta (2016), these two concepts illustrate two independent *justices*, each one representing a different legal approach. “Environmental law” represents people and their right to be compensated for any natural disaster caused by others. Meanwhile, the “rights of Nature” represents Nature to ensure the survival of species and guarantee the restoration of damaged ecosystems (Acosta, 2016, p. 132).

According to art. 71 of the Constitution of Ecuador, any person, community, village or nationality can demand before public authorities that the rights of Nature are complied with:

Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. / All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate. / The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem (Constitution [...], 2008).

Nature has the right to restoration (art. 72), and the State has an obligation to establish the mechanisms of restoration and adopt measures to eliminate or diminish harm caused to the

²² On rivers as legal actors, see O'Donnell and Talbot-Jones (2018).

environment²³. However, both in Ecuador and in Bolivia, the State remains – through its legal apparatus – the guardian of the environment. Therefore, despite discourses of participation, it maintains the hegemony to define what is legal and acceptable in relation to the environment.

In Ecuador, opposition to mining and hydroelectric projects has repeatedly caused social clashes. The Correa administrations imposed their will on local communities with autocratic measures, such as issuing criminal charges of terrorism and sabotage to individuals defending their right to *buen vivir*. One prominent example of the Correa government's prioritization of mining over *buen vivir* is the Yasuní-ITT Initiative, which proposed a mechanism of financial compensation for leaving oil underground through a trusteeship proposed by the United Nations Development Program.

Yasuní-ITT took shape during a long process of indigenous and environmentalist resistance to oil exploitation in the Amazon. However, once the initiative was transformed into public policy, the actions of the State excluded and marginalized the very groups that had defended it from the beginning. In 2013, Correa officially decided to drill for oil in the ITT bloc, and he had already expressed his intention to do so as early as January 2010, explaining that he considered the conditions of the trusteeship proposed by the United Nations Development Program “dishonouring” (Caria and Domínguez, 2016, p. 23).

The argument Correa used to justify these politics is that the country must pursue economic development before *buen vivir* can be achieved. Indeed, Ecuador continues to rely heavily on traditional industries, which are conceived of as the motor of development and an important source of revenue for social programs. Exports of raw materials increased from 74.3% in 2007 to 83% in 2014, the non-oil-sector trade deficit doubled between 2006-2012, and deforestation increased by 55% between 2001 and 2012 (203,015 ha in 2001-2006 to 315,009 ha in 2007-2012) (Caria and Domínguez, 2016, p. 23; Gudynas, 2010, p. 67).

According to de Sousa Santos, Correa believes that society is under-developed and unprepared for democratic participation or active citizenship, and thus, investments need to be made in development and education. The best kind of citizen, then, is one who has confidence in the State. In the short term, it is necessary to create and distribute wealth, carry out social policies and improve infrastructure to achieve development. The long-term goal of environmental protection is sacrificed in favour of the exploitation of natural resources by the mining, oil and industrial agriculture sectors.

²³ Constitution [...] (2008, art. 72): “Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems. / In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences”.

At the same time, aggressive reforms in education aim to create a knowledge economy based on the country's biodiversity (Santos, 2015, p. 134).

According to Gudynas (2009, p. 219, translation ours),

[...] neo-extractivism is a new ingredient of a contemporary and South American version of developmentalism. This version has inherited the classical ideas of modernity and therefore maintains faith in material progress, but it is a contemporary hybrid which results from the cultural and political conditions specific to South America²⁴.

Given its state-centred character, Ecuadorian *buen vivir*, as it stands, appears to result in a weakening of civil society²⁵. Along these lines, Martin Calisto Friant and John Langmore state that "Ecuador seems to treat its citizens as passive social clients rather than active participants in a radical democracy" (Friant and Langmore, 2015, p. 69).

Jason Tockman and John Cameron reach a very similar conclusion in relation to Bolivia. They assert that, despite the rhetoric of plurinationalism, the Movement Toward Socialism (*Movimiento al Socialismo*, MAS), led by President Evo Morales (in office 2006-2019), followed an interventionist policy, including in indigenous territories, and its economic development policies rely heavily on the extraction of non-renewable natural resources (Tockman and Cameron, 2014, p. 46-69). According to Ben McKay (2017, p. 1), "[...] the greatest threat to the indigenous, peasants, *originarios*, women and the youth in the current context is extractivism".

7 CONCLUSIONS

The Latin American new constitutionalism movement proposes a rupture with traditional modern constitutionalists and colonialist ideas. By breaking with the anthropocentrism paradigm, the Constitutions of Ecuador and Bolivia place environmental protection at the heart of their respective social, political and legal systems. However, despite ambitions, the policies followed by both countries in the past two decades have shown that it is difficult to speak of a true rupture. Rather, this

²⁴ "[...] el neo-extractivismo es un nuevo ingrediente de una versión contemporánea y Sudamericana del desarrollismo. Esta versión es heredera de las ideas clásicas de la Modernidad, y por lo tanto mantiene su fe en el progreso material, pero es un híbrido contemporáneo que resulta de las condiciones culturales y políticas propias de América del Sur".

²⁵ An interesting fact that may support the weakening hypothesis is the number of social movements in Ecuador in recent years. Gómez et al. (2014, p. 83) offer some data about the networks of social movements of resistance to hydroelectric projects in Latin America. According to these statistics, from 1991 to 2013, there has been no such social movement in Ecuador. However, the authors explain that countries in which they could not find any initiative with nationwide coordination were left out.

new constitutionalism represents itself today as a variation in constitutional thinking, but one that has not succeeded in breaking with dominant concepts of the State, the market economy or development.

In fact, the paper has pointed to important tensions and antagonism between the very foundational concepts Latin American new constitutionalism and their translation into concrete action in terms of legislation and politics. When analysing Latin American new constitutionalism, it is therefore important to distinguish between the ideals and discourses on the one hand, and the given context of their implementation, on the other. Latin American new constitutionalism has neither been able to resolve its very central problems of state-centrism (including questions of popular participation and equality of rights), nor of development (issues such as neo-extractivism and monetization of Nature), nor have the rights of Nature been liberated from the State's tutelage.

An issue that appears absent from the rights of Nature discourses in the context of Latin American new constitutionalism is the logic of consumerism largely endorsed by contemporary societies (Knights and O'Neill, 2016). It is evident that there are policies and civil society activism initiatives directed towards changing human consumption patterns. Organic food labels, anti-slavery campaigns and sustainable mechanisms of production promoted by private and public entities are just a few examples of how consumers are being encouraged to reflect upon and change their habits. However, these actions and campaigns often seem to focus more on product quality (questions of recycling and earth-friendly materials) than on the quantity of goods purchased and produced (questions of scale). Consequently, a fundamental question that must be included in rights of Nature discourses is whether it is possible to achieve economic growth and preserve the environment at the same time. Some doubts can be raised in relation to the recent policies adopted by Ecuador and Bolivia that rely heavily on the extraction of non-renewable natural resources and have not respected the rights of indigenous peoples, notwithstanding the rhetoric of plurinationalism.

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