The Andean New Legal Pluralism

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Submitted to the Department of Legal Studies of the Central European University

In partial fulfillment of the requirements for the degree of Master in

Laws in Comparative Constitutional Law

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Budapest-Hungary

2015-2016

ABSTRACT

This work is a comparative study between Bolivia, Colombia, and Ecuador. Legal pluralism recognized constitutionally in those countries are a novelty to the study of constitutional law. The fundamental features which shaped the constitutional spirit of these countries are based on their cultural diversity, colonial past, and the results of conflicts deriving from both, which represent a unique view of dealing with legal pluralism. Models of state, in these countries, are shaped by the recognition and evolution of legal pluralism and not vice versa as it would be from a traditional Western conception. In that sense, this thesis is an approach about the mentioned new pluralism; The Andean New Legal Pluralism.

ACKNOWLEDGEMENTS

I would like to express my deepest thanks to God whose will brought me to a country incredibly far from mine, I would also manifest my gratitude to my family and especially to my little daughter who was born by the time I ended this thesis.

The completion of this undertaking could not have been possible without the supervision, assistance, help and support of Professor Mathias Möschel, acting chair of the Comparative Constitutional Law program and my thesis supervisor.

Sergio Miranda Hayes

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INTRODUCTION

In the academic world, scientific literature comes mostly from the western part of the globe. Ramon Grossfoguel believes that knowledge is shaped by the power relations in the "post-colonial" era.[1] This means that the western powers dominate the academic world. In the world of constitutional law, this is not an exception. It is true that the western's constitutional law theories, doctrines, jurisprudence and constitutional provisions had influenced developing countries in all around the globe. However, most of the overseas countries had also gone forward in the development of their own constitutional systems that have specific and new features whose particular identity and the uniqueness which differentiate them from other systems. This work is an attempt (as some others) to present the special features that three countries in Latin America has on legal pluralism. These are Bolivia, Ecuador, and Colombia, which are part of the so-called Andean Region countries.

Latin America has been facing numerous issues regarding social differentiation. In the opinion of one of the most cited authors in Latin American constitutional law, Raquel Yrigoyen, the less favored were taken apart from social, economic, and political affairs by legal measures created by people from the advantaged minority in order to maintain their privileges.[2] A great percentage of the less favored peoples claim to be the historical victims in the region, which first were colonized and after ignored, these are the indigenous people. There are over 36.6 million of indigenous people in Latin America. In Bolivia, the number of natives rises to 4.115.222, in Ecuador 1.018.176

[1] Ramon Grossfoguel and Margarita Cervantes Rodríguez, "Unthinking Twentieth-Century Eurocentric Mythologies: Universalist Knowledges, Decolonization, and Developmentalism, in "The Modern/Colonial/Capitalist World System in the Twentieth Century", Greenwood Press, Westport, 2002, p. 16

[2] Raquel Yrigoyen Fajardo. "El horizonte del constitucionalismo pluralista. Del multiculturalismo a la descolonización. *El derecho en América Latina. Un mapa para el pensamiento jurídico del siglo XXI,* Siglo XII Editores, Buenos Aires, 2011, pág. 139 [The Horizon of the pluralist constitutionalism. From multiculturalism to decolonization.]

and in Colombia 1.392.623[3]. In this sense, Roberto Gargarella articulates that the new constitutionalism in this region is an effort to gain social inclusion, a struggle that resulted in the creation of protective constitutions that not only have recognized a wide range of fundamental rights but also developed new constitutional features to undertake the goal of these diverse societies.[4]

Latin American constitutional law presents some important facts that are pertinent to the study of legal pluralism. On the one hand, its very nature is unique because the high percentage of indigenous people who lived before the Spanish Colonization and maintained their customs and traditions through time until now. On the other hand, the region had gone through an intense historical and social process. The colony, the war for independence, the development of the republican states, the dictatorships of the 60s and the neoliberal ruling parties in the 80s and the 90s had triggered the fire of the unsatisfied social movements. This fact resulted in conflicts whose resolution introduced modern day Latin America's new constitutionalism[5].

The clear recognition of diverse ethnicities led to the trend of the legal pluralism change in the constitutions of the region. This due to the several social pressures led by social movements inspired on the basis of their historical relegation and political mobilization. This fact has resulted in new legal orders that have guided to an apparently new state organization combined with the local views of law and native visions directed to what I claim to be the New Legal Pluralism.

Structure of the Thesis

[3] World Bank Group inform on Indigenous People in Latin America, New York, 2014, p. 25
[4] Roberto Gargarella, *"Latin American Constitutionalism,1810-2010: The Engine Room of the Constitution*", Oxford University Press, New York, 2014, p 175
[5] Ibid., p 151

In chapter I, I will address the historical background of the region. Today, Latin America is the result of its history and the evolution of its institutions. It is a vast continent with many geographical sectors which one is the region of the Andes. This region was home for various native cultures who suffered a tremendous blow when foreigners willing to exploit them arrived and formed what is now known as the colony for many years.

This event has left an eternal scar on Latin America's heart and the only way to understand the legal system is knowing this historical heritage. After the formation of independent states, the ethnic clash remained and the contradiction also continued, this fact generated social unrest that later became uncontrollable. In this respect, after the passage of time and after a long social struggle, governments built a new model of recognition of diversity within a state.[6] Words like multi-ethnicity, multiculturalism and diversity were common in the language of the constitutional scholars.[7] However, new trends appeared lately, more pluralistic views and the plurinationality trends gained force in the constitutional life after several series of battles initiated by pro-indigenous and indigenous social movements who were not satisfied with the previous recognitions. The present thesis study is about these new trends.

In Chapter II, I will address the traditional legal pluralism, first by conceptualizing it and then by referring to investigations carried out in the world and in Latin America. All this to lay the groundwork to comprehend the traditional legal pluralism before discussing the legal dimension in the constitutional systems of Bolivia, Colombia and Ecuador. Chapter II shows how some countries accepted legal pluralism and through examples shows how they have defined the law of

[6] Alison Brisk, "From Tribal Village to Global Village.", Stanford University Press, Stanford, 2000, p 59
[7] Yrigoyen Fajardo, Raquel. El horizonte del constitucionalismo pluralista. Del multiculturalismo a la descolonización, in "*El derecho en América Latina. Un mapa para el pensamiento jurídico del siglo XXI",* Siglo XII Editores, Buenos Aires, 2011, p. 139 [The horizon of pluralist constitutionalism. From multiculturalism to decolonization.]

each recognized jurisdictions. The example of the Latin American researchers whom I will outline in this chapter are from a traditional legal pluralism point of view in order to leave space for the new legal pluralism explanation in Chapter III.

In Chapter III, The newest constitutions of the countries mentioned have several constitutional provisions which entail the spirit of the new legal pluralism. In the first part, I will address the definition, organization, and specific constitutional provisions that protect legal pluralism in the three counties. In addition, I will address the model of states that make the new legal pluralism posible and also enriches it. I will make a comparison among the states regarding this issue and show the new constitutional motions that the Andean countries have in relation to the new legal pluralism. I will explain the importance of the pluralistic and the plurinational character for the study of the new legal pluralism.

In the second part, I will refer to the jurisdictions of the subjects of legal pluralism which are in most cases indigenous peoples[8] and the limits that these jurisdictions have because the popular questions regarding the problems that indigenous law may have with ordinary jurisdictions, human rights and constitutions. I will answer these questions: To whom is applicable? Where and when is applicable? What is the hierarchy of indigenous law? And some concerns regarding the jurisdictional function.

In conclusion, I will prove that there is a new legal pluralism, in the countries studied, under all the features pointed out in the comparative perspective. And I will show how this new legal pluralism works as an overview in Bolivia, Colombia, and Ecuador.

[8] There are also afro-descendants jurisdictions

CHAPTER I: HISTORICAL BACKGROUND

The Latin American legal reality can only be studied before a historical backdrop. The interrelationship of indigenous peoples, nation-states, and democratization in Latin America can be found in the historical development of the region. [9] To understand legal pluralism in Latin America, and more specifically in the Andean countries addressed in this thesis, it is pertinent to have a picture of the historical portrait of the development of these through history.

In that sense, the present chapter will briefly describe the periods of Latin American history, and will finish examining some key historical factors which changed the constitutions in Bolivia, Colombia, and Ecuador, in order to acknowledge the true spirit of legal pluralism in Latin America.

1.1.THE PREHISPANIC PERIOD

In this subchapter, I will expose some key elements from the prehispanic period to give the basis of the understanding of the next stages of history. In addition, I will name some cultures which lasted for two reasons. Firstly, this helps understanding the diversity which inspired today's constitutionalism. Secondly, because some of the cultures mentioned have survived in time, and now, are constitutionally recognized as I will explain in Chapter III.

The pre-Hispanic period covers an era that streams from the arrival of humans to the Americas until the discovery of America by Europeans. It began with the first hunters and gatherers, to the formation of stable settlements. Due to the practice of agriculture, people were forced to wait in one specific place for the product of the harvest, fact that caused the first human settlements. These emerging societies were grouped in villages formed by simple houses. They built ceremonial

[9] Edward L. Cleary and Timothy J. Steigenga, "Resurgent voices in Latin America : indigenous peoples, political mobilization, and religious change", Rutgers University Press, New Jersey, 2004, p. 16

centers and responded to an ideology. This was expressed by various religious manifestations. Combining religious beliefs and customs to set a configuration of norms.[10]

Finally, large and powerful states were formed through efficient organization, characterized by the use of advanced technology and the distribution of work, allowing the growth of a surplus to be used to serve the community. Temples, palaces, and roads were built, and the first urban cities settled[11]. Henceforth, the inhabitants developed customary law to coexist with each other in communities.

The pre-Hispanic period is relevant to understand the current legal system in Latin American countries. This is precisely because cultures, ethnic groups, and practices have survived despite the passage of time. The Andean region includes, from north to south, the countries of Colombia, Ecuador, Peru, Bolivia, and Chile. However, not all the territory of these countries is considered Andean. Despite that fact, the international community knows these states as the Andean countries. In that sense, for the purpose of this work, I will include Bolivia, Ecuador and Colombia among the Andean Countries just like the Andean Community of Nations[12] does.

Many indigenous cultures occupied the territories of these states. It is compelling for the purpose of this work to have an overview of the circumstances before the colonizers arrived which undoubtedly have to address the dwelling cultures that lived by the time the Spanish arrived. However, neither can the complexity of the native populations be addressed in this legal pluralism thesis nor can every single culture which inhabited that territory be analyzed. Nevertheless, an overview of the most popular will be provided here. The reasons of this are not only to comprehend

[10] Carlos Mesa Guisber et al: " *Historia de Bolivia*", Gisber, La Paz, 1998, p. 3 [History of Bolivia]
[11] Ibid, p. 9
[12] The CAN (Comunidad Andina de Naciones) is an International Regional Entity formed by the Andean Countries.

the diversity of Latin America but also to note that many cultures survived and other some are even constitutionally recognized, as I will refer to in chapter III.

Probably the most famous and the most distinctive culture from the Andean region is the Incan empire. The organization of it consisted of several nations with their own cultural, historical, linguistic individuals, all of them, were reigned by the Incas[13]. The imperial headquarters were located in Cusco and the whole territorial organization was called the *Tawantinsuyo* which dates back to 1200 AD. The word Tahuantinsuyo comes from a Quechuan name and consists of two words: *Tawa*, which means four, and *Suyo*, which means state. The territorial area of the Tahuantinsuyo was enormous. It took more than 3,000,000 km2, with more than 5,000 km (3107 miles) of coastline on the Pacific Ocean. It was composed by *Chinchasuyo, Collasuyo, Antisuyo,* and *Contisuyo*. The four nations had their own capital and recognized their geographical and political center Cusco, located in Peru. These four states were distributed to the northwest by *Chinchasuyo*, which goes to the Ancashmayo river in Pasto (Colombia) and covers Ecuador; The *Antisuyo* to the northeast located in the subtropical valleys, part of the Amazonian lowlands; The *Contisuyo* which occupied the southwestern part of the Peruvian coast to the Maule (Chile) river; and in the southeast the *Collasuyo*, which now is the territory of Bolivia and Tucuman (Argentina)[14]. The Incas had some common laws applying in their territory, local and general authorities, and a setup of principles to live in a harmonic society.[15]

[13] The Incas were the ruling political class. They claimed to be the children of the sun, the *Inti,* In the Quechan language who was the major divinity in their polytheist culture as it is noted in David S. Dearborn, "The Inca: The rulers of the Andes, Children of the Sun, ed. Gelain Selin, "Astronomy Across Cultures, The History of non-western cultures. Springer Science+Business Media Dordrech, Amherst, 2000, p. 197

[14] Carlos Mesa Guisbert et al: " *Historia de Bolivia*", Gisbert, La Paz, 1998, p. 11

[15] Barbara Somerville, *"Greats Empires of the Past: The Empire of the Inca."* Shoreline Publishing Group, New York, 2005, p 10

There were others cultures which inhabited the Andean territory, in the later period of the precolonial era. For instance in Colombia, near the center of its territory; the *Tairona* people, who inhabited the slopes of Sierra Nevada and its neighboring plains. They were one of the most developed cultures in the region. The *Sinu* people, who were occupying the Sinú River and its surroundings plains. To the north of the country, the *Chibchas* who were located near the eastern cordillera. To the coast side; the *Sondaguas,* the *Carares,* the *Muzo,* the *Kolima* and the *Pijaos*. To the south side; the *Timaná*, the *Yacones,* the *Paex*, the *Pastos*, and the *Chilacingas*.[16] It is evident that many other Indian groupings whose origins, cultures and relationships are still far from being understood and explained, dwelled in by the time the Spanish conquerors arrived the territory which now is Colombia[17]. Therefore, to name them would be not pertinent to the present work.

In the territory which now is Ecuador in the Amazon, there were the *Quijos*[18], the *Shuar* (who reduced the heads of their victims, and resisted both Inca and Spanish conquests)[19]; in the Sierra dwelt the *Pastos*[20], the *Caranqui-Cayambe*[21], the *Quitus*, who inhabited what is now Quito[22], the capital of Ecuador; the *Puruháes*[23], and the *Carani* and the *Paltas*[24], among others.

In Bolivia, several cultures dwelled, the ones which were conquered by the Incas and some others, among them, were in the west the *Colla* Kingdoms, characterized for their mummification

[16] Anthony McFarlane, *"Colombia before Independence Economy, Society and Politics under Bourbon Rule."* Cambridge University Press, Cambridge, 2002, p. 14-15
[17] Op. cit p. 15
[18] Ed. David Levinson*, " Encyclopedia of World Cultures, South America"* Volume VII, G.K. Hall & Company, New York, 1994, p. 98
[19] Ibid p. 295 (they literally reduced the skulls of their victims using some chemicals compounds.)
[20] Ed. Lawrence Boudon, "*Handbook of Latin American Studies"*, v. 58, University of Texas Press, Austin, 2002, p. 124
[21]Ed. David Levinson, *"The Encyclopedia of World Cultures: South America, Volume VII"*, G.K. Hall & Company, New York, 1994, p. 252
[22] Juan de Velasco, *"Historia del Reino de Quito de la América Meridional"*, Ayacucho, Caracas, 2012, p. 10 [History of the Reign Quito from the Meridional America.]
[23] Ed. David Levinson, *"The Encyclopedia of World Cultures: South America, Volume VII"*, G.K. Hall & Company, New York, 1994, p. 289
[24] Ibid p. 293

procedures.[25]. In the East side, the *Moxos*, *Baures*, *Itonomas*, the *Chunchus*. To the South the *Chiquitos*, the *Guaraní*, the *Sirionós*, the *Guarayos*, the *Pacaguaras*[26], the *Chiriguanos* and the *Arawak*[27].

It has to be noted that the importance of the pre-Columbian cultures naming is that not only the ways to solve conflicts and work organizations prevailed through time but also the indigenous authorities that are vital to the livelihoods of legal pluralism in the Andean region, which now are recognized as I will refer to in Chapter III. Moreover, in some cases such as Bolivia, Colombia and Ecuador, some of these cultures are constitutionally recognized.

1.2.THE COLONIAL PERIOD

This chapter addresses one of the main issues in the history of Latin America, which is the historical damage that was made not only to the indigenous people but also to the whole region. Moreover, to understand constitutionalism of this continent it is necessary to make a mental abstraction of the colony since most of the political discourses that led to the creation of the new constitutions of Colombia, Bolivia and Ecuador (ordered chronologically) were made on the basis of decolonization. Even if the colonial atrocity happened in the past, native communities happened to be mobilized by the recall of that memory which left a profound scar on their collective spirit. This happens also because they still felt by some means taken apart not only from the political decisions but from the urban society itself. (i.e. racial discrimination, ethnic prejudices).

When the invasion of white men coming from Europe happened, as the Cambridge History of Latin America says, a profound clash among two different worlds took place. The Native

[25] Carlos Mesa Guisber et Al: " *Historia de Bolivia*", Gisbert, La Paz, 1998, p. 18 [History of Bolivia]
[26] Ibid p. 49
[27] Ibid, p. 52

Americans' reaction to the Spanish incursion varied significantly: from proposals of alliance to more or less forced association, from passive resistance to constant opposition[28]. This book also states that at the beginning of the conquest, native people had experienced a great loss of inhabitants, due to the war brought to them by the colonialist conquerors. However, the dwellers of the Andean region survived more than other cultures in South America losing "only" the 25% (about ten million) of the Indian population[29] which certainly was killed during the conquest.

Although the Native American population was large, it started to sense some declining. Consequently, the Spanish needed more labor force. The African demand for slave labor in Latin America was modest, except, to some extent, in the Caribbean islands and the tropical coasts of the continent, in which Indians[30] virtually disappeared during the early stages of colonization[31]. This is the reason why Africans were brought to the former colonies in the region. Some of them have been dwelling there since. This fact is important for the comprehension of the Andean legal pluralism of nowadays as I will express in chapter III, because Legal Pluralism in Latin America, in contrast to the general belief, is not only understood from its indigenous perspective but also from other ethnicities, as the Afro-Americans.

The type of colonialism exerted by the Spaniards bound them to the inhabitants of the land establishing direct contact with the colonized ones. The conquerors founded cities, tried to penetrate the land and turned to govern the native peoples. Furthermore, they justified the colonial expansion and the right to subjugate the pagan peoples in order to evangelize them by the papal

[28] Ed. Leslie Bethell, *"The Cambridge History of Latin America"*, Volume I, Cambridge Histories Online, Cambridge University Press, 2008, p. 228
[29] Ibid p. 233
[30] This is another demonitation that the Spanish Colonizers put to the native people of Latin America.
[31] Ed. Leslie Bethell, *"Historia de América Latina",* Editorial Crítica, Barcelona, 1990, p. 138 [History of Latin America]

bulls, which were used as legal titles. The ideological foundation of colonialism in Latin America was the mission of introducing "civilized" values to the native community. The military conquest, the political domination and economic exploitation of the colonial territory and its native inhabitants were linked to Christianity and, consequently, the result of a repression of the indigenous religions. The colonial rule was a "civilizing" mission, which in turn sought to educate the native inhabitants by the introduction of the Spanish language. These claims reflected the ideological basis of all forms of colonialism, to reflect the alleged inferiority of the other. In the social practice, this assumption was reflected in a paternalistic attitude of the European "masters" toward the native populations, which occupied the lower levels of society justifying their exclusion by their ethnic origins[32].

As in all Latin American countries during the colony, a segregation model which separated physically and legally Indian Peoples from the Villages of Spain[33] was introduced. The Indians were subjected to the trustees, who were responsible for their evangelization and control, being subjected by force to their standards of living. To justify this submission, the ideology of inferiority of the indigenous was created by the rulers. Only some of the indigenous authorities were respected. This only to organize labor, tax, and evangelization. They were just allowed to the conservation of some "uses and customs" while these did not affect the "divine and natural law." Indigenous justice could only be limited to minor cases, whereas cases which deserved severe

[32] Iris Gareis, *"Identidades Latinoamericanas frente al colonialismo: Una apreciación histórico-antropológica",* in Indiana, 22, 2005, p. 9-18
[33] Name given to the former colonial cities.

punishments had to be decided by the Spanish magistrate. This fact materialized in order to not recognize "much power" to the local people.[34]

1.3.THE INDEPENDENCE PERIOD

Although native ethnic groups played a very important role in the war for independence, the indigenous were historically abandoned again. The good will of the creoles (descendants of the Spanish conquistadores) that struggled and won the independence war, towards the indigenous peoples and afro-descendants was fabricated for political purposes. In order to justify politically the independence, the elites (who happened to be creoles) used the discourse of the brutality suffered by the indigenous peoples during the colony to legitimize the creation of new states, as only a medium of "propaganda"[35].

In 1819, Colombia enacted its first independent constitution, after the decisive battle which led the nation to the victory over the colonizers. [36] The nation states hid under their cloak of the legal and administrative unit the presence of a variety of ethnic groups in the same territory, that in the Colombian case (as in many others in Latin America) included indigenous peoples, Afro-Colombians and Roma (Rom), as well as the mixed result of ethnic. Colombia was by that time (and it remains to be) the result of historical population dynamics that made this country a mixture of nations or communities with profound differences in their languages, customs, practices and

[34] Raquel Yrigoyen Fajardo, *"Debate sobre el Reconocimiento Constitucional sobre el Derecho Indígena en Guatemala"*. In América Indígena, vol. LVIII, Núm. 1-2, México, 1999 p. 1 [Debate about the Constitutional Recognition on Indigenous Law in Guatemala.]

[35] Hans-Joachin Konig, Discursos e Identidad, Estado-Nación y Ciudadanía en América Latina: Viejos Problemas Nuevos enfoques y dimensiones, ed. Eduardo Cavieres F. in *"Entre discursos y prácticas. América Latina del Siglo XIX."* Ediciones Universitarias de Valparaíso, Valparaíso, 2003.p. 15 [Discourses and Identity, Nation-State and Citizenship in Latin America: Old Problems, New focuses and dimensions, in Between Discourses and practices. The Latin America of the XIX.]

[36]Michael J. Larosa and Germán R. Mejía "La Historia Concisa de Colombia: 1810-2013." Editorial Pontiicia Universidad Javeriana, Bogotá, 2013, p.46 [The Concise History of Colombia: 1810-2013.]

beliefs.[37] However, again, the rulers ignored in the constitution the heterogeneous character of the people of Colombia indeed.

Bolivia, Located in the center of South America, was born to the republican life by signing the Declaration of Independence on August 6, 1825, through a Constituent Assembly[38] in which there was none indigenous participation or proper native representation. Even after the fight for independence which victory could only by achieved with the cooperation of the natives. After that, and due to the predominant ideology by that time, Simon Bolivar, the Liberator, said in his speech in 1826 that he will give Bolivia the "most liberal constitution" in all the world[39], promise that was accomplished, leading this country again to a homogenous recognition of its people ignoring the reality.

In 1830, Ecuador constituted itself as an independent Republic[40]. From this date on, it maintained an exploitation model which subjugated the indigenous people. Although the states proclaimed themselves as liberals, a colonial heritage remained. Thus, the social exclusion and the growth of poverty of the indigenous was a result of the fusion of the new economic policies and the old ones. [41]

As one of the most cited scholars on legal pluralism of Latin America, Raquel Yrigoyen says, the liberal states recently born, including Colombia, in the nineteenth century were configured under the principle of legal monism. This was the conception of the existence of a single legal system within a single state and a general law for all citizens. Hence, legal pluralism as a way of

[37] Ibid p. 49
[38] Carlos Mesa Guisber et Al: " *Historia de Bolivia*", Gisbert, La Paz, 1998, p. 111
[39] Alcídes Arguedas, "Historia General de Bolivia", Archivo General de la República de Bolivia, La Paz, 1922, p. 24 [General History of Bolivia.]
[40] Alberto Acosta, "La Breve Historia Económica del Ecuador", Corporación Editora Nacional, Quito, 2006, p. 23 [The Brief Economic History of Ecuador]
[41] Ibid. p.25-26

coexistence of various normative systems within the same geographic space, even in their subordinate colonial form, was unacceptable to the monocultural nation-state ideology. Also a model of citizenship specifically for white men, owners and "illustrated", constituted the essence of the horizon of liberal constitutionalism of the nineteenth century in Latin America. As claimed by the specified author, this was an "imported constitutionalism by the local elites to set states in their image and likeness, to the exclusion of indigenous peoples, Afro-descendants, women and subordinate majorities, in order to maintain the Indians subjected"[42].

1.4.CONSTITUTIONS IN INTERNAL TENSION AND THE "NEW" LEGAL PLURALISM

The following years the relationship between the indigenous people and the rulers prevailed without significant changes. Despite the fact of the implementation of the universal suffrage in those countries, the problem of exclusion did not end. Even if some minor conquests were achieved, for instance, some land and social reforms, the general view of a homogenous state remained and, therefore, also social exclusion. For the present thesis, the important fact to emphasize about the Republican history of the Latin American countries is that from the independence period to the XX century, native ethnicities were still marginalized from the political, economic, and social spheres. However, their customary law was still practiced due to the lack of presence of the State's officials over the vast territories of the countries analyzed in this work. Nevertheless, it was hard for them to coexist in such diverse countries without recognition and in a marginalized status. Thus, it was only matter of time for the conflicts to arise.

[42] Yrigoyen Fajardo, Raquel. El horizonte del constitucionalismo pluralista. Del multiculturalismo a la descolonización, in "*El derecho en América Latina. Un mapa para el pensamiento jurídico del siglo XXI",* Siglo XII Editores, Buenos Aires, 2011, p. 139 [The horizon of pluralist constitutionalism. From multiculturalism to decolonization.]

After the 1960s, almost all countries in the Latin American continent were crushed by two major historical events. On the one hand, the political crisis of the 1970s which led to severe human rights abuses produced those years by dictatorial and authoritarian governments. On the other hand, the economic and social crisis that triggered the application of structural economic adjustment programs during the 90s.[43]

From the 1980s onwards, Latin American states were facing unpayable foreign debts and corruption in their institutions. This economic crisis caused social unrest. The inequitable distribution of wealth, the steady growth of poverty and social exclusion[44] which gradually led social upheavals that would later become uncontrollable. Since the early 1990s, social movements fought for a new order. On the one hand, they overthrew democratically elected presidents. (Ecuador, Argentina, Paraguay, Peru, Venezuela, Brazil, and Bolivia). On the other hand, they slowed or delayed the privatization process of natural resources, promoting mass street actions, which forced the elites to negotiate new rights and obligations. The "new" social movements were against privatization of natural resources, the decline in the advancement of social rights, the rule that highly protected the market and poorly the individual and the impositions of the International Monetary Fund. [45]

These social movements led to the necessity of changes in the political order, which resulted in the first constitutions to recognize some indigenous rights and legal pluralism. Although Colombia, Bolivia, and Ecuador, signed the Covenant on Tribal and Indigenous Peoples of

[43] Roberto Gargarella, *"Latin American Constitutionalism,1810-2010: The Engine Room of the Constitution."* Oxford University Press, New York, 2014, p 148

[44] Osvaldo R.Battistin, Algunos Elementos para el Análisis Comparado de los Movimientos Sociales, ed Manuel de la fuente in *"Movimientos Sociales y Ciudadanía."* , La Paz, 19 [Some Elements for the Compared Analysis of the Social Movements in Social Movements and Citizenship]

[45] Boaventura de Sousa Santos, *"Democracia de Alta Intensidad, Apuntes para Democratizar la Democracia"*, Unidad de Análisis e Investigación del Área de Educación Ciudadana de la CNE, La Paz, 2004, p 31. [High Intense Democracy, Notes to Democratize the Democracy.]

Independent Countries of the International Labor Organization, the first step regarding the materialization and the appropriate implementation of rights and constitutional measures were produced later. In Colombia, in the Constituent Assembly of 1991, indigenous people obtained three representatives. For the first time rights were assigned to the natives and aboriginal communities with respect to their territory, politics, economic development, administration and social and cultural rights.[46] Three years later, the indigenous leader of the *Kataristas*[47], an indigenous movement, Victor Hugo Cárdenas, was elected vice-president of Bolivia by popular vote. One year later, the Constitution was amended and within it, the recognition of a multiculturalist legal pluralism took place. In Ecuador, after many political tensions and the struggle of indigenous movements, the 1998 Constitution recognized the Ecuadorian State as multicultural, intercultural, multiethnic and recognized indigenous people the right of to "liberate themselves from any oppressive system" (Art. 4, para. 6).

In this sense, Raquel Yrigoyen expresses that since the late twentieth century, the Latin American constitutions were changed as follows:

a) Multicultural constitutionalism (1982-1988),

b) Pluricultural constitutionalism (1989-2005), and

c) Plurinational constitutionalism (2006-2009) [48]

[46] Jesús Avirama and Rayda Márquez, *"The Indigenous Movement in Colombia, ed. Donna Lee Van Cott in "Indigenous Peoples and Democracy in Latin America.",* St. Martin's Press, New York, p- 1994, p. 84

[47] Named after Tupac Katari, the Indian who blocked two times the food sources during the colonization of the city of La Paz, starving to death its colonial inhabitants.

[48] Yrigoyen Fajardo, Raquel. El horizonte del constitucionalismo pluralista. Del multiculturalismo a la descolonización, in "*El derecho en América Latina. Un mapa para el pensamiento jurídico del siglo XXI",* Siglo XII Editores, Buenos Aires, 2011, p. 140 [The horizon of the pluralist constitutionalism. From multiculturalism to the decolonization.]

According to this author, plurinational constitutionalism is the result of a fight for substantive social inclusion. The social movements that inspired these changes carried the demands of plurinationality, the institutionalization of new forms of participatory democracy, recognition of self-government of the people with their own institutions and the change of the economic and political paradigm which are articulator factors in the process of constitutional changes. However, the "new" Latin American constitutionalism with regard to legal pluralism is not only a result of the social movements struggle, the historical configuration, and the social construction but also the political discourse that was directed to gain support from the marginalized. The main reason of this is that after several census held, it was proven that the indigenous population was very important to achieve victory in an electoral race.

Later, in Bolivia, the "wars of water" in 2000 and gas in 2003 together with the struggle of the coca growers in the Chapare region and highland indigenous movement put an end to the government of Sanchez de Lozada [49]. In Ecuador, the indigenous movement with the CONAIE (Confederation of Indigenous Nationalities of Ecuador) represented the fall of the Presidents Jamil Mahuad in 2000 and Lucio Gutierrez in 2005[50]. The subsequent weakening of State institutions led to a change in the political regime of both countries. This caused the victory of the "first" elected indigenous president in 2006 in Bolivia, and the success of Rafael Correa the same year in Ecuador. These new governments led the constituent assemblies in each country to enact their brand new constitutions (Bolivia in 2009 and Ecuador in 2008). Charged with the contemporary ideology both states proclaimed themselves as "Plurinational States" as I will explain below.

[49] Roberto Gargarella, *"Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution."* Oxford University Press, New York, 2014, p 152
[50] Ibidem

In the Colombian case, after the constitutional reform of 1991, the case law advanced in a line that can be considered as the "new" legal pluralism. The Colombian Constitutional Court is a referent for many constitutional courts in Latin America, including Bolivia and Ecuador. However, the Plurinational character could not go further for many reasons, one of them is the presence of terrorist groups in indigenous lands and several political and institutional issues. Notwithstanding this fact, as I will state in chapter III, the Colombian Republic is a pluralistic country which has some common features with the two compared countries regarding legal pluralism and some particularities that enhance the new pluralism which is the main topic of this work.

CHAPTER II: THE ONTOLOGY OF THE TRADITIONAL LEGAL PLURALISM

In his famous masterpiece, Montesquieu said: *"all beings have their laws: the divinity has its laws, the material world has its laws, the intelligence superior to man have their laws, the beasts have their laws, man has his laws"*[51]. From the legal pluralist perspective, the existence of more than one operating law system in one territory under the sovereignty of one state is completely possible. In this sense, legal pluralism recognizes laws not only emanated from the traditional state's enactment process but also from other sources. Macdonald and Kleinhans distinguish two legal pluralist tendencies: the doctrinal legal pluralism and the socio-scientific legal pluralism. The first seeks to pluralize law from the starting point of the state's law and the second focuses on the non-State legal ordering.[52] According to the same authors, the socio-scientific legal pluralism studies two non-state's legal ordering types, these are the "pathological" and the "non-pathological". The first treats the result of colonialism, folkways and/or urban subcultures, and the second analyzes

[51] Charles-Luis de Montesquieu, *"The Spirit of the Laws",* Cambridge Texts in the History of Political Thought, Cambridge, 1989, p. 3

[52] Martha-Marie Kleinhans and Roderick A. Macdonald, "Critical Legal Pluralism", 12 Can. J.L. & Soc. 25 1997, p. 23 Accessed form http://heinonline.org 5th march 2016

the diverse "nonpathological" displays of non-State law in contemporary, Western, multicultural and polyethnic societies.[53] In the present chapter, and in the whole work, my only concern is about these "pathological" ordering types but only those which are recognized by the states. In the first part of this chapter, I will list three examples around the globe and the evaluation of the augment of legal pluralism in western cultures in comparison to Latin America. In the second part, I will discuss the notion of legal pluralism in the region by viewing its recognition in some countries' constitutions

2.1. LEGAL PLURALISM AROUND THE GLOBE

Some countries have adopted a system of legal pluralism. This is the system of law that allows for more than one legal system to operate within one jurisdiction at the same time.[54] One expression of legal pluralism conceives that separate personal laws may operate in the areas of family law.

Malcolm Voyce and Adam Possamai are legal scholars who studied the Shari'a Law which is the Islamic religious legal order. They recognized that nowadays states are accepting jurisdiction which is not the hegemonic state law. This research shows how family law is applied in Australia regarding Shar'ia, and how the State's legal order accepts it. A personal family law system may be defined as a system in which each individual is subject to the jurisdiction of his/her own legal norms and institutions with regard to matters of marriage, maintenance, custody of children, and inheritance. In such system, a Muslim may be subject to Shari'a, or a Jew subject to *Halakhah* [55]. They believe that, since Australia is a liberal democracy and they are citizens of Australia, they

[53] Ibídem
[54] John Griffiths, "Legal Pluralism", in *International Encyclopedia of the Social and Behavioral Sciences,* ed. Neil Smelser and Neil J. Baltes, Elsevier, New York. 2001, p. 654
[55] Malcom Voyce and Adam Possamai, "Legal Pluralism, Family Personal Laws, and the rejecton of Sari'a in Australia: A Case of Multiple or "Clashing" Modernities?"ed. Adam Possamani et al, in *Legal Pluralism and Shari'a Law*, Taylor & Francis, New York, 2014 p. 31

have the right to practice their religion freely –a religion whose essence is the Divine Law- Shari ʻa. According to these authors, the application of the Islamic religious rules is a mere exercise of their citizenship rights in a liberal democracy. It is still a demand to recognize it formally and if successful, will enable them to lead what they perceive to be a true Islamic way of life.[56] However, this "legal order " is still been applied and, even though it is not a formal recognition of legal pluralism as such, their practices and values are compelling for those who practice the Islamic religion. Therefore, as these authors state, Australia is recognizing the coexistence of other legal order in addition of its own, when it does not overcome any law or other right acknowledged in its legal system. This is very distinct from legal pluralism in Latin America, but its description supports the ontology of the plurality of legal jurisdictions upon a state, which I will explain below.

Another research that expresses the issue of the present work is Jacques Frémont's study on legal pluralism in **Sub-Saharan Africa**. Accordingly, this author exposes that conflict resolution in modern Africa also uses traditional and customary conflict resolution mechanisms. In addition, ethnic groups who use this manner of solving disputes appoint their own authorities and reach a decision regarding an issue according to their ancient practices. This allowed different generations of members of the group, organized in age groups, to participate in the debates led by elders, who symbolize wisdom as well as expertise in history, customary law and esotericism. In such cases, the conflict must not be resolved by an authority deciding who is right or wrong according to preestablished rules of law as understood and interpreted by any given judge. Rather, it must be solved by the litigants themselves with the help of the community, in a collective process where the conflict will be solved with a view of attaining harmony.[57] In its preamble, the African Charter

[56] Ibid p. 57

[57] Jacques Frémont, *"Legal Pluralism, Customary Law, and Human Rights in Francophone African Countries.",* paper presented *in* absentia at "Strategies for the Future: Protecting Rights in the Pacific", Apia, Samoa, 2009, p.149

on Human Rights recognizes the "historical tradition and the values of African civilization". Thus, Article 29 (7) demands to protect "ancient values". Consequently, legal pluralism in Sub-Saharan Africa is known and respected. However, this understanding of plural legal orders and the acknowledgment that some traditional authorities are allowed to administer justice among this region's cultures is important for this research. The reason of this statement is that in Latin America the indigenous authorities are constitutionally allowed to do so.

Natalia Loukacheva has researched the **Inuit Culture in Canada**. This group of people dwells in the northern part of the country and has its own legal traditions. The native culture has a different definition of right and wrong because it was based on traditional codes of behavior – certain rules on subsistence, hunting practices and social conduct; certain actions that are socially not approved in the "Western" legal culture, were considered as legally acceptable in the traditional Inuit society and were not deemed as criminal actions (e.g., perceptions of suicide, senilicide, invalidicide and infanticide)[58]. However, the Inuit also had other traditions regarding a peaceful settlement of conflicts. According to their ancient values, they apply their customs rather than the ordinary legal system which, among other difficulties, has its courts far away from Inuit lands. For example, in family law matters Inuit law is legally recognized by the settler state. In Canada, it is well defined in the legislation, case law and other sources, such as the Aboriginal Custom Adoption Recognition Act[59]. Consequently, Inuit law is being used parallel to Canadian law.

The above mentioned demonstrate that the issue of legal pluralism is a worldwide concern. Its study nowadays is approaching to the idea that two or more jurisdictions can coexist with each

[58] Natalia Loukacheva, *"Indigenous Inuit Law, Western" Law and Northern Issues"* in Arctic Review on Law and Politics, vol. 3, 2/2012 pp. 200–217, p. 203
[59] Ibid p. 209

other, and in some cases, as I will address in the present work, they can learn from each other creating an intercultural legal order.

Raúl Borello warns about the difference in the use of the pluralism argument in the Western part of the globe and in Latin America (and developing former colonial countries), where a paradox emerges: While in European countries legal pluralism appears as a mode of resistance to state omnipotence, in Latin America the equation is reversed, for the development of a parallel regulation arises from the inefficiency of state activity to contain vast social sectors. The author points out that if the first case that pluralism is resulting from an excess of State, while the second is caused by the absence of State.[60]

2.2. LEGAL PLURALISM IN LATIN AMERICA

In Latin America, the researchers referenced in this supchapter found that the existence of situations of non-state legal pluralism had already been known for several decades. In general, their aims were to find alternative legal production standards, as well as to look for different spaces of conflict resolution. Therefore, they found that in indigenous communities, procedural rules had been created independently from the ordinary jurisdiction. Today, most indigenous and, in a minor extent, afro-descendants communities are recognized as entities entitled by the state to exercise their own law.

Boaventura de Sousa Santos argues that the emergence of legal pluralism lies in two specific situations, with possible historical outcomes: **a)** The "*colonial origin*"; **b)** The "*non-colonial origins*." In the first case, legal pluralism is developed in countries that were dominated economically and politically. Mostly in the regions which were forced to accept the legal standards

[60] Raúl Borello.: "Sobre el pluralismo jurídico", *XV Jornadas de Filosofía Jurídica y Social, Asociación Argentina de Filosofía del Derecho,* Buenos Aires, 2001, p. 7 [About legal pluralism]

of the metropolis (English colonialism, Portuguese, Spanish etc.). With this, he identifies an imposed unification and administration of the colony. Therefore, in the same space, the coexistence of the law of the colonizing State and traditional rights was allowed. This concurrence became, at times, a factor of "conflict and poor accommodations".[61] This is the view of the "pathological" idea stated above applied to Latin America.

In this sense, as these authors would say, Latin America has faced a "pathological" phenomenon. Colonialism brought a clash of legal cultures that have remained until the present days as I addressed in Chapter I. This colonial result was treated in most of today's Latin American constitutions, consequently, these legal cultures which are the product of the colonial history are recognized constitutionally. Therefore, the practice of indigenous law has switched from being unofficial law to official law.

Luis Tapia thinks that legal pluralism is articulated and developed from the condition of fragmentation and social diversity, produced by the processes of capitalist modernization and colonization, which generate a multiplicity of organizations.[62]

The relations between different groups or cultures, as noted the Xavier Albó and Franz Barrios, may be negative when a cultural group overpowers another. As in the case of the conquest and colonialism. Yet it can be positive when there is mutual respect between cultural groups, understanding with each, having acceptance, sharing and learning experiences between the different social groups, without demanding a loss of cultural identity, but gaining a mutual

[61] Sousa Santos, B.: "El discurso y el poder. Ensayo sobre la sociología de la retórica jurídica", Porto Alegre, p. 73. [The discourse and the power. Essay on the rhetoric law sociology]
[62] Luis Tapia, *"La velocidad del pluralismo"*, Muela del diablo, La Paz, 2002, p. 78. [The velocity of pluralism]

enrichment[63]. However, many multicultural countries have been gradually becoming states with a unique identity and cultural homogeneity[64]. This is not the case in most Latin American countries due to their large indigenous presence in contrast to a European-descendant and mixed population.[14]

Indigenous people are the main subject of legal pluralism in Latin America.[65] In 1989, the 169 Convention of the International Labor organization was signed by the countries studied in this paper. Article 1 of this international legal body recognized the right of the collective entities (indigenous peoples) to preserve all its own, economic, cultural, and political, or part of social institutions. In the words of Schilling-Vacaflor and René Kuppe, the 169 ILO convention was the starting point for the actual legal pluralism in Latin America.[66]

In this sense, The Mexican Constitution refers to the existence of indigenous peoples and recognizes legal pluralism in art. 2nd, stating: "The Nation has a multicultural composition originally based on its indigenous peoples are those who descend from populations that inhabited the present territory of the country at the beginning of colonization and who retain their own social, economic, cultural and political institutions or part of them ... ".

Art. 5 of the Constitution of Nicaragua made an express recognition of the existence of indigenous peoples and their rights, especially the right to maintain and develop their identity and culture, and

[63]Xavier Albó, et al: "Por una Bolivia plurinacional e intercultural con autonomías", La Paz, Documento de Trabajo, Informe nacional sobre desarrollo humano en Bolivia, PNUD, 2006, p. 41. [Towards a Plurinational and intercultural with autonomies Bolivia, national inform on human development in Bolivia]
[64]Ibíd., p.54
[65] Roberto Gargarella, *"Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution."* Oxford University Press, New York, 2014, p.182
[66] Almut Schilling-Vacaflor and René Kuppe, Plurinational Constitutionalism: A new era of indigenous-state relations?, ed. by Detlef Nolte and Almut Schilling-Vacaflor in *"New Constitutionalism in Latin America. Promises and Practices."* Ashgate, Farnham, 2010 p.347

establishing a system of autonomy for the communities of the Atlantic Coast which develops its legal pluralism system.

Venezuela's Constitution provides in art. 119: " The State recognizes the existence of indigenous peoples and communities, their social, political and economic traditions, their cultures, customs, languages and religions, as well as their habitat and original rights to the lands they ancestrally and traditionally occupy and which are necessary for them to develop and guarantee their way of life."

The art. 62 of the Constitution of Paraguay recognizes the existence of indigenous peoples, defined as groups prior to the formation and organization of the Paraguayan State cultures which customs have to be protected. Argentina, in its art. 75.17 declares that "Congress shall recognize the ethnic and cultural pre-existence of indigenous peoples". In the same article recognizes their rights to develop but as not as directly as the precious ones nor the Andean countries studied in the present thesis.

In the next chapter I will use this legal pluralism notion as a starting point of the “new” legal pluralism which has, to some extent, special features that developed a new pluralist constitutionalism due to the recognition of new constitutional rights, new forms of state organization on the basis of indigenous legal organization and new constitutional values.

CHAPTER III: LEGAL PLURALISM IN BOLIVIA, COLOMBIA, AND ECUADOR

As I indicated in Chapter I, the result of internal tension in the countries mentioned has been translated into the enactment of new constitutions. However, the result of the ratification of the International Labor Convention 169, in 1989, is another consequence of the legal pluralism recognition in the countries studied. This international legal body was endorsed by more states in Latin America than in any part worldwide. The acceptance rate of the concept of indigenous

peoples was much greater than in Asia or Africa. It included terms such as equality of opportunity and treatment, protection of indigenous peoples and their customs, rights to ownership and possession, rights to appropriate forms of access to health and education, the right to be consulted, the self-determination and self-government rights, the land rights among other rights than benefit native communities.[67] In terms of indigenous rights protection, a great advance was done by this convention. Therefore, each country regulated these provisions in their own legal system sharing some legal traditions and building new ones by their own.

These legal bodies not only protect legal pluralism emphatically in their provisions but also built their constitutional identity based on it. This chapter is a comparative study of the recognition and the protection of the topic studied in the three countries mentioned and an answer of whether this is truly a "new" legal pluralism. For that purpose, it must be taken into account that the Constitution of Colombia was enacted in 1991, Ecuador's in 2008 and Bolivia's 2009. The first guaranteed the right to cultural diversity and proclaimed the equality of cultures[68] setting up the basis for its legal pluralism, and the last two went further and summarized the region's best endeavors to empower indigenous rights.[69]

In the view of Boaventura de Sousa Santos, legal pluralism in Latin America is not only the recognition of cultural diversity in the country, or the permissible provisions that allow local and remote communities to solve small conflicts ensuring social peace in which the state would not guarantee the application of justice due to the lack of material and human resources. In his view,

[67] Rachel Sieder, Legal Cultures in the (Un) Rule of Law: Indigenous Rights and Juridification in Guatemala, ed. by Javier A. Couso et. al. in *"Cultures of Legality. "Judicialization and Political Activism in Latin America"*, Cambridge University Press, New York, p.166
[68] Roberto Gargarella, *"Latin American Constitutionalism,1810-2010: The Engine Room of the Constitution*", Oxford University Press, New York, 2014, p. 182
[69] Ibídem

legal pluralism in Latin America is "new" because it conceives indigenous justice as an important part of a political project of a "decolonizing" and "anticapitalistic" vocation. In other words, according to him, it is the search for a second independence that finally breaks with the Eurocentric links that have conditioned the development processes in the last two hundred years.[70] Although I will not asses this author's ideological view, I believe his evaluation is right in the sense that the recognition of legal pluralism in Latin America obeys to a new vocation, he calls it the "decolonizing" and "anticapitalistic" which, for sure, is very different from the constitutional traditions seen in the Western hemisphere. To follow the concepts that Boaventura uses, the Constitution of Bolivia prays "decolonization" to refer to the process of their "new" constitutional system[71] whereas the Preamble of the Constitution of Ecuador condemns all forms colonization by saying that the citizens of Ecuador are the heirs of the victory against colonialism.[72] In addition, the Colombian Constitutional Court case law, as the judgment addressed below in this chapter, often addresses their decisions as the counterpart of the Western culture's understanding.[73] Consequently, the study of the "new" legal pluralism in the Andean Countries is not only about the coexistence of different systems of law in one territory but also about the "new" constitutional vocations I will address in the present chapter. First, I will be looking into the plural legal systems, their categories, and their implications for legal pluralism. Second, I will address the special jurisdictions and autonomies, which in the Latin American case and more specificity in Bolivia,

[70] Boaventura de Sousa Santos, Cuando los Excluidos tienen Derecho: justicia indígena, plurinacionalidad e interculturalidad, in *"Justicia indígena, plurinacionalidad e interculturalidad en Bolivia"*, Fundación Rosa Luxemburg/AbyaYala, Quito, 2012, p. 13 [When the ecluded have rights: Indigenous justice, plurinationality and interculturality.]

[71] Bolivian Constitution arts. 9. 1 and 78

[72] This follows the line of Grosfoguel who says that there is a new kind of colonialism, the colonialism of knowledge which can be seized by the acknowledgment of the cosmologies, thinking processes and political strategies from the "non-dominant" peoples. Ramon Grossfoguel and Margarita Cervantes Rodríguez, "Unthinking Twentieth-Century Eurocentric Mythologies: Universalist Knowledges, Decolonization, and Developmentalism, in "The Modern/Colonial/Capitalist World System in the Twentieth Century", Greenwood Press, Westport, 2002, p. 16-17

[73] See judgment SU-510 of 1998

Colombia and Ecuador are indigenous people and, to a much lesser extent, afro-descendants. Lastly, I will address some curiosities brought by the "new" legal pluralistic vocations within the countries mentioned.

3.1. PLURAL LEGAL SYSTEMS: PLURALISTIC OR PLURINATIONAL?

The analysis of the models of states is highly relevant for the present study because the "new" legal pluralism can only be fully understood by the comprehension of this taxonomy. Case law decisions on legal pluralism, as I will corroborate below, are based on the model of state. Therefore, I start this chapter by addressing the notions of this "model of state".[74] The importance of this is enormous to study legal pluralism in the Andean Countries. However, for the study of the "new" legal pluralism, which is the central topic of this work it is even more important because it addresses a new legal setup of a country by its recognition. As a result, this subchapter analyzes these models from the legal pluralism scope and remarks its features.

In most of the constitutions of Latin America, the acceptance of cultural diversity is a structuring element of the social and politic system[75]. As I am evidencing in this chapter, in Bolivia, Colombia, and Ecuador this is not the exception. Bolivia is defined as a "plurinational" country which fosters intercultural and multilingual dialogue and it recognizes the right to cultural identity development of nations and indigenous peoples (arts. 1.9, 2,3, 30.II.2, and 100. I, 100.III of the Bolivian Constitution). In the same line, the Constitution of Ecuador in its art. 1 declares that "Ecuador is a constitutional State of rights and justice, social, democratic, sovereign, independent, unitary, intercultural, **plurinational** and secular."[76] (Emphasis added).The Republic of Colombia,

[74] It is not very probable that political scientist would not use this wording to define the features of these "new" legal and political culture. However, as this chapter shows, the countries studied and their case law refer to this wording.
[75] Gonzalo Aguilar, et al, "The Constitutional Recognition of Indigenous Peoples in Latin America", in Pace International Law Review Online Companion, Vol. 2, N° 2, September 2010, pp. 52
[76] *Ibid, p. 52-54*

meanwhile, declares itself as a pluralistic republic (art. 1) and recognizes and protects the "Ethnic and cultural diversity" of the Colombian nation (art. 7).

The differences are noticeable, it is clear that Bolivia and Ecuador refer to themselves as "plurinational", [77] which is a core element to build their "new" constitutional identity within the scope of legal pluralism.[78] In contrast, the Colombian constitutional system, although it does not recognize the literal meaning of "plurinational" (many nations dwelling in one state), it has developed its pluralistic identity by the recognition of the following in its case-law; Judgment T-496/96[79]:

"States have discovered the necessity to take the traditional existence of diverse communities, as an important basis for the welfare of their members, allowing the individual to define his identity, not as a "citizen" in the abstract concept of belonging to a governing state and a defined territorial society, but as an identity based on ethnic and cultural specific values. In order to make the protection of ethnic and cultural diversity really effective, the State recognizes to the indigenous community members all rights granted to other citizens, prohibiting all forms of discrimination against them, but in addition, it protects **cultural diversity**, granting certain rights based on the community as a collective entity. In others words, it develops a coexistence of rights of the individual as such, and the rights of the community to be different and to have the support of the State to protect such a difference."[80]

[77] These concepts are defined below by the Bolivian constitutional tribunal's judgment 0112/2012 of April 27th and the Ecuadorian decision, judgment 113-14-SEP of the Ecuadorian Constitutional Court

[78] Which requires not just not only recognition of diversity, but rather the celebration of the cultural diversity and mutual enrichment between the various cultures present, Boaventura de Sousa Santos, Cuando los Excluidos tienen Derecho: justicia indígena, plurinacionalidad e interculturalidad, in *"Justicia indígena, plurinacionalidad e interculturalidad en Bolivia"*, Fundación Rosa Luxemburg/AbyaYala, Quito, 2012, p. 20

[79] This judgement treated the conflicts between indigenous and ordinary jurisdictions on the grounds of murder.

Therefore, the protection of cultural diversity, as it is addressed here, sets down the basis of a pluralistic state, as the Judgment SU-510 of 1998[81] of the same court distinguishes:

"The recognition and due protection of ethnic and cultural diversity of indigenous peoples founded on the respect for the dignity of all inhabitants of the territory, regardless of the ethnic group to which they belong and the worldview they defend, it is a projection, in the legal plane of the democratic, participatory and **pluralistic** character of the Colombian republic and obeys the 'acceptance of otherness' linked to the acceptance of the multiplicity of forms of life and systems of understanding different from the world of Western culture." (Emphasis added)

These judgments uphold the pluralistic character of the Colombian nation, which as they state, configures the legal and political system, and, therefore, it entrenches the pluralist model of state as a basis for the decisions which addresses legal pluralism.

In another line from Colombia, in the opinion of Raquel Yrigoyen, the constitutions of Ecuador and Bolivia proposed a recasting of State from the explicit recognition of the ancient roots of Indigenous peoples ignored in the Republican foundation. Therefore, their challenge was to put an end to colonialism and its "new" forms. In this model, indigenous people are recognized not only as "different cultures" but also as originating nations or nationalities with self-determination or free-determination.[82] Accordingly, indigenous people are collective political subjects entitled to define their destination, govern themselves in autonomies and participate in new pacts of the State. Consequently, in the same author's view, the concept of "plurinational state" recognizes the new

[81] This was a judgement which ruled in favor of the decision of a local court which upheld the indigenous authorities' determination of relegating indigenous evangelical believers. Surprisingly, the collective right of self-determination prevailed over the right of freedom of religion.

[82] Raquel Yrigoyen, El horizonte del constitucionalismo pluralista: del multiculturalismo a la descolonización in *"El derecho en América Latina."*, Siglo XXI, Buenos Aires, 2011, p. 149 [Law in Latin America]

principles of organization of power based on diversity, equal dignity of peoples, interculturality and a model of equal legal pluralism, with an explicit recognition of indigenous judicial functions than previous constitutions of Bolivia and Ecuador did not provide so clearly as the new ones.[83] With regard to the plurinational character I have to note that this notion is the counterpart of the western view which defends the one-nation one-state character, understanding that in one state the coexistence of more than one nation is possible.[84]

The Bolivian Constitutional Tribunal in its Judgment 0112/2012[85] of April 27th, points out that the legal rationale of judges must start from the consideration of the new model of State which proclaims the values, norms, principles and the constitutional characteristics of the system.[86] This makes the constitutional identity built from the model of state shown in art. 1 of the Constitution of Bolivia. The decision also declares that: "The classical forms to designate the state governed by the 'rule of law', 'social and democratic state of law' are insufficient to characterize the new model and to classify it, because it not only feeds from the different principles and values that come from the tradition of liberal constitutionalism (State law), social constitutionalism (social and Democratic State of law) and the constitutional rule of law (neo-constitutionalism), but also from an essential feature that distinguishes and marks the horizon of this new state: the plurinational and intercultural character." Therefore, the Constitutional Court of Bolivia in all its decision has to take into account its model of state.

[83] Ibíd., p. 152

[84] Boaventura de Sousa Santos, *"La Reinvención del Estado y El Estado Plurinacional"*, OSAL, CLACSO, September, 2007, Buenos Aires, p. 34 [The re-invention of the State and the Plurinational State.]

[85] This was a judgment about the arbitrary detention of man who claimed the rule of law principle stated in the Bolivian constitution. The judges recognized that the plurinational character of the country determines any decision taken by the judiciary.

[86] Plurinacional Constitucional Tribunal of Bolivia, Judgment 0112/2012

Manuel Bonilla, an Ecuadorian legal scholar, believes that today in his country the constitutional trend requires to recognize the plurinational character in all constitutional decisions. He thinks that the acknowledgment of the pluralistic character is a vital prerequisite for a full realization of legal pluralism. Especially to respect the legitimacy and recognition of communitarian life forms and indigenous justice orders.[87]

With this regard, the Ecuadorian Constitutional Court has not identified the influence that the plurinational character has to reflect in case law decisions as explicitly as the Bolivian Constitutional Tribunal did. However, the plurinational model is also present in its constitutional identity. The Judgment 113/14[88] defines the concept of plurinationality and expresses the new constitutional culture. The decision declares that plurinationality involves a concept that recognizes the right of people to identify their nation membership, not only within a certain geographical area but also within a certain culture. On the one hand, it says that the term plurinationality refers to the coexistence of various cultural or ethnically different peoples nations within a large civic nation. On the other hand, this judgment recognizes that Ecuador has to advance in the construction of new "decolonized" institutions in order to develop a well-established plurinational state.

[87] Marcelo Bonilla, Pluralismo jurídico en el Ecuador. Hegemonía estatal y lucha por el reconocimiento de la justicia indígena, ed. by Rudolf Huber in "Hacia Sistemas Jurídicos Plurales", Antropos Ltda., Bogotá, 2008, p. 64 [Legal Pluralism in Ecuador. State's hegemony and the struggle for the recognition of indigenous law.]

[88] This judgement was about the *non bis idem* principle applied to a murder case. In which the constitutional court declared that the punishment received by the murderer in the indigenous community which he was member was constitutional and did not preclude the application of the mentioned principle. This happened because in the rationale of the court the punishment made by the indigenous authorities occurred because of the protection of the collective rights of the community and not the individual right to life as such. Therefore, the decision of imprisonment made by the ordinary court was totally valid in the sense that the prohibition of murder stated in ordinary law had to be protected under the ordinary system, and, thereby, the indigenous collective traditions had to be guarded under indigenous jurisdiction.

In the context of the Plurinational State, Bolivia and Ecuador have entrenched in their constitutions the indigenous visions. These are the indigenous conception of the universe and the ancient native philosophies which are summarized in constitutional provisions and constitutional decisions. For instance, the Ecuadorian fundamental law celebrates the victory over colonialism, recognizes the divinity of nature, [89] and the mission of reaching the native welfare which is the "*Buen vivir*" of the Quechuan word "*Sumak Kawasay".* Whereas the Bolivian constitution refers to the respect for the "mother" earth, the anticolonial spirit, the leaving behind of the republican state to embrace the plurinational character, and the recognition that Bolivia is a country governed by God and the "Pachamama."[90] Additionally, only the Bolivian Constitution adds indigenous moral-ethic principles which govern the state as the following (art. 8.I): "The State assumes and promotes as moral-etic principles of the pluralistic society the *'ama quilla, ama llula, ama suwa'* (Do not be lazy, do not be a liar, do not be a thief.) The '*suma qamaña'* (good life), the '*ñandereko'* (harmonic life), *'teko kavi' (*good life), '*ivi marei'* 'land without evil' and *qhapah ñan* 'honorable path'". This provision mixes both traditional values with ancient indigenous values which summarizes the spirit of the Constitution of Bolivia and, to a lesser extent, Ecuador's Basic Law.

These are the founding visions and elements for the formation of the plurinational State. First, the acceptance of many nations dwelling and taking part in one State with the vision of a "decolonization" process (as stated above). Second, the introduction of indigenous visions in the constitutions. Third, the constitutional features that endorse this model of State. However, Bolivia and Ecuador, as plurinational states, and the Colombian Republic which embraces the pluralist

[89] In Quechuan Culture "Pachamama", the divinity of the earth, known as the "mother" earth.
[90] This refers to the same "divinity" as Ecuador. This happens because as I stated in Chapter I, these countries shared cultures, and both (even Colombia) were ruled by the Incan Empire before the colonial period.

model, are part of the new pluralistic states[91] that contribute to the trend of what is called the new legal pluralism.

In the effort of inclusion and the formation of a new pluralistic model of State, traditional institutions had also to change. Accordingly, Boaventura de Sousa Santos explains that new ways of living together had to be created in Latin America, and these had to be tran0112/2012 slated into traditional public institutions. Following this statement, he believes that a new constitutional plurinational, intercultural and postcolonial court has to be redesigned, with the capacity to resolve conflicts with the understanding that differences require appropriate institutions and similarities require shared institutions.[92]

The Bolivian Constitutional Tribunal (Tribunal Constitutional Plurinacional) is the only entity among the Andean Countries which is constitutionally obliged to have at least two judges who come from the native indigenous communities.[93] In the qualification of merit to access the position of judges of the constitutional tribunal, while Congress selects candidates for the pre-election of judges, [94] any applicant who had been an indigenous authority will have better qualification than those who had not.[95] In addition, within the organizational structure, the Plurinational Constitutional Court of Bolivia has created the Technical Secretary of Decolonization, in order to permanently have an interdisciplinary team that articulates the constitutional court and the

[91] Raquel Yrigoyen, El Horizonte del Constitucionalismo Pluralista, ed. by César Rodríguez Garabito, *"El Derecho en América Latina. Un mapa para el pensamiento jurídico del Siglo XXI."*Siglo XXI, Buenos Aires, 2011, p. 148 – 149 [The constitutional pluralist horizon]

[92] Boaventura de Sousa Santos, *"La Reinvención del Estado y El Estado Plurinacional"*, OSAL, CLACSO, September, 2007, Buenos Aires, p. 36

[93] Plurinational Constitutional Tribunal Act, art. 13 and art. 197 of the Bolivian constitution

[94] In Bolivia, the Constitutional Court Judges are chosen by popular elections. However, it is held a "pre-election" of candidates made by the congress taking into account their professional merits.

[95] Plurinational Constitutional Tribunal Act, art. 13. I

indigenous jurisdictions. That Secretary is formed of sociologists, anthropologists, and *amautas.*[96] They do the legal research for the specialized chambers or the high constitutional chamber whenever they request so. Neither Ecuador nor Colombia has indigenous quotas for constitutional judges. Nor do they have a permanent Secretary of Decolonization in their constitutional courts. However, both courts often ask non-permanent interdisciplinary teams formed by professional and indigenous authorities to make their constitutional decision. Although Bolivia and Ecuador are considered plurinational states, the only plurinational constitutional court in the understanding of Sousa Santos (as stated above) is the Bolivian.

Actual developments in Bolivia and Ecuador represent a break with the previous models of indigenous-state relation. In the opinion of some legal scholars, the plurinational State is a revolutionary social philosophy that has been introduced into the new constitutions of Bolivia and Ecuador.[97] The Colombian constitutional model, despite not recognizing the plurinational model, is very progressive on indigenous rights law, its pluralistic model also represents and advance on legal pluralism and its special features contribute to set down the basis of the Andean new legal pluralism. The conceptual debate, the significance, the constitutional vocation and the features pointed out in this chapter form a basis of the "new" legal pluralism in the plurinational and pluralistic countries. The fact that the new models of State are closely linked with legal pluralism represents a process of pluralization of the legal system.[98] Likewise, these constitutional systems that have adopted visions of justice of the native indigenous represent a novelty for the study of

[96] Name granted to some of the highest authorities in the indigenous entities in Bolivia, no one who was not an indigenous authority can apply for this position.

[97] Almut Schilling-Vacaflor and René Kuppe, Plurinational Constitutionalism: A New Era of Indignous-State Relations?, ed. by Detlef Nolte and Almut Schilling-Vacaflor in *"New Constitutionalism in Latin America. Promises and Practices"*, Ashgate, Farnham, 2012, p. 365

[98] Raquel Yrigoyen, El Horizonte del Constitucionalismo Pluralista, ed. by César Rodríguez Garabito, *"El Derecho en América Latina. Un mapa para el pensamiento jurídico del Siglo XXI."*Siglo XXI, Buenos Aires, 2011, p. 149 [The pluralist constitutionalism horizon.]

law. I think we are facing a new legal pluralism. There too many reasons and examples to ignore this claim. The perfect proof is the social, legal and political change that exists in the countries studied in this paper.

3.2. INDIGENOUS AUTONOMIES, JURISDICTIONS, AND THEIR LIMITS

Indigenous autonomies apply their own legal system. These parallel legal systems must have a valid scope of application. Therefore, various parameters can be set. This subchapter will employ some elements to compare the three legal systems with regard to the special jurisdictions (indigenous) and their constitutional limits.

Judgment T - 496/96 of the Colombian constitutional court refers to the "collective entities" as institutions of indigenous peoples that are entitled to exercise their own legal system. This is important for the study of legal pluralism because these entities coexist with the traditional state's institutions. In the Colombian constitution, Article 246 states that the authorities of indigenous peoples may exercise jurisdictional functions within their territory, in accordance with their own rules and procedures, provided they are not contrary to the Constitution and laws of the Republic. In other words, the scope of the indigenous law application in Colombia lies upon territory and it finds its limit when it clashes with the Constitution and the ordinary laws. The same occurs in Ecuador, for indigenous jurisdiction is only exercised within the territory of the native entity (art.171). In contrast, the Bolivian fundamental law recognizes the territorial, material[99] and personal validity of the indigenous jurisdiction (art. 192. II). Therefore, because of the personal validity of the jurisdiction, many scholars think that indigenous jurisdiction in Bolivia has an

[99] This is regulated by the Jurisdictional Demarcation Act. Although it seems that the Bolivian constitution would grant the indigenous communities jurisdiction over several matters it does not. Art 10. II lists a wide range of restrictions.

extraterritorial competence.[100] However, this happens only in cases in which the indigenous community member committed a fault in another indigenous community. Hence, the first indigenous entity is allowed to apply its justice.[101] This has a narrow relation with the model of states of these countries, as I stated above.

The Bolivian Constitution refers to indigenous autonomy by alluding to "indigenous peoples and nations, peasants and originating people". It is an entity that shares "territory, culture, history, languages, and distinct juridical, political, social and economic organization or institution." (art. 289). The self-government which they are entitled to exercise can be adopted by referendum. Any autonomous government that is identified as indigenous can assume the indigenous autonomy status by this democratic process. Hence, the self-government shall be exercised following the customary indigenous norms, institutions and procedures (art.290). In the opinion of Jonas Wolf, these self-government practice significates the third form of "communitarian" democracy, fusion with "direct and participatory" and "representative democracy" which altogether follow the customary indigenous norms and procedures for "election, designation or nomination of authorities" (article 11.II.3). [102]

Following the same line, the core concept of Ecuador's indigenous collective rights is the right to "preserve and exercise authority in their legally recognized territories and in their ancestral community lands" which is stated in Article 57. 9. In this sense, indigenous peoples[103] can

[100] Raquel Yrigoyen Fajardo, "Pluralismo jurídico, derecho indígena y jurisdicción especial en los países andinos" in El Otro Derecho, number 30. ILSA, Bogotá D.C., Colombia 2004, p. 34 [Legal Pluralism, indigenous justice and special jurisdiction in the Andean Countries.]

[101] Plurinational Constitutional Tribunal of Bolivia, Sentence 0037/2013

[102] Jonas Wolf, New Constitutions and the Transformation of Democracy of Bolivia and Ecuador, ed by Detlef Nolte and Almut Schilling-Vacaflor in *"New Constitutionalism in Latin America. Promises and Practices"*, Ashgate, Farnham, 2012, p. 192

[103] In art. 57 of the Ecuadorian constitution the collective rights above mentioned are not reserved only to indigenous peoples but also to afro-descendants communities.

organize special administrative unities that can "exercise the authority of the corresponding territorial autonomous government, guided by the principles of interculturality, plurinationality in accordance with collective rights" as it is said in Article 257. In this line, as the Bolivian case, any territorial autonomous government can decide by a referendum about being considered as a special indigenous government.[104]

In the three countries studied, indigenous autonomies are recognized. These entities have their own authorities who are elected by the community, they can manage resources according to their customs, and are entitled to exercise jurisdictional functions.[105] However, Bolivia not only recognizes indigenous jurisdictions, indigenous autonomies, and their authorities as Colombia and Ecuador do but also indigenous jurisdictions explicitly have the same hierarchy as the ordinary jurisdictions (art. 179. II), which neither Colombia nor Ecuador do. Furthermore, Colombia and Ecuador[106] only refer to the coordination that has to be between ordinary and indigenous jurisdictions, whereas Bolivia establishes the mentioned coordination but, in addition, considers constitutionally these institutions as part of the overall State. (Art. 30. II.5) .

The common principle regarding the hierarchy of indigenous law between these three states is the principle of constitutional supremacy which is respected in all three countries.[107] In addition, all three states recognize the constitutional block which grants constitutional hierarchy to all international human rights treaties and conventions that are ratified by these countries and give a better protection than the constitution are also applied.[108] Therefore, indigenous law, in order to

[104] Op. Cit.
[105] Arts. 178 and 2 of the Bolivian constitution, Arts. 268, 287 and 330 of the Colombian Constitution and arts. 57 and 171 of the Ecuadorian basic law
[106] Art. 248 in the Colombian Constitution and Art. 171 in the Ecuadorian basic law.
[107]Art. 410 Bolivian Art. 248 in the Colombian constitution and Art. 171 in Ecuadorian basic law.
[108] Art 410. II. Bolivian Constitution, art. 93 in light of the Court Judgment C-225 in Colombia, and art. 417 in the Ecuadorian fundamental law.

coexist with the ordinary law does not have to contradict both the constitution and the constitutional block.

There might be some concerns about the exercise of legal pluralism. One common worry is the application of the principle of res judicata. To solve this issue, there is a coordination between jurisdictions in the three countries studied in the present paper. Bolivia's Constitution, as stated above, expresses that indigenous law is part of the overall legal system, therefore, it does not have a specific provision regarding this issue because it embraces it implicitly. In Ecuador, the Constitution explicitly declares that no one can be judged twice for the same crime (art. 76. 7i). In the Colombian Constitution, Article 248 points out that only the sentences handed down in judgments from the traditional judiciary can definitively have the quality of res judicata. However, the Judgment T-866-13[109] prohibits ordinary judges to overrule indigenous law decisions which legal consequence is to uphold the *Non bis idem* principle in the sense that no one can be judged twice.

As far as indigenous autonomies, their limits, and the coordination with ordinary jurisdictions are concerned there are not only differences between Bolivia, Colombia, and Ecuador but also each of them has its own constitutional spirit with specific features that using comparative elements may give a correct overview about Andean legal pluralism. These comparisons speak for themselves. Some of them are the basic rational features of states that have cultural diversity, and others turn out to be more radical. On the one hand, it has to be noted the date of the constitution's enactment, and, on the other hand, the percentage of the indigenous population in each country. However,

[109] This is a Judgment in which the constitutional court decided that a robbery made by an indigenous community member had to be decided under ordinary law because the goods stolen were from a non-indigenous settlement.

there are more causes that explain these differences and common elements. Some of them are written in Chapter I and the others are, in my opinion, not very relevant for this work.

3.3. TERRITORY, LAND RIGHTS AND THE RIGHT TO BE CONSULTED

The territorial rights are important to understand the present study of legal pluralism because the special jurisdictions exercise their legal powers within that space. As I noted above, not every country has this territorial validity requirement but in the only case where such extraterritorial validity exists (i.e. Bolivia), the constitutional requirement is so specific that is infrequent.

The 169 International Labor Convention (arts. 13-15), which is ratified by the three countries, recognizes indigenous peoples' right to land and territory as a space of collective development. Territory is the place they occupy or the space that they use in any way for activities that enable their material and cultural reproduction.[110] As regards land rights, Article 63 of the Colombian Constitution stipulates that "the communal lands of ethnic groups, safeguard lands [...] are inalienable and indefeasible". This means that there is a special regime for indigenous lands which is also present in Ecuador (art. 57. 4) and in Bolivia (art 394. III). In all three cases, indigenous people are exempt from paying territorial taxes by the same constitutional provision. In addition, the Bolivia is constitutionally obliged to grant land rights over territories owned by the state to indigenous communities who do not owe any or have insufficient territory (Art. 395).

Whenever I refer to land rights I cannot omit to address natural resources. These resources are also a concern of the special jurisdiction because there are bound to the territory in the sense of collective development as stated above. Therefore, rights to land, territories and natural resources

[110] Article 13 of Convention 169 of the International Labor Organization

cannot be dissociated.[111] The main issue about natural resources is their extraction. Renewable resources can be extracted from indigenous lands according to their laws and customs. However, the conflict arises when there are nonrenewable resources in their land. On the one hand, these resources cannot be property of individuals nor of collective entities (indigenous autonomies) because in the three countries studied these resources are a patrimonial domain of the State.[112] On the other hand, they cannot be freely extracted by the State because indigenous peoples have the right to be consulted about any state's measure that affects them, as I will state below.

The right to a free, prior and informed consultation, is a collective and participatory right of social and political importance.[113] The constitutions of Ecuador and Bolivia have granted these rights.[114] Although in the Colombian Constitution this right is not a written provision, the Constitutional Court's decision SU-039 of 1997[115] has also recognized this right as the following: "…ways of consultation with the community are absolutely necessary in order to achieve an agreement or consent and to specify how the project affects their ethnic, cultural, social and economic identity." In these three cases, the right to be consulted is not only reduced to natural resources extraction but also to any State's measure or policies that affect the indigenous communities' interests.[116]

[111] Report of the Special Rapporteur on the situation of human rights and fundamental freedoms indigenous people, Rodolfo Stavenhagen, February 2, 2002, N.U. Doc. E / CN.4 / 2002/97, par. 55.
[112] Art. 1 of the Ecuadorian Constitution
[113] Patricia Carrión, *"Análisis de la consulta previa, libre e informada en el Ecuador"*, Konrad Adenauer Foundation, Quito, 2012, p. 25 [Previous, free and informed consultation analysis in Ecuador.]
[114] Art. 311 of the Bolivian constitution, art. 332 of the Colombian basic law and Art. 57. 7 of the Ecuadorian Constitution.
[115] In this decision the constitutional court obliged the Colombian Republic to make a consultation to the indigenous community that was about to be affected by a company's excavation in the indigenous territory.
[116] Art. 30. II. 15 of the Bolivian constitution and art. 398 in the Ecuadorian fundamental law.

The result of the consultation is not always binding but there may be political consequences when governments do not obey the results. In Colombia, the Judgment T-376-12 [117]of the Constitutional Court recognized that decisions of the communities only will be considered binding when severe damage to the community would be done in case the government does not obey the result of the consultation. Ecuador's Constitution is more explicit. Its Article 398 declares that whether the decision which is a result of a consultation will be taken into account or not lies in the administrative authority according to the law. In Bolivia, this consultation is not binding either. Consequently, in none of the countries studied the consultation is binding. However, it is logical that ignoring the result of a consultation will have political consequences.

Lastly, the Ecuadorian system contains a strong provision in comparison to the others regarding the protection of ancestral territories in Article 57 which states "…The territories of peoples in voluntary isolation are irreducible and intangible ancestral possessions shall be closed all extractive activity". The violation of this provision, as the same article stipulates, is condemned as ethnocide. Compared to the other countries' constitutional system, this is an extremely strong provision because the other constitutional systems do not have a provision as such. However, this is in some manner understandable due to the extremely rare cases that such territories and peoples dwelling in them are found.

3. 4. LINGUISTIC RIGHTS AND EDUCATIONAL RIGHTS

As I wrote in Chapter I, the cultural diversity in the Andean Countries is vast. Many cultures have their own native language which made the constitutional framers to introduce some provisions for

[117] This decision was about an indigenous community that demanded the application of the result of a consultation made to it in which the indigenous entity unanimously rejected the presence of a Hotel in a beach in North Colombia. The court ruled that only in extreme cases an indigenous community consultation's result will be binding.

the protection of language diversity. This is part of the new legal pluralism because its features are made on the basis or diversity recognition, protection and the acknowledgment of institutions capable of producing norms which have to be empowered and guarded trough linguistic and educational rights.

The Colombian Constitution in its Article 10 indicates that in addition to Spanish, "the languages and dialects of ethnic groups are also official in their territories." In this sense, Ecuador's Constitution articulates that Spanish is its official language, the "Kichua" and "Shuar" are the official intercultural relation languages, and all the others are official in the territories that they occupy (art. 2). Bolivia recognizes Spanish and all the 36 native languages as official in the State [118](art 5. II). Furthermore, only the Bolivian Constitution adds a compulsory requirement to access to any public office position. This is speaking fluently, at least, two official languages (art. 234. 7).

With regard to the education from a pluralistic view, these countries have addressed the subject from different perspectives. Ecuador is the most conservative. On the one hand, it claims for education in the native language of the communities but requires teaching Spanish as an intercultural tongue (art. 347). On the other hand, it mandates to reflect in all the educational system the diversity of the country but does not create a special educational regime with an explicit constitutional mandate as the others (Arts. 16.4 and 57.21). However, this provision led to the creation of intercultural universities, like the Amawtay Wasi University, whose mission is the 'Recovering of the interweaving tissue of the life in the cosmic interculturalism' of all the

[118] These are aymara, araona, baure, bésiro, canichana, cavineño, cayubaba, chácobo, chimán, ese ejja, guaraní, guarasu'we, guarayu, itonama, leco, machajuyai-kallawaya, machineri, maropa, mojeño-trinitario, mojeño-ignaciano, moré, mosetén, movima, pacawara, puquina, quechua, sirionó, tacana, tapiete, oromona, uru-chipaya, weenhayek, yaminawa, yuki, yuracaré and zamuco

Ecuadorian indigenous peoples.[119]The Bolivian Constitution advanced further with regards to educational pluralistic rights and created the indigenous universities (art. 93. 5) which are universities that carry ancestral indigenous visions. Colombia, surprisingly, has the most developed pluralistic education tradition between the three countries studied. This is because the constitutional system recognized the ethnocultural education as a constitutional duty[120] since 1976. The government drafted a law in 1994 to set the basis of the ethnocultural education on the grounds of Articles 7º, 10º, 13, 27, 63, 68, 70 and 243 of the 1991 Constitution which promoted education based on ethnicity with special features regarding the Colombian cultural diversity.[121]

These rights have contributed to the essence of the Andean legal pluralism for its characteristics. They nourish this new constitutional motion so that legal pluralism can persist. As it is seen in this subchapter chapter, educational and linguistic rights ensure the subsistence the subsistence of this new legal pluralism.

For all addressed, I am convinced that this topic is a new study of legal pluralism in the sense that it brings with it unusual features in the world of constitutional law. The restricted legal pluralism is directed to simply study the coexistence of different legal systems in a State. While the new Andean legal pluralism involves legal and regulatory development that nurtures the spirit of Andean societies based on their legal diversity. Accordingly, under all the arguments that have been addressed in this paper, there is a new legal pluralism in the countries studied which is

[119] Luis Fernando Sarango, Universidad Intercultural de las Nacionalidades y Pueblos Indígenas «Amawtay Wasi». Ecuador / Chinchaysuyu. in Daniel Mato (coord.), "*Instituciones Interculturales de Educación Superior en América Latina. Procesos de construcción, logros, innovaciones y desafíos*." Caracas: Instituto Internacional de la UNESCO para la Educación Superior en América Latina y el Caribe (UNESCO-IESALC), 2009 p. 191-214. [Intercultural high education institutions in Latin America. Construction processes, achievements, innovations and challenges.]

[120] The ethnocultural education has been promoted since 1976 but after the enactment of the 1991 Constitution it is now upgraded to constitutional range according to Patricia Enciso Patiño (cited below).

[121] Patricia Enciso Patiño, *"Estado del arte de la etnoeducación en Colombia con énfasis en política pública.",* Ministerio de Educación Nacional, Bogotá, 2004, p. 9 [The state of art of ethnoeducation in Colombia with focus on public policy.]

different from the western tradition. Because of its features, it needs more importance in the academic world because it protects cultures, it solves problems that their survival imply and it fosters social integration.

CONCLUSIONS

The product of a turbulent historical process has resulted in what has come to be called "new legal pluralism". The society in America is unique, as a result, the legal system is also unique. The indigenous people who were historically disadvantaged have played a major role in the design of the new legal system. Native communities, as recognized by the ILO Convention 169, became subjects of collective rights that allowed the transition to a constitutional recognition and protection of legal pluralism. Each country modulated its legal system according to its historical, political, social and economic circumstances. The result was commonalities among constitutions and singular characteristics in the countries studied. Bolivia, with the large presence of Natives in its population has shaped its constitutional provisions ensuing such virtue. Ecuador and Colombia followed suit.

There were several facets of recognition of legal pluralism, as I showed in Chapter I. Today, this acknowledgement has advanced substantially. Therefore, legal pluralism is increasingly becoming the central axis in these states. This happens in a way that is legal pluralism which conditions the model of state and not vice versa. Because of this statement, I have called it the new legal pluralism, which has developed innovative features in the effort to deal with plural societies. On the one hand, models of state called plurinational (Bolivia and Ecuador) carry a number of provisions with fusions between native Indians and ordinary state's institutions and visions. These states have within their constitutional provisions the "decolonizing" effort which is having their

own state traditions on the grounds of their ancestral heritage. On the other hand, there are the pluralistic states like Colombia, which has special characteristics due to its indigenous population.

All the above mentioned translated into what I now call a sort of constitutional syncretism. Where indigenous institutions can coexist peacefully and respecting the authority of the state body with special rights exercised in the special jurisdictions. It is a special pluralistic constitutional regime in which conflicts are resolved in the best way possible, optimizing the results.

Rights over the territory, the right to preserve and access it are fundamental to the exercise of legal pluralism because it is the area of validity in which indigenous governing rules are applied. There are features in common between the studied countries, as well as some radical and unique provisions.

The recognition of rights is very important for the survival of the new legal pluralism. Linguistic and educational rights are certainly innovative for the study of constitutional law and diverse societies.

Although its application is not always effective, all these features endorse the new plural constitutionalism. This draws on the legal traditions of the Andean countries regarding the new pluralism which has brought within its characteristics not only a new way of perceiving legal pluralism but also established the basis of new models of pluralistic states.

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