

Decolonization in the constitutional system: Indigenous Rights and Legal Pluralism, a comparative study between Bolivia, Colombia, and Ecuador.

By Sergio Miranda Hayes

INTRODUCTION

In the academic world, scientific literature comes mainly from the western part of the globe. Ramón Grossfoguel believes that knowledge is determined by power relations in the "post-colonial" era (Grossfoguel, 2002: 16). This means that Western powers dominate the academic world. In constitutional law, this is not the exception. However, while we can accept that it is true that many constitutional provisions, doctrine, jurisprudence and theories of Western constitutional law have influenced Latin American countries, most of these countries have also developed their own constitutional systems that have specific and new features, whose unique identity differentiates them from other systems in the world. In this paper, I will try to study the special features that Bolivia, Ecuador, and Colombia have in the recognition of indigenous rights and legal pluralism, whose discursive axis entails a "decolonizing" spirit which is the retrieval of their own institutions against the trends of hegemonic governance of the western culture as I will explain later.

Latin America has faced numerous problems concerning social differentiation. In the opinion of one of the most cited authors in Latin American constitutional law, Raquel Yrigoyen, the disadvantaged were left behind from the social, economic and political issues through legal measures created by people of a favored minority, in order to maintain privileges (Yrigoyen, 2011: 139). In the case of Latin America, many of the disadvantaged match to be those survivors of the brutal Spanish conquest; the native Indians. I have chosen these three countries since they have a significant indigenous population; more than 36.6 million indigenous people in the region. In Bolivia, the number rises to 4,115,222 natives, in Ecuador 1018176, and in Colombia 1392623. (World Bank, 2014: 24-25)

The Constitutions of Colombia (1991), Ecuador (2008) and Bolivia (2009) reflect the new "decolonizing" ideology; Colombia through its jurisprudence, on the one hand, and Bolivia and Ecuador, proclaiming themselves "Plurinational" countries on the other. All made great strides in recognizing indigenous rights and, consequently, in gaining their social inclusion. (Gargarella, 2014: 175)

Constitutional systems are a product of history and the struggle of peoples. In these cases, the effort to include indigenous peoples in the economic, political and social spheres resulted in these new constitutional models which can be understood through a comparative study. By understanding this, advantages and disadvantages of each country to improve social inclusion of indigenous peoples in all the mentioned spheres can be found.

In the first title, I will talk about the meaning of legal pluralism. In the second, I will discuss the new models of state which are conditioned by legal pluralism and indigenous rights. In the third, I will address indigenous autonomies and jurisdictions that are the subject of our study. And in the remaining two titles, I will discuss the most distinctive features, and rights arising from the recognition of this unique legal pluralism. All this with the purpose of exposing the new constitutional spirit of "decolonization" of these countries.

LEGAL PLURALISM

The result of the ratification of the International Labor Convention 169, in 1989, is a fundamental precedent in the recognition of legal pluralism in the countries studied. This international legal instrument was adopted by more states in Latin America than anywhere in the world. The rate of acceptance of the concept of indigenous peoples was much higher than in Asia or Africa. Terms such as equality of opportunity and treatment, protection of indigenous peoples and their customs, property rights and possession rights, right to adequate access to health and education forms, the right to be consulted (consultation), self-determination and self-government, land rights, among other rights that benefit native communities were included (Sieder, 2002: 116). As for the protection of indigenous rights, the convention took the decisive step towards what we know today by legal pluralism. Therefore, each country regulated these provisions in its own legal system, by sharing some legal traditions and of course, by developing their own themselves. These legal bodies not only protect legal pluralism with emphasis on its particular provisions but also built their constitutional identity based on that pluralism.

For this comparative study, we must take into account that the Constitution of Colombia of 1991, guarantees the right to cultural diversity and proclaims the equality of cultures, thereby creating the basis of recognition of its legal pluralism. The Constitutions of Ecuador and Bolivia 2008 2009, are more progressive, as they try to promote the rights of indigenous peoples and develop them more widely (Gargarella, 2014: 182).

I must emphasize that contemporary legal pluralism, in these three countries, it is not simply what its etymological definition indicates. According to Boaventura de Sousa Santos, legal pluralism in Latin America is not only the recognition of cultural diversity in the country, or the permissible provisions allowing local and remote communities solve small conflicts to ensure social peace in those cases in which the State would not guarantee the application of justice due to lack of material and human resources. In his opinion, legal pluralism in Latin America is "new" because indigenous justice is conceived as an important part of a political project which has a "decolonizing" and "anti-capitalist" spirit. In other words, according to him, this region is facing a second independence that finally breaks the Eurocentric relations that have conditioned the development processes in the last two hundred years (Sousa Santos, 2012; 13). Taking into consideration what has been analyzed on the Constitutions of the countries under comparison this time, I believe that the evaluation of Sousa Santos is correct in the sense that the recognition of legal pluralism in Latin America is obeying a new vocation, which he claims to be a "decolonizing" and "anti-capitalist" spirit that at first sight, of course, is very different from the constitutional traditions seen in the Western hemisphere. To follow the terms used by Boaventura, the Constitution of Bolivia refers to "decolonization" to denote the process of its constitutional system (arts. 9 1 and 78), while the preamble of the Constitution of Ecuador condemns all forms of colonization by saying that the citizens of Ecuador are the heirs of victory against colonialism. In that sense, the jurisprudence of the Constitutional Court of Colombia often attributed the reasoning of its decisions as the counterpart of the understanding of the Western culture (Judgment SU-510 1998, which will be explained later). Consequently, the study of legal pluralism in the Andean countries is not only the coexistence of

different systems of law in a territory but also on new vocations that guide constitutional models of states.¹

PLURALISTIC OR PLURINATIONAL?

Understanding these models is important for this work, since constitutional decisions on legal pluralism, as I will corroborate below, are based on the model of State. Therefore, this subtitle discusses the notions of these "modelsof state".

In most of the constitutions of Latin America, cultural diversity has been accepted as a structuring element of the social and political system (Aguilar, 2010; 22), as I am evidencing in this title, Bolivia, Colombia, and Ecuador, are not the exception to this phenomenon.

Bolivia is defined as a "plurinational" country, which is based on plurality and political, economic, legal, cultural and linguistic pluralism, it promotes intercultural dialogue and recognizes the right of development of the cultural identity 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 art. 1 states that "Ecuador is a constitutional State of rights and justice, social, democratic, sovereign, independent, unitary, intercultural, **plurinational** and secular." (Aguilar, 2010; 23-24). The Republic of Colombia, meanwhile, is declared by its constitution as a pluralistic republic (art. 1) and recognizes and protects "ethnic and cultural diversity" of the Colombian nation (art. 7).

The differences are remarkable. Clearly, Bolivia and Ecuador refer themselves as plurinational countries,² which is a key element to shape their constitutional identity within the scope of legal pluralism.³In contrast, Colombiadespite not recognizingconstitutionally the literal meaning of "plurinational" (many nations living within a State), it has developed its plural identity through constitutional jurisprudence; in that sense, Judgment T-496/96⁴ says the following:

"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."

Therefore, in Colombia, the protection of cultural diversity, sets down the foundation of a pluralistic State, as the Judgment SU-510 1998⁵of the same Court distinguishes:

¹For a better comprehension of the present work. I will use the Word "model of state" to refer to a specific kind of state. Bolivia and Ecuador as plurinational and Colombia as pluralistic.

²These concepts are defined in Judgement No. 0112/2012 of April, 27 of the Constitutional Tribunal of Bolivia and in Judgement 113/14 of September of the Constitutional Court of Ecuador.

³Which requires not only the recognition of cultural diversity but also the promotion of this diversity and the mutual enrichment of the several cultures present. (Boaventura, 2012; 20)

⁴This judgment dealt with conflicts between indigenous and ordinary jurisdictions in an assassination case.

⁵This is a judgement in which the Court ratified the decision of a local court in which evangelical pastors were excluded from indigenous territories. Surprisingly, the collective right to self-determination prevailed over freedom of religion.

"The recognition and due protection of ethnic and cultural diversity of indigenous peoples based 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, is a projection in legal terms of the democratic, participatory and pluralistic character of the Republic of Colombia and obeys the 'acceptance of otherness' linked to acceptance of the multiplicity of life forms and systems of different understanding of the world of Western culture " .

These Judgments confirm the plural character of the Colombian State, which as they state, configures the legal and political system, and, therefore, it entrenches the pluralistic state model as a basis for constitutional decisions which address legal pluralism.

In another track from Colombia's, in the opinion of Raquel Yrigoyen, the constitutions of Ecuador and Bolivia proposed a redefinition of the State for the explicit recognition of the ancient roots of indigenous peoples who, of course, do not count in the Republican base. Therefore, the challenge of these Constitutions was to put an end to "colonialism" and to its new forms. In this model, indigenous people are recognized not only as "different cultures", but also as nations or nationalities of origin, which have self-determination. Consequently, under this model, indigenous peoples are collective political subjects who are entitled to define their destination, enjoy autonomy, govern themselves and participate in new pacts of State. According to the same author, the concept of "plurinational state" recognizes new principles of organization of power based on diversity, equality, dignity of peoples, multiculturalism and a model of equal legal pluralism, with explicit recognition of indigenous judicial functions that previous constitutions of Bolivia and Ecuador recognized unsatisfactorily (Yrigoyen, 2011; 149). The plurinational character, in the words of Boaventura, is a notion that is the counterpart of the Western view that defends the character of "one state on single nation", so that given the cultural diversity of these countries, it has to be understood that in a state the coexistence of more than one nation is possible (Sousa Santos, 2007; 34).

The Constitutional Court of Bolivia in its judgment of 27 April 0112/2012, states that the legal basis of judges must proceed from the consideration that the new model of State proclaims the values, norms, principles and constitutional characteristics of the system in general. This makes evident that constitutional identity is built from state model shown in art. 1 of the Constitution of Bolivia. The decision also states that the classical forms to designate the Plurinational State as a unitary, social and democratic, and rule of law State are insufficient to characterize the new model and classify it. This because it not only feeds of different principles and values that come from the tradition of liberal constitutionalism (rule of law), the social constitutionalism (social and democratic rule 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 decisions must take into account the Bolivian state model.

Manuel Bonilla, an expert on Ecuadorian laws, believes that his country now requires a constitutional tendency to recognize the plurinational character in all constitutional decisions. He thinks that the recognition of the plurinational character is an essential prerequisite for the full realization of legal pluralism in his country. Especially at the moment of respecting legitimacy and recognition of the forms of communitarian life justice of the indigenous orders (Bonilla, 2008; 64). In this regard, the Constitutional Court of Ecuador has not identified the influence that the plurinational character must reflect in the decisions of jurisprudence as explicitly as the Constitutional Court of Bolivia did. However, the plurinational character is also present in its

constitutional identity. In the Constitutional Judgment 113/14,⁶ the concept of plurinationality is defined and expressed as the basis of the Ecuadorian new constitutional culture. The decision states that plurinationality involves a concept that recognizes the right of people to identify their belonging to the nation, not only within a given geographical area but also within a given culture. On the one hand, it conveys that the term plurinationality refers to the coexistence of different nations culturally or ethnically identified within a civic nation. Furthermore, this judgment recognizes that Ecuador has to advance on the construction of new “decolonized” institutions in order to develop a well-established plurinational state.

Bolivia and Ecuador have entrenched indigenous visions in their constitutions following the plurinational state concept. These are the indigenous conceptions of the universe and ancient native philosophies which are summarized in the constitutional provisions and constitutional decisions. For example, Ecuador's fundamental law celebrates the victory over colonialism, recognizes the divinity of nature,⁷ and recognizes the mission of reaching the native conception of welfare which is the "Good Life" idea, translated from the Quichuan word "*SumakKawasay*". Following this trend, the Bolivian Constitution in its preamble promotes the respect for the "Mother Earth", the anti-colonial spirit, the leaving behind of the Republican state itself, the embracing of the Plurinational State, and the recognition that Bolivia is a country governed by God and the "*Pachamama*"⁸ In addition, the Bolivian Constitution adds indigenous ethical and moral principles that govern the state as the following (art 8.I): "The State assumes and promotes as ethical-moral principles of the plural society the '*ama llula, ama quilla, amasua*' (Which in Quichua means do not be lazy, do not lie, do not steal). The '*suma qamaña*' (good life), the '*ñandereko*' (harmonious life), '*Teko Kavi*' (good life), the '*ivimare'i*' (land without evil) and the '*qhaphah ñan*' honorable way ". In this arrangement, traditional constitutional values and ancient indigenous values sum up the spirit of the constitution of Bolivia and, to a lesser extent, the constitution of Ecuador. These are the founding visions for the formation of the plurinational state. First, because of the acceptance of many nations who live and participate in a state with the vision of a process of "decolonization" (as indicated above). Second, due to the introduction of indigenous visions in the Constitutions. And third, because of the constitutional characteristics that support this model of state. All these features of Bolivia and Ecuador, on the one hand, and the pluralistic characteristics of the Republic of Colombia, on the other, are the pillars of what Raquel Yrigoyen calls the new plural States (Yrigoyen, 2011; 148-149) which of course, are new understandings of the legal-political organizations, which contrast to any conventional model of state.

Boaventura de Sousa Santos explains that the new forms of social coexistence which are now more effectively recognized have to transform also traditional public institutions. Consequently, he defends the idea of creating a new plurinational, intercultural and postcolonial Court with the ability to resolve conflicts with the understanding that the differences and similarities require appropriate institutions. (Sousa Santos, 2007; 36)

⁶This judgment dealt with the *non bis idem* principle which was applied in a murder case. The Constitutional Court declared that the punishment received by the murderer in the indigenous community of which he was a member was constitutional. And this does not oppose to the application of the mentioned principle because, in the court's rationale the punishment conducted by the indigenous authorities aimed to protect the collective rights of the community and it did not occur to protect the right to life as such. Therefore, the decision of imprisonment dictated by the Court was valid in the sense that the prohibition of murder stated in ordinary laws has to be protected in the ordinary regime. Consequently, indigenous traditions have to be protected under the indigenous jurisdiction.

⁷ In the Quichuan culture "*Pachamama*" is the divinity of the divinity of the earth it is the "mother earth".

⁸ It refers to the same "divinity" as in Bolivia

Following what Sousa Santos said in 2007, after the enactment of the Bolivian constitution, it was understood that it was necessary to follow the path of transformation of public institutions, particularly in the Constitutional Court. In that sense, the above-mentioned, for example, is reflected in the evaluations of merits of judges of the Constitutional Court (or magistrates as the constitution calls them). While the Legislature performs the pre-selection of candidates for selecting these judges,⁹ an applicant who was an indigenous authority previously, has a better rating than one that does not (Art. 13 I of the Constitutional Court Act). In addition, within the organizational structure, the Plurinational Constitutional Court of Bolivia has created the Technical Secretariat Decolonization, in order to permanently have an interdisciplinary team that articulates the Constitutional Court and indigenous jurisdictions. The secretariat is formed by sociologists, anthropologist, and *amautas*.¹⁰ They perform legal research whenever the specialized chambers or the high constitutional chamber require it.

Neither Ecuador nor Colombia has these characteristics. However, both tribunals –or courts as their Constitutions call them– often turn to non-permanent interdisciplinary teams of indigenous authorities and professionals to take their constitutional decisions. Although Bolivia and Ecuador refer themselves as plurinational states, the only Plurinational Constitutional Court considered within the understanding of Sousa Santos is the Bolivian.

Both countries, Bolivia and Ecuador represent a break with the previous models of states and indigenous people's relationship. In the opinion of some legal scholars, the plurinational state is a revolutionary social philosophy that has been introduced in the new constitutions of Bolivia and Ecuador. (Schilling-Vacaflor and Kuppe, 2012; 365). In contrast, the constitutional model of Colombia, despite not recognizing the plurinational model is very progressive on the recognition of legal pluralism with its pluralistic model.

AUTONOMY AND INDIGENOUS JURISDICTIONS, AND ITS LIMITS

Indigenous autonomies apply their own legal system. These parallel legal systems must have a valid scope of application. Therefore, several parameters can be adjusted. In this section, I will use some elements to compare the three legal systems concerning the special jurisdictions (indigenous) and their constitutional limits.

Judgment T-496/96 of the Constitutional Court of Colombia refers to "collective entities" as institutions of indigenous peoples which are entitled to exercise their own legal system. This is important for the study of legal pluralism because these entities coexist with traditional state institutions. Article 246 of the Constitution of Colombia stipulates indigenous peoples' authorities may exercise jurisdictional functions within their territory in accordance with their own rules and procedures, provided that they are not contrary to the Constitution and laws of the Republic. In other words, the scope of application of indigenous law in Colombia falls on the territory and finds its limit when it collides with the Constitution and ordinary laws. The same happens in Ecuador, the indigenous jurisdiction is exercised only in the territory of the native entity (Article 171). In contrast, the fundamental law of Bolivia recognizes the territorial, material¹¹ and personal

⁹In Bolivia, judges of the Constitutional Court are elected by general elections. However, the candidates have to be "pre-selected" by the Congress –the so-called Plurinational Legislative Assembly–. The Congress takes into account their professional merits.

¹⁰Name granted to some of the highest authorities of indigenous entities of Bolivia. If the candidate has never been an indigenous authority he/she cannot apply for this position.

¹¹This is regulated by the Jurisdictional Delimitation Act. Although Bolivia seems progressive in favor of indigenous rights this Act in its art 10. II enumerates a wide list of restrictions made to indigenous jurisdictions.

competence of indigenous jurisdictions (art. 192 II). Therefore, due to the personal validity of the jurisdiction, many scholars believe that the indigenous jurisdiction in Bolivia has extraterritorial jurisdiction (Yrigoyen, 2004; 34) However, this only occurs in cases where the member of the indigenous community committed a crime in another indigenous community. Therefore, it is permitted to the indigenous entity to apply its own law (Bolivian Plurinational Constitutional Court, Judgment 0037/2013). This has a close relationship with the model of state of these countries, as I said 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) Wolf, 2012; 192)

Following the same author’s view, 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 peoples¹² can 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 (Wolf, 2012; 192)

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.¹³ 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 Ecuador¹⁴ 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.¹⁵ 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

¹² 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.

¹³ 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

¹⁴ Art. 248 in the Colombian Constitution and Art. 171 in the Ecuadorian basic law.

¹⁵ Art. 410 Bolivian Art. 248 in the Colombian constitution and Art. 171 in Ecuadorian basic law.

better protection than the constitution are also applied.¹⁶ Therefore, indigenous law, in order to coexist with ordinary law, does not have to contradict both the constitution and the constitutional block.

There may be some concerns about the exercise of legal pluralism. A common concern is the application of the principle of *res judicata*. To resolve this problem, there is coordination between the jurisdictions of the three countries studied in this paper. The Constitution of Bolivia, as mentioned above, states that indigenous law is part of the overall legal system, therefore, it does not have a specific provision regarding this issue because it implicitly signifies that what is sentenced in one jurisdiction has the condition of *res judicata* in the other. Furthermore, this text also recognizes the hierarchical equality between jurisdictions¹⁷ so this principle is in fact applied. In Ecuador, the Constitution explicitly states that no one can be tried twice for the same offense, (art. 76. 7i) even in cases in which the indigenous jurisdiction is involved. The Constitution of Colombia in its Article 248 states that only the judgments in trials of the traditional judiciary can definitely be *res judicata*. However, Judgement T-866-13¹⁸ prohibits ordinary judges to overrule indigenous judges' decisions, so the result is the same in these two countries as in the case of Bolivia.

TERRITORY, LAND RIGHTS AND THE RIGHT TO BE CONSULTED

Territorial rights are important for the understanding of our study on legal pluralism because the special jurisdictions exercise their legal powers within that space. Convention 169 of the International Labor Organization in its arts. 13-15, which is ratified by the three countries, recognizes the right of indigenous peoples to have land and territory as a space for collective construction. The territory is the place or space used somehow in activities that allow the material and cultural reproduction of indigenous peoples.¹⁹ As regards to land rights, Article 63 of the Constitution of Colombia states that "the communal lands of ethnic groups are inalienable and imprescriptible". A similar provision also is present in Ecuador's constitution (art. 57. 4) and in Bolivia's (Art 394. III). In all three cases, indigenous peoples are exempt from paying land taxes by the same constitutional provision. Moreover, Bolivia is constitutionally obliged to grant rights over tracts of land to indigenous communities that have none or insufficient territory to develop their activities (art. 395).

Natural resources are also a concern at the moment of recognizing indigenous autonomies since rights to land and territory cannot be dissociated from natural resources management (UN Stavenhagen, Doc. E / CN.4 / 2002/97, para. 55.) The main question about natural resources is extraction. Renewable resources can be extracted from indigenous lands in accordance with their laws and customs. However, the conflict arises when there are non-renewable resources on their lands. On the one hand, these resources cannot be owned by individuals or collective entities (indigenous autonomies) since in all the three countries these resources are exclusively state's domain. On the other hand, they cannot be taken freely by the State because indigenous peoples have the prior consultation right (to be consulted) on every measure taken by the State in which they are affected, as I will explain below.

¹⁶ Art 410. II. Bolivian Constitution, art. 93 in light of the Court Judgment C-225 in Colombia, and art. 417 in the Ecuadorian Constitution.

¹⁷ Art 179.II of the Bolivian Constitution.

¹⁸ This a judgement about a robbery made by an indigenous community member in which the Court held that it had to be tried in the ordinary jurisdiction because the criminal action occurred in a non-indigenous settlement.

¹⁹ Art.13 of the 169 International Labor Organization.

The right to free, prior and informed consultation, is a collective and participatory right of social and political importance (Carrion, 2012; 25) The constitutions of Ecuador and Bolivia have granted these rights.²⁰ Although in the Constitution of Colombia this right is not a written provision, the judgment of the Constitutional Court SU-039 1997²¹ has also recognized this right according to the following: "... the forms of consultation with the community are absolutely necessary to reach an agreement or consent and to specify how the project affects their ethnic, cultural, social and economic identity." In these three countries, the right to be consulted not only regulates the extraction of natural resources but also tailors policies that affect the interests of indigenous communities of any state.²² The consultation result is not always binding, but it may have political consequences when governments do not obey the results. In Colombia, Judgement T-376-12²³ of the Constitutional Court acknowledged that the results of the consultations will be considered binding only when the damage to the community is severe. The Constitution of Ecuador is more explicit, in its Article 398 states that independently of the result of the consultation the final decision to proceed with the extraction of resources rests with the authority which will be regulated according to the law. In Bolivia, this consultation is not binding. Consequently, none of the countries studied recognize the consultation result binding. However, it is logical to ignore that ignoring a result will have political consequences.

Finally, the Ecuadorian system contains a vigorous disposition compared to other countries with regard to the protection of ancestral territories. Article 57 of the Constitution states that "... The territories of peoples in voluntary isolation are irreducible and intangible ancestral possessions and all extractive activity will be forbidden." The violation of this provision, as the same article provides, is condemned as ethnocide. Compared with the constitutional system of other countries, this is a very strong constitutional provision because the other systems do not have a provision as severe as this one. However, this is somehow understandable because of the extremely rare cases that one of those territories can be found.

LINGUISTIC RIGHTS AND EDUCATIONAL RIGHTS

Cultural diversity in the Andean countries is vast. Many cultures have their own language. This inspired the drafters of the constitutions to introduce some provisions for the protection of linguistic diversity. The need to establish educational schemes that go in line with the spirit of pluralistic or plurinational states was also a concern.

Article 10 of Colombia's Constitution states that in addition to Spanish, "the languages and dialects of ethnic groups are also official in their territories." In this sense, the Constitution of Ecuador articulates that Spanish is the official language, "Quichua" and "Shuar" are official languages of the intercultural relations, and all others are official in their territories (art. 2). Bolivia recognizes Spanish language and all native languages as official in the state (art. 5 II). In addition, only the Bolivian Constitution adds a mandatory requisite to access any public office position. This is speaking fluently at least two official languages (art. 234. 7).

²⁰ Art. 311 of the Bolivian Constitution, art. 332 the Constitution of Colombia and art. 57. 7 Of the Ecuadorian Constitution

²¹ In this judgment the Constitutional Court obliges the Republic of Colombia to perform a consultation to an indigenous community that was going to be affected by the activities of a company.

²² Article 30. II. 15 of the Bolivian Constitution and art. 398 of the Constitution of Ecuador.

²³ This decision was about an indigenous community that claimed the respect of the results of a consultation in which this entity rejected unanimously the presence of a hotel on a beach in the North of Colombia. The Court held that only in extreme cases the State have to follow the results of the consultation.

With regard to education from a pluralistic view, these countries have addressed the issue from different perspectives. Ecuador is the most conservative. On the one hand, Ecuador promotes the education in the mother tongue of indigenous communities but also requires the teaching of Spanish as intercultural language (art. 347). On the other hand, it aims to reflect the cultural diversity in the entire educational system of the country (Arts. 16.4 and 57.21), but it does not create a special educational regime with an explicit constitutional mandate as the other countries, as I will show. However, the mentioned provision led to the creation of intercultural universities, including the University Amawtay Wasi, whose mission is "Recovering woven fabric of life in the cosmic interculturality" of all the indigenous peoples of Ecuador (Sarango, 2009; 191 -214).

The Bolivian Constitution went further with respect to plural educational rights, in its art. 93. 5 it created indigenous universities that carry ancestral indigenous visions. With regard to Colombia, it has the most developed plural education tradition among the three countries. This is because the constitutional system recognized ethnocultural education²⁴ since 1976. After this facts, in 1994 the Colombian government enacted a law to establish the basis of ethnocultural training on the grounds of Articles 7, 10, 13, 27, 63, 68, 70 and 243 of the 1991 Constitution, which promoted education based on ethnicity, with special features relating to the cultural diversity of Colombia. (Patiño, 2004; 9)

These rights have contributed to the essence of legal pluralism for its characteristics. They nourish this new constitutional debate for legal pluralism. Decolonization, as is stated in the present work, is the engine of all these notions and provisions.

CONCLUSIONS

- Legal pluralism and indigenous rights have become one of the cornerstones of these states. This happens in such a way that is legal pluralism that determines the state's model and not the reverse. Because of this statement, this legal pluralism, which certainly contrast to the Western view of pluralism, is still new to Western constitutional law, it has developed innovative features in the effort to address plural societies. On the one hand, models of plurinational states like Bolivia and Ecuador, have a number of provisions that combine indigenous visions and missions with the ones of the ordinary state. On the other hand, the Pluralistic State as Colombia, which also has special features, has also advanced in its constitutional tradition on the basis of its cultural diversity. All of these countries share the "decolonizing" effort in their constitutional rulings which also inspires their constitutional culture.
- Since the ratification of the ILO Convention 169, all indigenous peoples in those countries became subjects of collective rights that allowed the transition to a constitutional recognition and protection of legal pluralism. Each country modulates its legal system according to its historical, political, social and economic circumstances.
- All this, resulted in what I now call a kind of constitutional syncretism. This because indigenous institutions, on the one hand, have special rights and special jurisdictions and, on the other, they can coexist peacefully and respecting the State's authority. Therefore, the three constitutions entail a special pluralist constitutional regime in which conflicts are resolved in the best way possible, optimizing results.

²⁴The ethnocultural education has been promoted since 1976. But since the enactment of the 1991 constitution this special type of education is recognized constitutionally (Enciso, 2004; 9)

- The recognition of these rights is very important for the survival of legal pluralism. Linguistic and educational rights are certainly innovative for the study of constitutional law in diverse societies.
- Although their implementation is not always effective, all these features are not only new way of perceiving legal pluralism but also the basis of the new models of plural states which are the so-called: pluralistic and plurinational.
- Constitutional recognition of legal pluralism and indigenous rights in these countries is undeniably a worthy effort made by the states to gain social inclusion of indigenous people.

BIBLIOGRAPHY

AGUILAR, Gonzalo

2010 “The Constitutional Recognition of Indigenous Peoples in Latin America”, in *Pace International Law Review Online Companion*, Vol. 2, N° 2

BONILLA, Marcelo,

2008 “Pluralismo jurídico en el Ecuador. Hegemonía estatal y lucha por el reconocimiento de la justicia indígena”, ed. by Rudolf Huber en *Hacia Sistemas Jurídicos Plurales*, Antropos Ltda., Bogotá

CARRIÓN, Patricia,

2012 “Análisis de la consulta previa, libre e informada en el Ecuador”, Konrad Adenauer, Quito

ENCISO, Patiño, Patricia,

2004 “Estado del arte de la etnoeducación en Colombia con énfasis en política pública”, Ministerio de Educación Nacional, Bogotá

GARGARELLA, Roberto,

2014 “*Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution*”, Oxford University Press, New York

GROSSFOGUEL, Ramón,

2002 “Unthinking Twentieth-Century Eurocentric Mythologies: Universalist Knowledges, Decolonization, and Developmentalism”, in *The Modern/Colonial/Capitalist World System in the Twentieth Century*, Greenwood Press, Westport

SARANGO, Luis Fernando,

2009 “*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),

SIEDER, Rachel,

2002 “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.

SCHILLING-VACAFLOR, Almut y KUPPE, René,

2010 “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

STAVENHAGEN Rodolfo,

2002 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms indigenous people, February 2nd, N.U. Doc. E / CN.4

SOUSA SANTOS BOAVENTURA ,

2007 “*La Reinención del Estado y El Estado Plurinacional*”, OSAL, CLACSO, Buenos Aires

2012 “Cuando los Excluidos tienen Derecho: justicia indígena, plurinacionalidad e interculturalidad”, in *Justicia indígena, plurinacionalidad e interculturalidad en Bolivia*, Fundación Rosa Luxemburg/AbyaYala, Quito

WOLF, Jhonas,

2010 “New Constitutions and the Transformation of Democracy of Bolivia and Ecuador”, ed por Detlef Nolte y Almut Schilling-Vacaflor in *New Constitutionalism in Latin America. Promises and Practices*, Ashgate, Farnham

YRIGOYEN FAJARDO, Raquel,

1999 *Debate sobre el Reconocimiento Constitucional sobre el Derecho Indígena en Guatemala. In América Indígena*, vol. LVIII, No. 1-2, México

2011 “El Horizonte del Constitucionalismo Pluralista”, ed. by César Rodríguez Garabito, en *El Derecho en América Latina. Un mapa para el pensamiento jurídico del Siglo XXI*, Siglo XXI, Buenos Aires