

RIVISTA QUADRIMESTRALE
DI
DIRITTO DELL'AMBIENTE

-

Decennale della Rivista (2010-2020)
Tenth Anniversary of the Journal (2010-2020)

NUMERO 1 - 2020

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*Environment for development in the Latin American legal system: the
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G. Giappichelli editore

ISSN 2239-964X

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Environment for development in the Latin American legal system: the paradigmatical case of trine federalism in Brazil****

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1. Introduction

Referring, more generally, to the advances of some Latin American constitutions, especially articulated with the protection arising from the Andean myth of Pachamama; the vanguardism of some constitutions - especially Ecuador and Bolivia, the latter with the emphasis on indigenous law and its prediction in a Magna Carta, pluralism, multiculturalism and the insertion of society in a new process of normative construction and, essentially, the coexistence of traditional

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**** Report of the exhibition held in the framework of the International Study Conference on the occasion of the tenth anniversary of the quarterly Environmental Law magazine, entitled “The environment for development: legal and economic profiles”, which took place on February 19, 2020 in Perugia, Italy.

knowledge with plurinational societies and the departure from the utilitarian view of nature, with the increase in the notion of humanistic sustainability.

Even though more restricted to Ecuador, Bolivia and, in some way, Colombia, the analysis of what is called New Latin American Constitutionalism, with its perception of well living - *bien vivir* - and of considering the land as Pachamama expands the notion of collective in the face of the individualistic vision.

But it is in the approach to the paradigmatic case of Brazil, that the main focus of the exposition resides, be it in its legal historical aspects, in the recent examples of environmental degradation - focus on the Brazilian Amazon – and, finally, in what is considered the peculiarity of the country, which is the complex articulation of three levels of federated entities in the protection of the environment.

Therefore, the analysis of the Brazil case will be supported by a principle implicit in its constitutional order, with a strong European connection, namely the principle of subsidiarity. This, in turn, assumes greater prominence to face the positive conflict of competence in its internal administrative dimension.

In addition, the relationship between the constitutional provision of environmental protection and the Brazilian reality, especially in the recent year of 2019, with the beginning of the Bolsonaro era, will be present in the set of reflections. It is necessary to verify the existence or not of adherence of the text foreseen in the legal system and its effectiveness in the complex federative structure of Brazil and its dimension of three levels.

And it is precisely the local power, with its limits and possibilities, that will take over the center of the analysis, given the peculiarity that this sphere of power assumes in the Brazilian context: how to reconcile the administrative and even legislative competence in environmental matters of over 5000 Brazilian municipalities, with the need for an articulated system with a national reference for environmental protection.

What are the obstacles to the coexistence and implementation of the basic constitutional principles that form the environment with this multiplicity of decision-making spheres and the priority of competence of the local sphere in the face of subsidiarity?

These are the challenges and objectives of environmental analysis for development in the Latin American legal system and, in particular, the paradigmatic case in Brazil.

2. *The new Latin American constitutionalism*

When talking about the New Constitutionalism of Latin America, it is imperative to highlight its direction towards «consolidation of principles, punctuated in pluralism, emancipation, interculturality and well living with dignity» (WOLKMER; FAGUNDES, 2011, p. 405)¹. Thus, it can be said that it is a novel processing of traditions and practices that systematize the process of power and the legal order.

In this sense, it is possible to clarify that today's Latin American Constitutionalism is incisive, because traditional constitutionalism has not historically been sufficient to «explain colonized societies; it was not clear enough to explain the rupture with European metropolises and the continuity of typically colonial relations in their respective societies throughout the 19th, 20th and part of the 21st centuries» (VARGAS, 2009, p. 158)².

Furthermore, on the historical itinerary of New Constitutionalism in Latin America, which is also called Andean Constitutionalism or Third Generation Constitutionalism, it is worth of note that the current Constitutions were created or reformed after the existence of military dictatorships and the application of neoliberal policies in region, which adds elements for debate, making possible the announcement of a new phase of constitutionalism (CADEMARTORI; COSTA, 2013).

Thus, it is clear that the New Constitutionalism acts in the contemporary Latin American social fabric as a transforming mechanism, since it takes over reality, culture and specificities to the detriment of the Western knowledge that prevailed. For this reason, New Constitutionalism in Latin America promotes the restructuring of the State model in favor of the strengthening of community legal systems and the ecocentrist paradigm.

The idea of Latin American New Constitutionalism recognizes a list of fundamental rights, such as citizen participation. In this way, Garagarela affirms that: «*por un lado, proponen mecanismos generosos de participación popular,*

¹ «*Consolidação de princípios, pontuados no pluralismo, emancipação, interculturalidade e bem viver com dignidade*» (WOLKMER; FAGUNDES, 2011, p. 405).

² «*Explicar sociedades colonizadas; não teve clareza suficiente para explicar a ruptura com as metrópoles europeias e a continuidade de relações tipicamente coloniais em suas respectivas sociedades ao longo dos séculos XIX, XX e parte do XXI*» (VARGAS, 2009, p. 158).

mientras mantienen, al mismo tiempo, organizaciones políticas fuertemente verticalizadas» (GARGARELLA, 2011, p.295; 2009, p. 11)³.

To improve context, Constitutionalism on screen is substantially represented by the avant-garde Constitutions of Ecuador (2008) and Bolivia (2009). Some argue that these political texts express a Community Plurinational Constitutionalism, which is «coexistent with experiences of the “traditional knowledge” of plurinational societies, with practices of jurisdictional pluralism and, finally, with the recognition of collective rights linked to the common goods of the nature» (WOLKMER; WOLKMER, 2014, p. 1005)⁴.

It is important to emphasize that the valuing of nature in the New Constitutionalism of Latin America is crucial not only because of the commitment to collective well-being, but also because the search without responsibility for supposed progress generates human behaviors that are harmful to the environment, so that the expansion from the community ecological perspective presented by the Cartas Andinas is relevant for the realization of the solidarity ethics committed to restoration and environmental preservation.

Furthermore, it is evident that the New Constitutionalism of Latin America translates a social, legal and political change directed towards the re-signification of the exercise of «constituent, of legitimacy, popular participation power and the very concept of the State. The state of the new Latin American constitutionalism is the plurinational state, which recognizes social and legal plurality, respecting and ensuring the rights of all social strata» (ALVES, 2012, p. 143)⁵. It should also be noted that, in addition to enhancing traditional knowledge, among the established rights are those of nature, a major constitutional innovation.

In other words, the New Constitutionalism infused in the last decades, from political changes and new social processes of struggles, has: «[...] the

³ «Por un lado, propõem mecanismos generosos de participação popular, mientras mantienen, al mismo tiempo, organizaciones políticas fuertemente verticalizadas» (GARGARELLA, 2011, p.295; 2009, p. 11).

⁴ «Coexistente com experiências dos “saberes tradicionais” de sociedades plurinacionais, com práticas de pluralismo igualitário jurisdicional e, finalmente, com o reconhecimento de direitos coletivos vinculados a bens comuns da natureza» (WOLKMER; WOLKMER, 2014, p. 1005).

⁵ «Constituinte, de legitimidade, da participação popular e o próprio conceito de Estado. O Estado do novo constitucionalismo latino-americano é o Estado plurinacional, que reconhece a pluralidade social e jurídica, respeitando e assegurando os direitos de todas as camadas sociais» (ALVES, 2012, p. 143).

strategic space of inspiration and legitimation to promote the development of vanguardist paradigms within the scope of new collective sociabilities (original, indigenous and Afro-descendant peoples) and Rights to common (natural resources and balanced ecosystem) and cultural (Pluricultural state, diversity and interculturality) heritage. Thus, the development of some of these great guiding axes, already foreseen and enshrined in the new Pluralist Constitutionalism of Andean America, implies challenges of assimilating and interacting towards its real materialization. The challenge for the future of the region lies in the effective and complex realization of new conceived and projected epistemic paradigms, which go far beyond the institutionalized and legally standardized. The challenge for continents such as Latin America is to find hermeneutical points of convergence and complementarity with the “world-system”, without losing its autochthonous and mestizo identity (WOLKMER, AUGUSTIN, WOLKMER, 2012, p. 67)»⁶.

The fact is that, in addition to being costly to maintain original characteristics in the globalized world, the New Constitutionalism remarked denotes that most of the Constitutions of Latin America still express the interests of the elites, which are influenced by European and Anglo-Saxon culture. However, this prototype is being gradually changed by the idea of everyone's relationship with everyone, that is, the Constitutions are innovating and transmuting to an ecocentric perception that values traditional knowledge, which needs to be fully materialized.

It is emphasized that the New Latin American Constitutionalism, according to Roberto Viciano Pastor and Rúben Martínez Dalmau (2010, p. 12): «[...] arises from civic movements combined with political proposals adopted by the people, in scenarios of high social and political conflict. The activation of the

⁶ «[...] o espaço estratégico de inspiração e legitimação para impulsionar o desenvolvimento de paradigmas de vanguarda no âmbito das novas sociabilidades coletivas (povos originários, indígenas e afrodescendentes) e dos Direitos ao patrimônio comum (recursos naturais e ecossistema equilibrado) e culturais (Estado pluricultural, diversidade e interculturalidade). Assim, o desenvolvimento de alguns desses grandes eixos norteadores, já previstos e consagrados no novo Constitucionalismo Pluralista da América andina, implica em desafios de assimilar e de interagir na direção de sua real materialização. O desafio para o futuro da região está na concretização efetiva e complexa de novos paradigmas epistêmicos concebidos e projetados, que vão muito além do institucionalizado e do normatizado juridicamente. O desafio para continentes como a América Latina está em encontrar pontos hermenêuticos de convergência e complementaridade com o —sistema-mundo, sem perder sua identidade autóctone e mestiça» (WOLKMER, AUGUSTIN, WOLKMER, 2012, p. 67).

constituent power, in this sense, is directly related to the revolutionary character of its origin. In effect, the claim of the constituent power that is being proposed by the new Latin American constitutionalism returns to the first forms of exercise of this power, typical of revolutionary constitutionalism. In the face of the agreed transitions, the constituent power - which comes fully into effect when only a political transition, but also a legal one is no longer necessary - raises the original formula of democracy and shapes the radical nature of constitutionalism»⁷.

Thus, this revolutionary conception of the State that implements a dialogue of cultures without submission, especially among Europeans, Anglo-Saxons and Latin Americans, and that instigates a harmonious experience among the inhabitants of Earth, opens space for cultural pluralism and redefines the social organization. It can be reflected that the New Constitutionalism has the purpose of fostering popular participation and guiding the functions of the State in favor of a vigorous and realistic social organization, which returns to the planet without corrupting its identity.

From the above, it can also be concluded that the New Constitutionalism of Latin America «is a constitutionalism without parents. No one, except the people, can feel itself as progenitor of the Constitution, due to the genuine participatory and legitimizing dynamics that accompanies the constituent processes» (VICIANO PASTOR, MARTÍNEZ DALMAU, 2010, p. 13)⁸. It is necessary to clarify that the New Constitutionalism does not aim at isolation, but aims at establishing the cultural and social specificities of Latin America in the global context.

According to Marcos Leite Garcia, William Paiva Marques Júnior and Liton Lanes Pilau Sobrinho (2014, p. 961), the New Constitutionalism of Latin America: «[...] it is a movement that arises exactly with the need to solve common

⁷ «[...] surge de movimientos cívicos combinados con propuestas políticas adoptadas por los pueblos, en escenarios de alta conflictividad social y política. La activación del poder constituyente, en este sentido, guarda relación directa con el carácter revolucionario de su origen. En efecto, la reivindicación del poder constituyente que está planteando el nuevo constitucionalismo latinoamericano vuelve a formas primeras de ejercicio de este poder, propias del constitucionalismo revolucionario. Frente a las transiciones pactadas, el poder constituyente - que entra plenamente en vigencia cuando ya no es necesaria sólo una transición política, sino también jurídica - plantea la fórmula original de democracia y da forma a la naturaleza radical del constitucionalismo».

⁸ «Es un constitucionalismo sin padres. Nadie, salvo el pueblo, puede sentirse progenitor de la Constitución, por la genuina dinámica participativa y legitimadora que acompaña a los procesos constituyentes» (VICIANO PASTOR, MARTÍNEZ DALMAU, 2010, p. 13).

local and, therefore, also regional issues. It arises from the need for a search for original solutions to the problems of the American peoples and, along with it, the need for regional integration to build a new South American citizenship. These are urgent themes that refer to the future of all humanity: the issues of the development of peoples and the protection of the environment, themes that are framed in a single issue: that of sustainability»⁹.

Thus, New Constitutionalism in Latin America is based on the development of an integral and sustainable ecological awareness. From the moment that traditional knowledge is exalted, the Andean worldview triggers a plural, intercultural and community constitutionalism never experienced. In addition, the rights of nature praised by the New Latin American Constitutionalism make the appreciation of the protection of Pachamama and environmental preservation paramount, as today's constitutionalism underlines a different perspective that protects the Earth from degrading human attitudes.

3. The protection of Pachamama and environmental preservation

The New Constitutionalism of Latin America among its innovations, especially due to the strengthening of traditional knowledge that fosters an ecocentric view of the world, presents the constitutionalization of Pachamama, which, in turn, instigates the perception of the need for environmental preservation for the present and future generations.

Firstly, it is necessary to clarify that, when fragmenting the term Pachamama, it is noted that Pacha portrays the universe, world, time and place and that Mama represents, in turn, mother. In addition, it is emphasized that Pachamama is an Andean myth concerning time linked to the earth, which cures ills, establishes the seasons and absorbs the life of beings in the universe (TOLENTINO, OLIVEIRA, 2015).

In addition, the term Pachamama represents a kind of duality on the basis of which «existence itself is divine at the same time earthly, it is the spiral that

⁹ «[...] é um movimento que surge exatamente com a necessidade de solução de problemas locais comuns e por isso também regionais, nasce da necessidade de uma busca de soluções originais dos problemas dos povos americanos. E com ele paralelamente a necessidade da integração regional para a construção de uma nova cidadania sul-americana. São temas urgentes e que se referem ao futuro de toda a humanidade: as questões do desenvolvimento dos povos e da proteção do meio ambiente. Temas estes plasmados em uma só problemática: a da sustentabilidade».

symbolizes life and death. The Pachamama is what sustains the existence of these types of peoples in both the human and sacred spheres». (MARTÍNEZ, 2018, p. 12)¹⁰. Pachamama has a visually stringent utilitarian vision of nature, which should be respected in its integrality. In the vision of Martínez, the «nature represents a mother, probably the most important one, because she is the mother of everything that grows in her and, in turn, there is an awareness of her as part of an integral system, as a provider, she is respected [...]». (MARTÍNEZ, 2018, p. 13)¹¹.

Pachamama is: Mother Earth is a community, indivisible and self-regulated, of interrelated beings that sustain, contain and reproduce all the beings that compose it. Each being is defined by its relations as part of the integral Mother Earth, that the inherent rights of Mother Earth are inalienable because they are derived from the very source of existence. Mother Earth and all the beings that compose it are holders of all inherent rights recognized in this Declaration without any distinction, as it can be between organic and inorganic beings, species, origin, uses for human beings, or any other status (UNIVERSAL DECLARATION OF MOTHER EARTH RIGHTS, 2010, page 14)¹².

In this bias, it is added that «Pachamama is seen, ultimately as a mother; better yet, as lady mother, as it induces respect and fear» (PARISACA, 1999, p. 43)¹³. It can be reflected, therefore, that Pachamama has a relationship with sustaining life, with the well-being of fauna and flora, with the protection of nature, harmony and balance.

¹⁰ «La existencia misma, es divino al mismo tiempo que terrenal, es la espiral que simboliza la vida y la muerte. La Pachamama es lo que sostiene la existencia de este tipo de pueblos tanto en el ámbito humano como en el sagrado» (MARTÍNEZ, 2018, p. 12).

¹¹ «Naturaleza representa a una madre, probablemente la más importante, pues es la madre de todo lo que crece en ella y a su vez hay una conciencia de ésta como parte de un sistema integral, como provedora se le respeta [...]». (MARTÍNEZ, 2018, p. 13).

¹² *A Mãe Terra é uma comunidade, indivisível e auto-regulada, de seres interrelacionados que sustentam, contêm e reproduz a todos os seres que a compõem. Cada ser se define pelas suas relações como parte da integrante Mãe Terra, que os direitos inerentes da Mãe Terra são inalienáveis porque se derivam da fonte mesma da existência. A Mãe Terra e todos os seres que a compõem são titulares de todos os direitos inerentes reconhecidos nesta Declaração sem nenhum tipo de distinção, como pode ser entre seres orgânicos e inorgânicos, espécies, origem, usos para os seres humanos, ou qualquer outro status* (DECLARAÇÃO UNIVERSAL DOS DIREITOS DA MÃE TERRA, 2010, p. 14).

¹³ «La Pachamama es vista, en última instancia como madre; mejor quizás, como señora madre, pues provoca respeto y temor» (PARISACA, 1999, p. 43).

Thus, Eduardo Gudynas (2010, p. 6-7) shows that: «[...] the debate on environmental ethics and the political ecology of Mother Earth is not only important but also urgent. As environmental problems continue, the simplistic and contradictory defenses of Pachamama in many cases end up reinforcing that common idea of understanding alternatives to development as something that lacks essence and is hardly applicable. If we want to broaden the social base that demands political changes in contemporary development, we must provide more rigorous, more detailed proposals, and that are felt and valued for their relevance and applicability»¹⁴.

Thus, gradually, the discussion on conceptions of nature is advancing in Latin America. In this sense, when popular knowledge is praised, the invocations of Pachamama, or Mother Earth, are highlighted. Mentioned invocations: «[...] They have enormous potential, especially to generate alternatives to current development that do not persist in the destruction of Nature. But it also falls into exaggerations and dogmatism, where invocations to the "Pachamama" for some would be little less than useless positions, stained with primitivism and anchored in old mythologies, while for others they would represent the vanguard of a new political thought and the anteroom of a new culture» (GUDYNAS, 2010, p. 01)¹⁵.

In spite of the most unbelieving depreciating the political ecology of Mother Earth, when talking about the protection of Pachamama, it is evident that the supporters articulate the environmental preservation that, in turn, triggers the connection between the legal paradigm of socio-environmentalism and its contribution to effective protection of socio-biodiversity. Recognizing the intrinsic connection between «the natural or built environment and the different forms of material and symbolic appropriation of it by communities from their

¹⁴ «[...] el debate sobre la ética ambiental y la ecología política de la Madre Tierra, no sólo es importante sino que es urgente. Como los problemas ambientales siguen su marcha, las defensas simplistas y contradictorias de la Pachamama en muchos casos terminan abonando esa idea tan común de entender las alternativas al desarrollo como algo que carece de esencia y es difícilmente aplicable. Si deseamos ampliar la base social que demanda cambios políticos en el desarrollo contemporáneo, debemos brindar propuestas más rigurosas, más detalladas, y que sean sentidas y valoradas por su relevancia y aplicabilidad».

¹⁵ «[...] tienen enormes potencialidades, sobre todo para generar alternativas al desarrollo actual que no persistan en la destrucción de la Naturaleza. Pero también se cae en exageraciones y dogmatismo, donde las invocaciones a la "Pachamama" para algunos serían poco menos que inútiles posiciones, teñidas de primitivismo y anclada en viejas mitologías, mientras que para otro representarían la vanguardia de un nuevo pensamiento político y la antesala de una nueva cultura» (GUDYNAS, 2010, p. 01).

knowledge, their culture, their ways of life and their relationship with their environment» (CAVEDON; VIEIRA, 2011, p. 68)¹⁶.

In addition, it is evident that environmental protection, which covers the preservation of nature in all «its aspects related to human life, aims to protect the environment as a result of the right to a healthy quality of life, in all its developments, being considered one of the aspects of fundamental human rights» (MAZZUOLI, 2008, p. 167)¹⁷.

With regard to environmental preservation, Edgar Morin and Anne-Brigitte Kern (2003, p. 70) emphasize that, due to the duty of precaution, there is a «need for an ecologized thinking that, based on the self-eco-organizing conception, consider the connection of any living, human or social system to its environment»¹⁸. Therefore, the New Constitutionalism of Latin America embodies the knowledge of traditional peoples, since, by constitutionalizing the Pachamama, positivized in the broader stigma of the normatization of a legal system the interdependence relationship between living beings. This new ecocentric paradigm, in turn, also activates the commitment to achieving sustainability, especially in its humanist bias.

This thought brought about a change in environmental rationality, where the human being gets involved with nature, allowing development to happen with a view to protecting and preserving the environment. Nature being a bearer of rights, as proclaimed by the Ecuadorian Constitution, in its art. 71, for example, allows sustainability to have a more humanistic bias, in addition to bringing an ecocentric view of the environment that protects Mother Earth. With this, sustainability reaches a level other than just the economic and capitalist bias and moves to a more human, fair and solidary bias of economic growth. Therefore, the concept of sustainability transcends capitalism and seeks a new rationality based on respect for nature and human beings.

¹⁶ «O ambiente natural ou construído e as diversas formas de apropriação material e simbólica do mesmo pelas comunidades a partir de seus saberes, de sua cultura, de suas formas de vida e de relação com o seu meio» (CAVEDON; VIEIRA, 2011, p. 68).

¹⁷ «Os seus aspectos relativos à vida humana, tem por finalidade tutelar o meio ambiente em decorrência do direito à sadia qualidade de vida, em todos os seus desdobramentos, sendo considerado uma das vertentes dos direitos fundamentais da pessoa humana» (MAZZUOLI, 2008, p. 167).

¹⁸ «Necessidade de um pensamento ecologizado que, baseando-se na concepção auto-eco-organizadora, considere a ligação de todo sistema vivo, humano ou social a seu ambiente».

When describing sustainability, it is worth highlighting that it touches on a temporal dimension «by comparing the characteristics of a given ecological and socio-cultural context in the past, present and future. The former serves as a sustainability parameter, while the latter requires the definition of the desirable state of society in the future» (RATTNER, 1999, p. 234)¹⁹.

Although sustainability (and not sustainable development) is in evidence, it is important to clarify that, according to Ignacy Sachs (2002, p. 35), the pillars of sustainable development are «the criteria of social relevance, ecological prudence and economic viability»²⁰. However, in recent times, the humanist perspective has received a highlight that needs to be considered. Thus, when addressing sustainable development and sustainability, there is no way to disregard the humanistic character.

Therefore, it is appropriate to add that humanistic sustainability means interacting in the world without compromising the future for the sake of collective well-being. Thus, it is evident that a major progress in the delimitation of sustainability is «represented by the growing consensus that this requires and implies political democracy, social equity, economic efficiency, cultural diversity, protection and conservation of the environment» (RATTNER, 1999, p. 240)²¹. It does not mean that the tripartite perception of sustainable development (economic, social and environmental) is out of step, but it is necessary to understand that there are many underpinnings. One can even apprehend that a design that encompasses all sustainability segments is urgent, so the humanist perspective is the one that could risk this trend.

As noted earlier, the fixation of Pachamama in the New Latin American Constitutionalism, which praises cultures and traditions, enhances the rights of nature and, in turn, the idea of integral ecology, encompassing sustainability. Therefore, the connection between traditional peoples and sustainability takes place in the environmental dimension of social territories expressed «in the ecological sustainability of the occupation by these peoples over long periods of

¹⁹ «Pela comparação de características de um dado contexto ecológico e sociocultural no passado, presente e futuro. O primeiro serve como parâmetro de sustentabilidade, enquanto que o último requer a definição do estado desejável da sociedade no futuro» (RATTNER, 1999, p. 234).

²⁰ «Os critérios de relevância social, prudência ecológica e viabilidade econômica».

²¹ «Representado pelo consenso crescente que esta requer e implica democracia política, equidade social, eficiência econômica, diversidade cultural, proteção e conservação do meio ambiente» (RATTNER, 1999, p. 240).

time, based on the forms of exploitation that do not deprive their respective ecosystems» (LITTLE, 2003, p. 275)²².

In this way, traditional knowledge constitutionalized in Latin America is relevant to establish ecological awareness of environmental preservation and to promote humanistic sustainability as a means of identifying living conditions against attitudes that degrade nature. The scope of this perspective is as costly as that of human rights, but it is not an unattainable fantasy. When considering the knowledge of traditional peoples in a Political Charter, there is progress; when the aforementioned knowledge raises awareness of the interdependence relationship between living beings, there is an advancement; when constitutionalism makes nature a subject of rights, it is possible to believe in the realization of humanistic sustainability.

In this sense, the fact is that the challenge imposed is none other than that of: «[...] affirm the rights of traditional peoples to their knowledge of biodiversity. This means maintaining complex knowledge about the ecosystems that they have helped to preserve today. The issue is marked by an urgency to think of biodiversity and the rights of traditional populations as a field of reflection for political ecology. Understanding the relationship between traditional peoples and nature requires an effort to operate with the complexity, contradictions and interests present in the agendas of the negotiations that are articulated in international spheres» (CASTRO, 1998, p. 14)²³.

The need to make a broader effort in favor of integrating the ethno-knowledge of traditional populations is highlighted, so that it is possible to go on «a process of gradual integration of knowledge, practices and heritage techniques in decision-making about the use of space for a long time inhabited and used by

²² «Na sustentabilidade ecológica da ocupação por parte desses povos durante longos períodos de tempo, baseada nas formas de exploração pouco depredadoras de seus respectivos ecossistemas» (LITTLE, 2003, p. 275).

²³ «[...] afirmar os direitos dos povos tradicionais aos seus saberes sobre a biodiversidade. Isso significa manter um conhecimento complexo sobre os ecossistemas que ajudaram até hoje a preservar. A questão é marcada por uma urgência de pensar a biodiversidade e os direitos de populações tradicionais enquanto campo de reflexão da ecologia política. O entendimento das relações entre povos tradicionais e natureza exige um esforço de operar com a complexidade, as contradições e os interesses presentes nas pautas das negociações que se articulam nas esferas internacionais» (CASTRO, 1998, p. 14).

the traditional resident» (DIEGUES, 2000, p. 72)²⁴. In this integrative field, based on the ideas around Pachamama and the rights of nature, humanistic sustainability takes root and fixes the other dimensions.

That said, it is observed that Marcos Leite Garcia, William Paiva Marques Júnior and Liton Lanes Pilau Sobrinho (2014, p. 989) assert that in order to arrive at a stronger definition of sustainability, «[...] one must study the transnational demands that the people of the planet must face. And only with regional integration policies will it be possible to reach a possibility of finding a solution for understanding between peoples [...]. The New Latin American Constitutionalism can be a light, since consumer societies will be able to learn a little with the consideration of nature as a subject of law and also as a simpler way of living (*bien vivir*) and the consideration of land as our mother (*pachamama*). The future of the human species involves an improvement in the quality of life of the vast majority of the world population and awareness that only with a simpler life can one survive»²⁵.

This simpler conception of life is related to the notion of a more sustainable existence, especially from a humanistic point of view, a situation justified by the consideration of fraternity and by the commitment to collective and environmental well-being. It is important to emphasize that the term humanist when associated with sustainability, in spite of it seeming mixed up, belongs to the change from an anthropocentric perspective to the ecocentric paradigm, since the term humanist does not mean to dispose the human condition above all, but it has the sense of contemplate the interests of the community, taking into account the particularities of the various social segments, in line with the preservation of the environment and economic balance.

²⁴ «Um processo de integração gradativa do conhecimento, dos fazeres e das técnicas patrimoniais nas tomadas de decisões sobre o uso do espaço por longo tempo habitado e usado pelo morador tradicional» (DIEGUES, 2000, p. 72).

²⁵ «[...] deve-se estudar as demandas transnacionais que os povos do planeta devem enfrentar. E somente com políticas de integração regional é que se poderá chegar a uma possibilidade de encontrar uma solução para o entendimento entre os povos [...]. O Novo Constitucionalismo Latino Americano pode ser uma luz, uma vez que as sociedades de consumo poderão aprender um pouco com a consideração da natureza como sujeito de Direito e assim também como uma forma de viver mais simples (*bien vivir*) e da consideração da terra como nossa mãe (*pachamama*). O futuro da espécie humana passa por uma melhoria na qualidade de vida da grande maioria da população mundial e de uma conscientização de que somente com uma vida mais simples se poderá sobreviver».

It happens that, in spite of a gradual change from the anthropocentric paradigm to an ecocentric paradigm, it is possible to perceive that «the human being is the main agent of environmental transformations and that his personal or even social and political choices remain, in a certain way, followed in an ecologically unsustainable way» (CALGARO, HOFFMANN, 2018, p. 14)²⁶. Such an itinerary of ecological unsustainability needs to be eradicated by expanding the possibility of effecting humanistic sustainability.

Leandro Carlos Dias Conde (2012, p. 800) states that the humanist approach recognizes social processes of dissimilar human groupings and their worldviews (such as cosmology, meanings and values); adds the importance of understanding that individuals «actively interfere in the social environment and, through the agency, can transform nature and its surroundings. Therefore, it is necessary to have an approach that considers all the particularities of the different social groups inserted in its space»²⁷.

Thus, «cooperation, compassion and solidarity are vital values for survival and quality of life. Conscious and active participation in decisions about your own life and collective life gives meaning to human commitment» (RATTNER, 1999, p 240)²⁸. Consequently, it can be seen that the growth of the notion of collective at the expense of the individualistic view is one of the factors that contribute to the expansion of humanist sensitivity and sustainability.

Rafael Padilha dos Santos (2015, p. 92-93) highlights that today, society is experiencing a crisis in humanism, so it is necessary to reflect a new humanism or a rescue «of the human being in his excellence and dignity. What all these characters of humanism teach us is the challenge of centering human beings on their duty to exist in the world to be propositive of resolute solutions that dignify human life»²⁹.

²⁶ «O ser humano é o principal agente das transformações ambientais e que as suas escolhas pessoais ou mesmo sociais e políticas continuam sendo, de certa maneira, trilhadas em um caminho ecologicamente insustentável» (CALGARO, HOFFMANN, 2018, p. 14).

²⁷ «Interferem ativamente no meio social e, através da agência, podem transformar a natureza e seu entorno. Para tanto, é necessária uma abordagem que considere todas as particularidades dos diferentes grupos sociais inseridos no seu espaço».

²⁸ «Cooperação, compaixão e solidariedade são valores vitais para sobrevivência e qualidade de vida. Participação consciente e ativa nas decisões sobre sua própria vida e a vida coletiva dá significado ao empenho humano» (RATTNER, 1999, p 240).

²⁹ «Do próprio ser humano em sua excelência e dignidade. O que todos esses caracteres do humanismo nos ensinam é o desafio de centrar o ser humano no seu dever de existência no mundo para ser propositivo de soluções resolutivas que dignifiquem a vida humana».

Therefore, the knowledge of traditional peoples already constitutionalized in some Latin American states, which exalt the protection of Mother Earth and environmental preservation, reveals the possibility of realizing humanist sustainability, especially since man is no longer the basic focus, and starts to perceive itself as part of the whole that cannot be compromised, as it would harm present and future generations. It is essential that humanist sustainability is considered in discussions about the New Latin American Constitutionalism due to the link of ecological sensitivity that connects them.

4. The paradigmatical case of Brazil: challenges and possibilities in trine federalism

The situation in Brazil deserves some lines of approach concerning evolving legal aspects. These aspects culminate in the 1988 Constitutional Charter, in the verification of real situations that, unfortunately, are disconnected from the constitutional frameworks and, finally, in an evaluation of the Brazilian peculiarity, characterized by its own unique model of federalism at three levels.

In the perspective of historical-legal evolution, it is clear that the environmental protection system can be considered young compared to other countries. At the end of the 1960s, with the rise of the oil crisis, the rupture of chemical storage tanks in the city of Seveso, in northern Italy, in 1976, and the accident of the oil tanker Amoco Cadiz, in 1978, on the coast of Brittany, the idea of protection and quality of the environment was reviewed, as they were not compatible with economic development. In 1972, in Sweden, the first Stockholm Conference took place, with the purpose of organizing the relationship between the environment and man, with the adoption of policies that would control environmental pollution.

From this Conference, Brazil, in its state and federal spheres, created the environment offices, with the appearance of the first environmental movements. In 1980, some laws were enacted, such as Law N° 6,803 of 1980, which was based on the guidelines for industrial zoning in critical pollution areas, as well as Law N° 6,902 of 1981, disposing about the creation of environmental protection areas and biological stations. The milestone occurred with the advent of the National Environmental Policy, Law N° 6,938 of 1981. This rule creates the national environmental system, SISNAMA, raising protection at both specific and global levels, composed of all federal entities.

However, the mention of environmental issues can be analyzed in the following rules: on 12/31/1923, the Decree No. 16,300 was drafted, which provided for health and sanitation, aiming at pollution control and prohibiting installations of harmful industries close to residences. Still, it can be observed in the 1934 Constitution, which now contains provisions related to environmental issues. But it is in the 1988 Constitution that it is observed, specifically, in Chapter VI, article 225, a matter related only to the Environment.

Article 225 of the Brazilian Constitutional Charter states that everyone has the right to an ecologically balanced environment, a good for the common use of the people and essential to a healthy quality of life, imposing on the Public Power and the community the duty to defend and preserve it for the present and future generations. In its first paragraph, it is stated that: To ensure the effectiveness of this right, it falls upon the Public Power: I - to preserve and restore essential ecological processes and to provide ecological management of species and ecosystems; II – to preserve the diversity and integrity of the country's genetic heritage and supervise entities dedicated to the research and manipulation of genetic material; III - to define, in all Federation units, territorial spaces and their components to be specially protected, allowing alteration and suppression only through law and prohibiting any use that compromises the integrity of the attributes that justify their protection; IV – to require, in accordance with the law, a prior environmental impact study, which will be made public, for the installation of a structure or activity potentially causing significant degradation of the environment; V – to control the production, commercialization and use of techniques, methods and substances that pose a risk to life, quality of life and the environment; VI – to promote environmental education at all levels of education and public awareness for the preservation of the environment; VII – to protect fauna and flora, prohibiting, in accordance with the law, practices that put their ecological function at risk, cause the extinction of species or subject animals to cruelty.

In the second and third paragraphs respectively: §2º Whoever exploits mineral resources is obliged to recover the degraded environment, according to the technical solution required by the competent public agency, in accordance with the law. §3º The Conducts and activities considered harmful to the environment will subject violators, individuals or legal entities, to criminal and administrative sanctions, regardless of the obligation to repair the damage caused.

The Environmental Crimes Law, number 9,605 of February 12, 1998, regulates Art. 225, third paragraph, which says that: «the conduct and activities considered harmful to the environment will subject violators, individuals or legal entities, to criminal and administrative sanctions, regardless of the obligation to repair the damage caused», it is emphasized that there are criminal and administrative sanctions.

«Article 3: legal entities will be administratively, civilly and criminally liable, in accordance with the provisions of this Law, in cases where the infraction is committed by decision of their legal or contractual representative, or their collegiate body, in the interest or benefit of their entity.

Single paragraph: The liability of legal entities does not exclude that of individuals, authors, co-authors or participants in the same fact».

«Article 21. The penalties applicable alone, cumulatively or alternatively to legal entities, in accordance with the provisions of 3º art., are:

I - fine;

II - restrictive rights;

III - provision of services to the community».

«Article. 22. Penalties restricting the rights of the legal person are:

I - partial or total suspension of activities;

II - temporary interdiction of establishment, work or activity;

III - prohibition of contracting with the Government, as well as obtaining subsidies, grants or donations from it».

The position of the Superior Court of Justice and of indoctrinators such as Édis Milaré say that legal entities can be criminally liable, but should be jointly with an individual. The decisions of this superior court emphasize that the Public Prosecutor's Office (*Ministério Público* - MP) cannot issue a complaint solely and exclusively against the legal entity, but must, at least, list one individual to the case, under penalty of the initial one being invalid. (Special Appeal 610,114 from the State of Rio Grande do Norte).

In the case of environmental crimes, for the Superior Court of Justice, legal entities are liable to be charged, provided that the moral entity and the natural person acting on their behalf are also charged. In this regard: Motion for clarification in Special Appeal 865,864 of the State of Paraná, Referendary Minister Adilson Vieira Macabu (Judge of the Rio de Janeiro State Court of Justice), Fifth Panel, judged on 10/20/2011.

The indoctrinators of this chain and the court understand that the wording of article 3 of Law number 9.605/98 provides that legal entities will be liable in cases where the infraction is committed «by decision of their legal or contractual representative, or of their collegiate body, in the interest or benefit of their entity».

The legal person can be criminally punished for environmental crimes even though there is no liability of individuals. That happens because it is often not possible to identify which people were involved in the specific case, but, as the objective was to increase the capital or the influence of the company, it must therefore be punished, especially in environmental cases, in which the damages are extensive and often irreversible.

However, if there is a possibility to punish, also and together, the individuals involved in the crime, this should be done. Because the penalty, when it directly affects the individual, better punishes the conduct, which would probably commit other crimes, even on behalf of the company.

But the constitutional and infra-constitutional provision is not reflected in Brazilian practice. In this sense, the situation in the Amazon is negatively highlighted. According to WWF, one in three fires in the Amazon is related to deforestation. The organization also found that, in eight months of 2019 - the beginning of the controversial and tumultuous Bolsonaro administration and its Minister, Mr. Salles -, the total area with deforestation alarms was 6,000 km², 62% more than that observed in the same period in 2018. Environmental aggressions are an expression of the imposition of the interest of a few in the world of everyone. The struggles against environmental aggressions and the respect for the environmental rights of the population are struggles to guarantee the public character of the environment.

The national environment policy - from 1981 - was accepted by the constitutional order as a complementary law, under the terms of article 23 of the Constitution. Since the right to the environment is considered a third dimension constitutional right, inserted in the social order, it needs a joint effort. Thus, when the division of material competence between the various federal spheres occurred, article 23 of the constitutional order determined the tutelage common to all entities, in the protection of the environment, as well as the fight against pollution in any form and the preservation of fauna, flora and forests.

«Art. 23. It is the common competence of the Union, the States, the Federal District and the Municipalities: VI - to protect the environment and fight pollution in any of its forms; VII - preserve forests, fauna and flora».

The reading of the constitutional rule refers to the reflection of the importance of local power, in this case, the municipalities, in matters of environmental protection. It considers that the protection of the environment remained included in the list of common competences. The Union, states, federal district and municipalities are competent - collectively - to carry out the implementation of public policies in the area under debate. In this sense, article 225 also imposes on the public power the preservation of the environment, which means the responsibility of all federal entities. Therefore, these articles are complementary, determining the need for the state to act at all levels. In addition, complementary law No. 140 of 2011 reaffirmed the need for cooperation between entities to protect the environment.

It is precisely here that the peculiarity of the Brazilian federation resides. The 1988 constituent elevated municipalities to the category of federative entities. Thus, the organization of the Brazilian structure provides for three levels of management, all autonomous and directly linked to the constitution. In addition to the central government and subnational entities, which are the states of the federation (Rio Grande do Sul, Pernambuco, Bahia, among others), we verified 5000 municipalities. Almost 1000 more than in 1990.

And how does this organization, which can present complexity, especially when it comes to common administrative skills, articulate and, mainly, interrelate and respect at the same time the constitutional principles, in the specific environmental case?

At this point, according to the reading of article 23, previously made, there is a clear positive conflict of competences, in which several entities must act concurrently. It is in this context that it is appropriate to discuss an extremely well-known principle in Europe, namely subsidiarity. Especially in its internal administrative dimension, as evidenced in the European Charter of Local Autonomy, in its fourth article, item three, which says: «as a general rule, the exercise of public responsibilities should preferably be the responsibility of the authorities closest to the citizens. Assigning responsibility to another authority must take into account the span and nature of the task and the requirements for efficiency and economy».

This principle, according to Professor Baracho, from the Federal University of Minas Gerais, is implicit in the Brazilian Charter, resulting from the notions of federalism, decentralization and democracy. Thus, it is an important principle in the organization of actions in favor of the environment.

The internal dimension brought by the European Charter of Local Autonomy manifests itself in two aspects: the vertical and the horizontal. In the situation of positive conflict, the subsidiarity approach is given from the vertical perspective, as it acts as a guide for the division of competences, emphasizing cooperation between the entities. This cooperation is carried out - not in all cases - first by the municipality, while the others would only act if really necessary. Thus, specifically related to the environmental issue, the trend towards an expansion of local autonomy corroborates the use of the principle.

One can think of a way to reinterpret competence, highlighting the municipality before the other entities, as it is effectively articulated with the population. This interpretation would favor decision-making, observing the ideal of subsidiarity and cooperation, starting from the entity closest to the citizen. This point of analysis can guarantee greater effectiveness of the competence, since the local manager is the one who knows the reality, making it easier to face the problems, especially due to the idea of belonging. The Union and the States, subnational entities, would only deal with the fulfillment of issues in which the lower entities and would not have the same effectiveness in the execution of such public policies.

The reinforcement of environmental management by the local entity is in accordance with the precepts of the principle of subsidiarity, which may have a greater effectiveness of rules, complying with the provisions of the Federal Constitution of 1988, especially when it comes to article 225. However, it does not mean that all the attributions of the matter should fall on the municipalities, since subsidiarity acts as a parameter of interpretation for the different situations in which there is no exclusive competence expressed and listed in favor of any entity.

However, we need to pay close attention to the fact that local decisions, without articulation in a national system, can, in practice, enforce rules that mitigate and reduce the effectiveness of environmental protection. Decisions resulting from local oligarchies that relativize protection must be countered. In addition, subsidiarity is never applied *contra legem*, that is, when the legislation reserves to the Union and States a specific theme.

It is in this context that the Brazilian National Environment System (SISNAMA) is inserted, which is a structure adopted for environmental management in Brazil, formed by the bodies and entities of the Union, the States,

the Federal District and the Municipalities responsible for the protection, improvement and recovery of environmental quality in Brazil.

Thus, the performance of IBAMA (Brazilian Institute of the Environment and Renewable Natural Resources), which represents the Union, and which should only intervene in the cases of Complementary Law 140 of 2011, and of state bodies, is essential, but there are several issues that are covered by these general rules or even related to guidelines of local scope in which the municipalities will be competent for licensing.

It is about the need for a constitutionally connected, integrated and related local power in which the Master Plan and the local environmental zoning must follow National and State laws and, above all, the great environmental constitutional principles already mentioned. Therefore, municipal legislation may expand environmental protection, never mitigate.

Thus, local power must be related to subsidiarity, while reinforcing the importance of municipalities and their role in environmental issues - notably in environmental licensing, environmental zoning in the master plans - and establishes that local action must materialize the constitution.

5. Final considerations

Nature needs to be seen in a different way by today's modern society, because the current paradigms make it exist and bring protection and preservation mechanisms that do not correspond with the real existing problem. The new tendency of Ecuadorian and Bolivian constitutionalism mentioned above brings a worldview of protection to nature and the peoples that compose it. These Constitutions bring about changes in democracy, allowing popular participation to protect the rights of Pachamama, in addition to recognizing the identity of peoples, expanding the list of fundamental rights. Latin American constitutionalism proposes a different form of political and social reality, allowing the emergence of a new constitutional paradigm and a new social rationality.

This constitutionalism prioritizes the recognition of a current vision based on "good living" and the rights of nature, adopting a new constitutional and cultural standard of awareness for humanist sustainability. It is known that the Constitutions are a process of evolution of the States allowing social, legal and political changes to be inserted and achieved through the social evolution of a

Nation. These achievements come from struggles and popular participation that aim to promote a constitutional text and democracy. With that, Ecuador and Bolivia - countries mentioned in the work - aim to protect the rights of human beings and nature, seeking new environmental and social trends. This allowed for a change in rationality and new thinking in today's modern society. It is known that these countries face difficulties in implementing the current constitutional precepts, but even so, the change in the paradigm that was in force in the social context allows to start, with a short step, a new vision of society and environmental preservation and protection.

Constitutionalism becomes a theory of democratic advancement of the Constitution, in which the rights of nature and its protection come to be protected together with the human beings that compose it. With this, sustainability based on a humanistic bias can be achieved and embodied in society.

In this sense, humanistic sustainability cuts across the spheres of the economic and turns to the socio-environmental, building an economy that is sustainable, using natural resources in a rational way and respecting the human being itself. Alternatives for this could be implemented more strongly, such as: the reforestation of degraded areas, the effective implementation of fundamental rights to citizens, basic sanitation, the rational management of water and natural resources, the restructuring of agriculture with less use of pesticides, etc. These may be some of the various alternatives to be proposed, ranging from the environmental to the social bias.

Therefore, it is necessary to change the existing inertia and seek a new direction for the future where the balance and harmony of the economic system with society and the environment are constantly evolving. Democracy is still the best system for growth and the participation of all in society, as the evolution of sustainability will be represented by the consensus of all who make up the social sphere, implying social and environmental equity, income redistribution, reduction and extinction of social and poverty inequality, economic efficiency, cultural diversity and the protection and preservation of the environment.

Evidently, all of this in the ideal plan, in Brazil, seems to be well established. However, some reflections as a conclusion should be presented to end the presentation and start some discussion points.

- The Municipality has legislative autonomy, respecting what determines the constitution in the field of competences and the master plan. The latter is an important local instrument that becomes a municipal rule and that

cannot be subject to concentrated constitutionality control with the Supreme Federal Court, as it is restricted to union and state laws. Thus, we may have difficulty keeping away from the legal system, with *erga omnes* effect, the local laws of territorial ordering - and, therefore, with reflexes on the environment - that eventually suppress or reduce areas of environmental preservation and, what is even more serious, permanent preservation areas, according to the rules defined in State or Federal legislation. The control bodies, public prosecutors, in relation to the removal of concrete effects also prove to be ineffective numerous times;

- The capacity for environmental licensing by the municipality can serve as a way of legitimizing decisions by large construction groups and the lack of clarity and efficiency of the SISNAMA - National Environment System can make it difficult to revoke these authorizations. As an example, the phenomenon of high luxury closed condominiums in areas that invade the fauna habitat;

- Even the national bodies that should articulate and, when necessary, limit local action, end up reflecting the ideological policy on duty. This happens especially at a time when Brazil is experiencing a radical turn to the right, in which senior environmental managers in practice are protagonists in the speeches of the great landowners and rural producers.

Finally, in addition to showing itself to be a very *sui generis* structure, given the multiplicity of spheres of power, with three levels of autonomy, Brazil does not have a clear way of administrative and judicial control - the latter for lack of direct action with the supreme court of municipal norms and even for not having, in specific cases, structure for a continental country.

We are far from the Latin American myth of Pachamama and still extremely linked to the governments of the occasion, regardless of their spheres. Spaces like these, such as we are now, allow us, from the exchange, especially of world anxieties, to advance to a more rational and balanced level of relationship between the public administration, the legislature and the environmental protection.

Between the constitutional provision of environmental protection and federated cooperation and the reality recently experienced in Brazil, there are immense gaps, which overcoming goes far beyond legal science, requiring an inter and transdisciplinary approach and concern.

ABSTRACT

Ricardo Hermany, Cleide Calgaro, Talissa Truccolo Reato –
*Environment for development in the Latin American legal system: the
paradigmatical case of trine federalism in Brazil*

This article discusses how Latin American constitutionalism can provide a humanistic vision of sustainability. It aims to demonstrate that it is possible in today's modern society to envisage the protection of the rights of nature and human beings to both reach levels of dignity. For that, the analytical method was used from the study of doctrines about the proposed question. It is concluded that it is possible to achieve a humanistic sustainability based on

Latin American constitutionalism that protects nature as a subject of rights beyond the protection of human beings in their dignity.

KEYWORDS: *Environment; Latin American constitutionalism; humanistic sustainability; rights of nature; local power.*

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