

Beyond the State: Can State Law Survive in the Twenty-First Century?

DANIEL BONILLA MALDONADO*

The classic nation-state was the legal and political structure that shaped Latin American political communities since their independence from the Spanish and Portuguese empires in the nineteenth century and until the end of the twentieth century (see also Sections 5.1–5.3).¹ This model of state intended to create a culturally homogeneous, legally monist, and politically sovereign polity structured around the grammar of modern constitutionalism.² However, this form of state was a normative project which was historically at odds with the social realities of Latin America and that was only partially materialized in the region (see also Section 5.3).³ On one hand, there was tension between the monocultural nature of the model and the cultural diversity that has characterized Latin American political communities since the days of colonization.⁴ Indigenous and African-American peoples, among other non-dominant cultures, were ignored by a legal, political, and cultural project that aimed to create a white, Catholic, and Spanish- or Portuguese-speaking nation in each of the region's countries.⁵ Policies of assimilation, integration, or violent elimination implemented by the Latin American nation-states in order to achieve monoculturalism were not able

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- 1 H. J. König, "Discursos de identidad, Estado-nación y ciudadanía en América Latina: viejos problemas, nuevos enfoques y dimensiones," *Historia y Sociedad* 11 (2005), 18–19.
- 2 P. Hirst and G. Thompson, "Globalization and the Future of the Nation State," *Economy and Society* 24 (1995), 408–42.
- 3 König, "Discursos de identidad," 19.
- 4 G. Kirkpatrick, "Spanish American Narrative, 1810–1920," in J. King (ed.), *The Cambridge Companion to Modern Latin American Culture* (Cambridge: Cambridge University Press, 2004), 62.
- 5 König, "Discursos de identidad," 15; Kirkpatrick, "Spanish American Narrative," 63.

to eliminate minority cultures and therefore failed to configure culturally homogeneous nations.⁶

On the other hand, the states' legal systems were not always applied throughout the territory or to all citizens. The idea that each state would have a single legal system that should be universally applied was not fully realized (see Section 6.1). The state's official law and administrative apparatus were not always able to operate throughout the respective national territory or to obligate all citizens. Likewise, state law competed with other normative orders, such as indigenous legal systems, informal normative orders of the peripheral neighborhoods in some cities of the region, and rural justice systems for the control of individuals' consciences and behaviors (see also Chapters 2 and 4 and Sections 3.1 and 5.3).⁷ Finally, the project of creating a legal and political unit that was (internally) autonomous and (externally) independent was not fully materialized either. The theoretical absolute sovereignty of states clashed with the constellation of sovereignties that existed in their territories in practice. Latin American states didn't always monopolize the political power or the capacity to create law, nor did they have the monopoly of force within their societies.⁸ Internally and externally, the state competed with other sources of legal creation and political action, and with other agents, such as indigenous authorities and criminal organizations, that established coercive apparatuses in some segments of their territory.

The sovereign, monocultural, and monist model of state dominant in Latin America underwent important transformations at the end of the 1980s and the beginning of the 1990s.⁹ During these years, a wave of constitutional reforms that aimed to confront the legitimacy deficits of the prevailing state model, its inefficacy, and the separation between social reality and its political and legal structures, as well as to eliminate the discursive and practical questioning of

6 K. von Benda-Beckmann and B. Turner, "Legal Pluralism, Social Theory, and the State," *The Journal of Legal Pluralism and Unofficial Law* 50(3) (2018), 256; F. López-Álves, "Nation-states and National States: Latin America in Comparative Perspective," in M. Hanagan and C. Tilly (eds.), *Contention and Trust in Cities and States* (New York: Springer, 2011), 118–19.

7 R. Sieder, "Legal Pluralism and Fragmented Sovereignties: Legality and Illegality in Latin America," in R. Sieder, K. Ansolabehere, and T. Alfonso (eds.), *Routledge Handbook of Law and Society in Latin America* (New York: Routledge, 2019), 60.

8 J. Lemaitre, "Law and Violence in Latin America," in R. Sieder, K. Ansolabehere, and T. Alfonso (eds.), *Routledge Handbook of Law and Society in Latin America* (New York: Routledge, 2019), 90.

9 R. Z. Yrigoyen, "El horizonte del constitucionalismo pluralista: del multiculturalismo a la descolonización," in C. Rodríguez (ed.), *El derecho en América Latina. Un mapa para el pensamiento jurídico del siglo XXI* (Buenos Aires: Siglo XXI Editores, 2011), 139–42.

the state monopoly of force, was set in motion.¹⁰ The constitutional reforms in Brazil (1988), Colombia (1991), Peru (1993), Bolivia (1994), Paraguay (1992), and Ecuador (1994), among other countries, sought to construct legally plural, multicultural states that would have an effective presence throughout the territory. More precisely, the multicultural constitutions that were drafted at the end of the twentieth century in Latin America acknowledge the cultural diversity that shapes the societies of the region, redistribute the political power and the capacity to create law among the various cultural communities that form them, and recognize a broad spectrum of rights.¹¹ These and other measures also aimed to apply the state's administrative apparatus and plural official law throughout the territory and to all citizens. In this way, the classic nation-state's project of creating a culturally homogeneous nation was replaced by one that recognizes, protects, and promotes cultural heterogeneity. Likewise, the legal monism that structured the nineteenth-century state project was substituted by a weak legal pluralism that complexifies processes of legal creation, although it continues to revolve around the vocabulary and grammar of modern constitutionalism.¹² The multicultural liberal model currently in place in numerous Latin American countries recognizes the existence of the cultural minorities' legal systems, primarily indigenous and occasionally Afro-Latin American ones, and it establishes a set of cultural rights that seek to protect and promote their cultural traditions.

However, in the first decade of the twenty-first century, the multicultural liberal model was itself replaced in some Latin American countries, such as Ecuador (2007) and Bolivia (2009), by a radical intercultural model that offers a new form of imagining states in the region. This model is structured around the principles of plurinationality and interculturality, and it deepens the weak legal pluralism that had already been recognized in the multicultural legal model.¹³ This new normative project seeks to reconceptualize how the constitutive discourses and practices of a culturally diverse state are conceived, while simultaneously delving into some of the multicultural processes that had been initiated with its predecessor. However, both models, the multicultural liberal as well as the radical intercultural one, remain normatively

10 R. Uprimny, "Las transformaciones constitucionales recientes en América Latina: tendencias y desafíos," in C. Rodríguez (ed.), *El derecho en América Latina. Un mapa para el pensamiento jurídico del siglo XXI* (Buenos Aires: Siglo XXI Editores, 2011), 111–21.

11 Uprimny, "Las transformaciones," 122–25; Yrigoyen, "El horizonte," 139–43.

12 Yrigoyen, "El horizonte," 142.

13 D. Bonilla, "El constitucionalismo radical ambiental y la diversidad cultural en América Latina. Los derechos de la naturaleza y el buen vivir en Ecuador y Bolivia," *Revista Derecho del Estado* 42 (2018), 9.

committed to the idea that the states of the region must be absolutely sovereign. The state is the basic unit around which cultural groups as well as the international community, should be structured. In addition, the state must be completely autonomous and independent; it must be the supreme source of political and legal power within its territory, and it must not depend on any external entity, politically or legally. Nonetheless, both models formally open the national legal system to international law, through mechanisms such as the constitutional bloc, which will be described in greater detail below, and the increasingly copious incorporation of international treaties into the national system. The remarkable number of bilateral or multilateral treaties that were incorporated into the national legal orders over the last thirty-six years, or the systematic and continuous application of treaties like those of the Inter-American Human Rights System, further enrich the weak legal pluralism that is at the heart of both these models (see Section 6.3). These bilateral and multilateral treaties also exert external pressure on the traditional concept of sovereignty, demonstrating its porous discursive and practical nature.

Despite these attempts, the normative projects promoted by the multicultural liberal and radical intercultural states also failed to fully apply the internally plural legal systems that were constitutionally recognized throughout the territories under their jurisdiction. During the last three-and-a-half decades, to varying degrees and as occurred during the reign of the monocultural-monist state, Latin American states featured a constellation of sovereignties; they were not formed by a single central star, the state star, from which all the legal and political power within the state emanates. This way, official weak legal pluralism has coexisted with strong legal pluralism, as the official sources of law – which primarily include congress, regional legislatures, national and regional governments, and cultural minorities' authorities – compete, interact, are transformed, and overlap with other sources of legal creation and with illegal or extralegal political powers, such as paramilitary and guerrilla groups, drug-trafficking cartels, and community organizations.

In this constellation of sovereignties, the state legal system does not recognize other sources of legal creation. Rather, it tries to eliminate them. In like manner, alternative normative systems don't recognize state law, or they ignore it. Sometimes they try to suppress state law (subversive groups); at other times they violate it or apply it only selectively (community organizations); or they partially replace it, but without attempting to subvert state lawfully (drug-trafficking organizations). In all of these cases, the official and unofficial normative systems interact with and modify each other. For

example, the extralegal property systems that regulate the neighborhoods on the periphery of many Latin American cities use categories that are central in the official legal system, like “sale,” “promise of sale,” and “property,” but they give them different meanings. Present-day Latin American legal systems are therefore structured around the conceptual opposition of legal/illegal and legal/extralegal.

This chapter describes and examines the ways in which the sovereign, monocultural, and monist state that was dominant in Latin America starting in the nineteenth century mutated over the last thirty-six years and analyzes the legal and political elements that remained stable despite these formal transformations. It also demonstrates that, despite numerous predictions that the state would weaken or disappear altogether, it remains the political and legal unit around which twenty-first-century Latin American political communities are structured. For these purposes, the chapter is divided into two parts. The first includes three sections. In the first of these, I briefly examine the elements constituting the sovereign, monocultural, and monist state, as we can only understand the transformations experienced by Latin American states in recent history if we also understand the model which is undergoing this transformation, if we also get a grasp of the discursive and practical adversary being replaced. In the second section, I study the structural components of the multicultural liberal and radical intercultural models that replaced the classic nation-state model. In the third section, I explore the discursive and practical challenges generated by illegal or extralegal normative systems coexisting with the internally diverse state law recognized by the multicultural liberal and radical intercultural models. Consequently, in this section, I examine the strong legal pluralism that characterizes contemporary Latin American states. Thus, this first part studies the mutations or challenges generated primarily by internal pressures of three basic features of the classic Latin American nation-state: a homogeneous culture, a sole and universal state legal system, and absolute sovereignty.

The second part of this chapter explores the transformations or challenges experienced by the multicultural liberal and radical intercultural state primarily as a consequence of external variables and is divided into two sections. In the first, I analyze the concept of constitutional bloc and examine the Inter-American Human Rights System to illustrate how this concept operates. In the second section, I study the bilateral or multilateral treaties signed by Latin American States in the course of the last three-and-a-half decades, primarily. I argue that these external factors further pluralize the sources for creating law in contemporary Latin American states and make them more complex,

weaken the concept of absolute sovereignty they are committed to, and contribute to either questioning or protecting the cultural diversity recognized by the state models currently dominant in the region. The analysis of the external weak legal pluralism that characterizes Latin American states carried out in this second part of the chapter thus complements the analysis of internal weak legal pluralism undertaken in the first part.¹⁴ It closes with an examination of how the discourses and practices under study are connected with global processes. The transformations and challenges that Latin American states have experienced in the last thirty-six years are not unique. Rather, they are part of discursive and practical patterns that are also reproduced and reinterpreted, to varying degrees and with significant nuances, elsewhere.

The Sovereign, Monocultural, and Monist State

Latin American societies chose the nation-state model to organize themselves politically and legally after achieving independence from the Spanish and Portuguese empires in the nineteenth century (see also Chapter 4).¹⁵ Mimicking developments elsewhere, the Latin American elites who led these developments structured their political communities around the model of the nation-state, which drew on the Treaty of Westphalia as well as the revolutions in the United States and France as central conceptual and historical sources.¹⁶ These processes of creation therefore partially reproduced those leading to the creation of nation-states in Europe during the eighteenth and nineteenth centuries and, as of the second half of the twentieth century, also entered into dialogue with processes of decolonization in Asia and Africa.¹⁷

14 The constitutionality bloc and multilateral and bilateral treaties are not the only discourses and practices that constitute Latin American external legal pluralism. Other issues such as the interactions between private international law and national legal systems, the arrival and consolidation of large multinationals to the region, canon law, or the discourse of global legal pluralism are also part of or have impacted on this dimension of Latin American law and politics. I do not examine these last four issues for the following reasons: first, because, arguably, the constitutionality bloc and multilateral and bilateral treaties have played a central role in the construction of Latin American law in the last three and a half decades. These issues have structured or influenced constitutional issues in ways that private international law, the economic activities of large multinationals, or the discourse of global legal pluralism have not; second, for reasons of space, I cannot analyze all the issues that I would like to explore regarding Latin America's external legal pluralism.

15 König, "Discursos de identidad," 18–19.

16 Hirst and Thompson, "Globalization," 409–11.

17 D. Bonilla and M. Riegner, "Decolonization," in R. Grote, F. Lachenmann and R. Wolfrum (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford: Oxford University Press, 2020).

The state model they adopted revolved around the following six elements: (i) for each nation there should be a state; (ii) the nation exists prior to the state. The nation creates the state to give itself a political and legal form that protects, promotes, and allows it to flourish; (iii) each nation has a cultural *ethos*, an identity that distinguishes it from other nations. The nation is therefore culturally homogeneous; (iv) the state must be sovereign: internally it must be autonomous and externally it must be independent; (v) the state's law must reflect the nation's *ethos*. Law must be an epiphenomenon of culture. It is an instrument that the state has in order to protect and reproduce the nation's identity, not an instrument to transform it; and (vi) the legal system that reflects the nation's *ethos* must be applied throughout the state's territory; there should not be any other normative order that competes with it (see Sections 5.1 and 5.2).

The mimetic process of constructing postcolonial political communities in Latin America, which was conjugated with rich and complex creative processes within the chosen canon, was structured around three categories that shaped, interpreted, and concretized the elements that constitute the nation-state model: time, space, and subject. First, the moment of independence, which was achieved through violence, marks both a break with the empire and the emergence of a new political community.¹⁸ The existence of this new legal and political structure is both crystallized and formalized with the issuance of a constitution. After violence, law arises; the constitution signals the emergence of a new political community.¹⁹ It also formalizes victories achieved on the battlefield. Latin American postcolonial societies of the nineteenth century therefore decided on the structures required to shape the new political communities by means of legal and political processes that ended with the issuance of a constitution.²⁰ To do so, they decided how to interpret the colonial past²¹ and its links with both the post-revolutionary present and the future of the new political community.²² Constitutions therefore emerge as autobiographical texts; documents that determine who the new political communities were, who they are, and what they want to be (see Section 5.1).

18 T. Halperin-Donghi, *Historia contemporánea de América Latina* (Madrid: Alianza Editorial, 2005), 135–36.

19 H. G. Espiell, "El constitucionalismo latinoamericano y la codificación en el siglo XIX," *Anuario Iberoamericano de Justicia Constitucional* 6 (2002), 147–49.

20 R. Gargarella, *Latin American Constitutionalism, 1810–2010* (Oxford: Oxford University Press, 2013), 1–5.

21 Gargarella, *Latin American Constitutionalism*, 62–63.

22 *Ibid.*, 84–85.

To articulate their legal and political identities, Latin American postcolonial societies called upon the vocabulary and grammar of modern constitutionalism. The new constitutions were structured around categories like “state,” “nation,” “rights,” “citizen,” “separation of powers,” “president,” “congress” and “judges,” as well as the rules for applying and interpreting these categories.²³ Revolutionary violence led to the generation of a new political reality, a reality that consciously broke with the imperial and colonial past. Paradoxically, however, as the mimetic process around which the new political communities in Latin America were structured revolved around the concept of nation-state, it maintained political and conceptual ties with the imperial Europe that these communities wanted to break with.²⁴ Contrary to the independence of the United States, however, the Latin American revolutions did not end with the issuance of constitutions that then remained stable for a long period of time.²⁵ In the twentieth century, no fewer than 103 constitutions were enacted in the region.²⁶ Nevertheless, those that were promulgated between 1850 and 1900, the foundational period of Latin American constitutionalism, are the ones that consolidated the process of nation-state creation in the region.²⁷ Constitutions like those issued in Argentina in 1853, Colombia in 1886, Peru in 1860, Ecuador in 1869, and Brazil in 1891 form the bases for the Latin American nation-states – the states which, through multiple transformations, shaped the region’s political and legal life during the twentieth century.

Second, the post-revolutionary Latin American constitutions (centralist or federalist; liberal, conservative, or republican) constructed the new political communities around a particular conceptual geography: the sovereign state. This space is shaped around the three classic categories modern constitutionalism associates with the concept of state: territory, population, and administrative apparatus.²⁸ The post-revolutionary constitutions also characterize this conceptual geography as autonomous and independent. Internally, the state is an entity with the capacity to create the legal norms that govern it and to regulate the behaviors of its citizens.²⁹ Externally, it does not depend

23 Espiell, “El constitucionalismo,” 150.

24 T. Halperin-Donghi, *Historia contemporánea*, 135–36.

25 Gargarella, *Latin American Constitutionalism*, 1.

26 *Ibid.*, 1. 27 *Ibid.*, 20–43.

28 R. Michaels, “Globalisation and Law: Law Beyond the State,” in R. Banakar and M. Travers (eds.), *Law and Society Theory* (Oxford: Hart Publishing, 2013), 294.

29 H. Kelsen, *General Theory of Law and State* (Cambridge: Harvard University Press, 1949), 189.

on any other political organization, institution, or entity.³⁰ The heteronomy of the colonial period, with the imposition of Spanish or Portuguese law in the colonies as well as the political subordination to imperial institutions, was thus abandoned. The foundational Latin American constitutions indicated that the obligations of the new postcolonial legal and political spaces would always be self-imposed.

Postcolonial constitutions in Latin America therefore extrapolated the characteristics of the autonomous and rational subject (sovereign) from the liberal interpretation of the grammar of modern constitutionalism to the conceptual geographies they constructed to shape their political communities. The norms that govern the state should only be created within this legal and political space, just as the norms that regulate the individual's good life project should only be constructed within the individual's conscience. Consequently, no external entity has the power to impose norms on the state. Borders delimit the jurisdictions where the legal structures each state autonomously creates can be applied. Likewise, borders partially determine the state's identity; borders, like the bodies of individuals, define the contours that differentiate the political and legal "self" from the "other."³¹ The conceptual geography created by the Latin American constitutions is therefore understood as absolutely sovereign; according to it, a porous sovereignty would involve ceding the state's autonomy³².

In addition, within the state's borders, there should be only one legal order, which must be applied universally. The new political communities in Latin America would break with the colonial stratified society; they would distance themselves from a legal system formed by sets of norms that were only applied to particular social groups, such as the nobility, the clergy, the peasantry, and indigenous groups.³³ The state legal system would be applied throughout the territory and to all citizens. Consequently, the monist nature of the legal system that governed across Latin American postcolonial states was founded on central categories of modern constitutionalism like equality, autonomy, and legal security.³⁴ In addition, the monist legal system included a set of civil and political rights held by all citizens, in order to protect the autonomy and basic equality of

30 Michaels, "Globalisation," 297. 31 Michaels, "Globalisation," 294.

32 V. Das and D. Poole, "State and its Margins: Comparative Ethnographies," in V. Das and D. Poole (eds.), *Anthropology in the Margins of the State* (Oxford: Oxford University Press, 2004), 7.

33 López-Álvarez, "Nation-states," 120.

34 D. Bonilla, "Extralegal Property, Legal Monism, and Pluralism," *Inter-American Law Review* 40 (2009), 204–14.

all.³⁵ Based on a liberal interpretation of the grammar of modern constitutionalism, these rights also protect the particular forms and turns citizens give their national culture.³⁶ However, the particular culture that citizens autonomously commit to is assigned to the private sphere, privatized, and protected by means of individual rights, such as freedom of expression, freedom of conscience, and freedom of association.³⁷ Culture is important for the nation-state model. The societal culture that welds the nation together and gives it identity, as well as the cultures that citizens can generate within this common cultural framework, are constitutive elements of the nation-state model.

Third, the nineteenth-century postcolonial Latin American constitutions also constructed the transtemporal collective subject that both creates the state and exercises sovereignty within its borders: the nation. The nation imagined is a culturally homogeneous subject; a subject that is white, Catholic, and Spanish- or Portuguese-speaking. The mimetic construction of the new political communities makes another appearance. The Latin American nation that is thus forged is identical to the imagined nation of the old Spanish and Portuguese empires. It is a nation radically dissociated from the culturally diverse societies that actually existed in nineteenth-century Latin America (see also Section 5.3).³⁸ In this nation, indigenous peoples, Afro-Latin Americans, and mixed-race individuals, who together form the demographic majorities, are not included.³⁹ The nation constructed by the post-revolutionary constitutions is therefore in reality a normative project, not the reflection of a social reality.⁴⁰ Contrary to the legal and political model, the nation in Latin America, like the nation in Europe, does not exist prior to the state; the state constructs it, or intends to do so.⁴¹ In addition, the nation imagined in Europe and Latin America concentrates political power and the capacity to create law within the state; it is the transtemporal collective subject which inhabits the conceptual and material geography that is the state. The nation is also the collective subject that determines the purposes of the state by the direct or indirect creation of the law that is applied within its borders – a law that should reflect the *ethos* that supposedly characterizes it.

35 R. Gargarella, "Sobre el 'nuevo constitucionalismo latinoamericano'," *Revista Uruguaya de Ciencia Política* 27 (2018), 114.

36 T. Modood, *Multiculturalism* (Cambridge: Polity, 2013), 20–23 and 29–30.

37 L. Stroubouli-Lanefelt, *Multiculturalism, Liberalism and the Burden of Assimilation* (Stockholm: Stockholm University, 2012), 25–26 and 59–60.

38 F. López-Álves, "Visions of the National: Natural Endowments, Futures, and the Evils of Men," in M. A. Centeno and A. E. Ferraro (eds.), *State and Nation Making in Latin America and Spain* (Cambridge: Cambridge University Press, 2013), 256.

39 Espiell, "El constitucionalismo," 158–60. 40 *Ibid.*, 156.

41 López-Álves, "Nation-states," 114.

In France, for example, the paradigmatic nation-state, no culturally homogeneous group existed before the creation of the French state; the French culture that has historically been associated with, among other things, rationalism, Catholicism, and the French language, did not exist. Rather, there was a set of heterogeneous cultural groups: the Bretons, the Gauls, and the Celts, to name some, who spoke their own languages and adhered to various religions including Catholicism, animism, and paganism. With the revolution of 1787, the process of constructing the French nation-state, which had been initiated by the absolute monarchies of Louis XIV and Louis XV, intersected with liberalism. As a result, the constitution of 1791 declared the French state to be a constitutional monarchy structured around individual rights.⁴² The Colombian constitution of 1886 and the Argentine constitution of 1853, paradigmatically reproducing the sovereign, monist, and monocultural state model that prevailed in the Latin American region until the end of the twentieth century, also partially mimicked processes similar to the ones that constructed the French nation and justified the constitution of 1791.⁴³ Eventually, other communities in other geographies would have to face similar challenges, for example in Asia and Africa with what has been called the move from Westminster to Eastminster in the postcolonial constitutions of India, Sri Lanka, Malaysia, and Ghana,⁴⁴ among others, and the construction of the independent states of French-speaking Africa such as Algeria.⁴⁵

The Liberal Multicultural State and Weak Legal Pluralism

At the end of the 1980s and beginning of the 1990s, Latin America experienced a wave of constitutional changes. These constituent processes had the primary objectives of addressing the states' deficit of legitimacy⁴⁶;

42 W. Safran, "State, Nation, National Identity, and Citizenship: France as a Test Case," *International Political Science Review* 12(3) (1991), 219–38.

43 I do not elaborate on these examples as Chapter 5 of this book examines them in detail. Other examples can be found in the Chilean constitution of 1833, articles 1, 2, 3, 4; Political Constitution of the Mexican Republic of 1857, articles 39, 40, 41, Third Title; Political Constitution of the Peruvian Republic of 1856, articles 1, 2, 3, 4.

44 H. Kumarasingham, "Eastminster: Decolonisation and State-Building in British Asia," in H. Kumarasingham (ed.), *Constitution-Making in Asia: Decolonisation and State-Building in the Aftermath of the British Empire* (New York: Routledge, 2016), 1.

45 J. Go, "A Globalizing Constitutionalism?: Views from the Postcolony, 1945–2000," *International Sociology* 18(1) (2003), 71.

46 R. Viciano and R. Martínez, "Los procesos constituyentes latinoamericanos y el nuevo paradigma constitucional," *Revista del Instituto de Ciencias Jurídicas de Puebla, Instituto de Investigaciones Jurídicas de la UNAM* 25 (2010), 10–21.

increasing their levels of efficacy; eliminating the gap between social reality and the legal, political, and cultural structures promoted by the old constitutions; and neutralizing entities such as guerrilla organizations, paramilitary groups, and organized crime (primarily associated with drug trafficking) – all of which undermine state legal and political systems by means of violence.⁴⁷

The new Latin American constitutions explicitly called into question the monist nation-state model. First, late twentieth-century Latin American societies faced – as the postcolonial societies of the region had done in the nineteenth century – the challenge of how to interpret their past in order to construct their present and announce their future.⁴⁸ This temporal axis became central for the reconstruction of their political, legal, and cultural identities. By the end of the 1980s and beginning of the 1990s, Latin American societies rejected the monocultural and monist project promoted by the foundational constitutions; a project that, with modifications, had dominated the greater part of the Latin American twentieth century. Instead, they sought to adopt new constitutions designed to reflect the social realities that had been ignored and devalued by previous ones.⁴⁹ Law and society should mirror each other. The legal and political present of Latin American societies should reflect the social present, which on matters of cultural diversity was not very different than the one that shaped the nineteenth-century societies in the region. Because Latin America had been (and remains) a culturally diverse region, constituted by the intersection of European, indigenous, and African cultures, the monocultural and monist constitutional past of the region's states should no longer form part of the present legal and political identities. In addition, the future was to be constructed by recognizing and including all citizens, not only those that the nation-state's normative project had considered valuable: white, Catholic, and Spanish- or Portuguese-speaking. Consequently, the new Latin American multicultural constitutions were both a descriptive undertaking and a normative project of multicultural state.⁵⁰

Second, Latin American multicultural constitutions replaced the culturally homogeneous transtemporal collective subject promoted by the

47 Uprimny, "Las transformaciones," 112.

48 J. Couso, "Radical Democracy and the 'New Latin American Constitutionalism,'" *Seminario de Teoría Política y Constitucional en Latinoamérica* (2014), https://law.yale.edu/sites/default/files/documents/pdf/sela/SELA13_Couso_CV_Eng_20130516.pdf (last accessed Sep. 22, 2021).

49 Yrigoyen, "El horizonte," 139–43.

50 Uprimny, "Las transformaciones," 112; Gargarella, "Sobre el 'nuevo constitucionalismo,'" 115.

nation-state model with a culturally heterogeneous transtemporal collective subject. The nations of Brazil, Colombia, Peru, Paraguay, and Ecuador, among others, recognized and accommodated the indigenous peoples in their constitutions.⁵¹ Occasionally, as happened in Brazil and Colombia, these nations also recognized and accommodated the Afro-Latin American cultural minorities.⁵² The new multicultural nation-state was thus structured around a regime of cultural majorities/cultural minorities. The white/ creole, Catholic, and Spanish- or Portuguese-speaking majority remained at the center of the nation. Indigenous and African minorities, now fully legally recognized and protected, revolved around it like satellites. In addition, the multicultural constitutions recognized a set of cultural principles and rights that acknowledged minority cultures as a constitutive part of the nation and allowed for protecting and reproducing their cultural traditions, among others, the rights of self-government and representation.⁵³ Though in these constitutions, the multicultural Latin American nation is now an internally complex subject, a multiple subjects, it continues to be imagined as a collective subject that existed in the past, exists in the present, and will exist in the future. The multicultural nation preexists the state; it creates the state, although, in the new Latin American constitutions, sovereignty does not reside in the nation anymore, but in the people who constitute it.⁵⁴ The people are envisaged as a transtemporal collective subject consisting of all the members of the political community. The nation is imagined as the transtemporal collective subject that is defined by the category “culture” and that overlaps with “the people.”

51 Constitución de la República Federativa de Brasil de 1988, article 231; Constitución Política de Colombia de 1991, article 7; Constitución Política del Perú de 1993, article 89; Constitución de la República del Paraguay de 1992, article 62; Constitución de la República del Ecuador, article 56; D. L. Van Cott, “Latin America: Constitutional Reform and Ethnic Right,” *Parliamentary Affairs* 53 (2000), 42; R. Gargarella, “Latin America’s Contribution to Constitutionalism,” in R. Sieder, K. Ansolabehere, and T. Alfonso (eds.), *Routledge Handbook of Law and Society in Latin America* (New York: Routledge, 2019), 31.

52 Constitución de la República Federativa de Brasil de 1988, article 215, 1; Constitución Política de Colombia de 1991, article 7, Transitory article 55.

53 Constitución Política de Colombia of 1991, articles 7, 10, 19, 246, 329, 330; Constitución Política de los Estados Mexicanos de 1917, article 2; Constitución Política del Perú of 1993, articles 89 and 149; Constitución Política de la República Federativa del Brasil of 1988, articles 210, 215, 231, 232; Constitución de la República del Ecuador de 2008, articles 242 and 257.

54 Constitución de la República Federativa de Brasil of 1988, Preamble; Constitución Política de Colombia of 1991, Preamble; Constitución Política del Perú of 1993, Preamble; Constitución de la República del Paraguay of 1992, Preamble; Constitución de la República del Ecuador, Preamble.

Third, the Latin American multicultural constitutions replace the legal monism of the nation-state model with a weak legal pluralism.⁵⁵ Nevertheless, they remain committed to the concept of absolute sovereignty that structures the classic model of the foundational constitutions of Latin America. Latin American legal monism imagines the legal system as a hierarchical structure that concentrates the power to create law in the democratically elected federal or central institutions which represent the citizens.⁵⁶ National or federal congresses are the primary source of state law, and departmental, state, or municipal institutions (e.g., state assemblies or municipal councils) only have the power to create legal norms that develop the normative frameworks created by congresses. In monism, national institutions are formed by public officials democratically elected by the members of the political community, the normative systems of cultural minorities are not recognized, and the authorities of indigenous or Afro-Latin American peoples are not considered to be entities that can create law.⁵⁷

In contrast, the multicultural constitutions of the late 1980s and early 1990s recognize the existence of indigenous minorities' legal systems, occasionally also those of culturally diverse Afro-Latin American minorities, and include them within the state's legal system. The new constitutions also acknowledge that the authorities of cultural minorities have the capacity to create law. However, they remain committed to the concept of absolute sovereignty and do not accord equal footing to these laws and bodies. According to the model they propose, the power of the authorities of cultural minorities to create law is subordinated to the constitution and statutes, in particular, to legal norms related to fundamental rights.⁵⁸ The criteria utilized by citizens, and in particular by public officials, to identify the norms that can be validly considered as legal norms,⁵⁹ are multiplied. However, the multicultural liberal model embraced by the new Latin American constitutions only promotes one rule of recognition.⁶⁰ State law must be multiple in a cultural key, but it must be applied throughout the state's territory and throughout the territory of cultural minorities. This is achieved via the recognition of self-government rights and indigenous or Afro-Latin American jurisdictions, from which other more

55 Uprimny, "Las transformaciones," 114. 56 Yrigoyen, "El horizonte," 139.

57 Yrigoyen, "El horizonte," 140.

58 Constitución Política de Colombia of 1991, article 246; Constitución Política del Perú of 1993, article 89; Constitución de la República del Ecuador of 2008, article 171; Constitución Política de Paraguay of 1991, article 62.

59 H. L. A. Hart, *The Concept of Law* (New York: Oxford University Press, 1994), 100.

60 Hart, *Concept of Law*, 100–10.

specific cultural rights are derived, for example, the right to collective ownership of their ancestral territories, the right to life of the cultural community, and the right to use their languages publicly.⁶¹ This way, the new constitutions allow cultural minorities to create legal norms for regulating both the public life of their collectivities and the private life of their members. Nevertheless, the individuals who constitute cultural minorities are also holders of the fundamental rights that are recognized in the constitutions. Indigenous and culturally diverse Afro-Latin American peoples therefore have a dual citizenship, a multicultural one.⁶²

The multicultural Latin American constitutions of the late 1980s and early 1990s are therefore cut across structurally by the tension between two principles, that of cultural unity and that of cultural diversity.⁶³ Latin American political communities are imagined as united in their diversity; as a single entity consisting of multiple cultures with some common traditions. This general tension is constituted by two sub-tensions that generate significant conceptual and practical challenges. The first of these is the tension between individual rights and indigenous self-government rights, which can sometimes lead to the creation and application of illiberal principles and rules.⁶⁴ This manifests daily in issues like gender inequality, the physical punishments some indigenous communities impose on those who violate their legal norms (e.g., whippings or the stocks), and the procedures these communities employ to judge and condemn their members for violating the law (e.g., the presence of a lawyer for the accused is not required, only of his family). In addition, the presuppositions on which liberal individual rights are based are not always recognized or shared by the normative systems of cultural minorities. The idea that subjects are autonomous and rational, that they are holders of rights that protect them from the undue intervention of the state in their good life projects, the separation between the public and private spheres, and the political equality of all individuals, to name a few, are not always part of the legal systems of Latin American cultural minorities. The tension is therefore simultaneously conceptual and practical; it replicates the tension that exists in international treaties that, like ILO Convention 169 on Indigenous

61 Constitución de la República Federativa de Brasil of 1988, articles 210, 215, 231; Constitución Política de Colombia of 1991, articles 10, 286, 329; Constitución Política del Perú of 1993, article 89; Constitución de la República del Paraguay of 1992, article 64; Constitución de la República de Nicaragua of 1987, article 180.

62 Modood, *Multiculturalism*, 108–9.

63 Van Cott, "Latin America," 42–43; Yrigoyen, "El horizonte," 141.

64 D. Bonilla, *La constitución multicultural* (Bogotá: Siglo del Hombre Editores, 2006), 148–97.

and Tribal Peoples, influenced the construction of the multicultural Latin American constitutions.⁶⁵

This type of legal pluralism, which can be identified as “weak” and centers around cultural principles and rights, is based on two core principles of the liberal canon: autonomy and equality.⁶⁶ The multicultural liberal state model is structured around new interpretations or turns of the vocabulary and grammar of modern constitutionalism. The model argues that individual autonomy is never exercised in a vacuum but only ever in particular cultural contexts.⁶⁷ The subject constructs and modifies its good life projects within the options, always limited, never infinite, offered by the cultural context it is immersed in. Individual identity is therefore always shaped on particular horizons of meaning.⁶⁸ Cultural rights have the objective of protecting cultures that give meaning to the lives of individuals who at the same time construct these cultures and are constructed by them. For the multicultural liberal model, defending culture thus involves defending autonomy. Subjects can change culture, of course. However, these transformations usually generate very high costs for subjects, such as the loss of meaning of vital projects, individual and collective self-esteem issues, and moral and political tensions with members of the cultures they arrive in.⁶⁹ The multicultural liberal model affirms that the state cannot impose these costs on its citizens.⁷⁰

The multicultural liberal model is also based on the idea that all the cultures which constitute a state should have the same opportunities to reproduce their traditions.⁷¹ The majority culture has an advantage over the minority cultures in achieving this objective. The economic, human, and political resources at the disposal of the majority, in part, because it controls the administrative apparatus of the state as well as its budget, allows it to protect and promote its culture. Likewise, this inequality between the majority and the minorities allows the former to exert undue influence on the culture of the latter. The majority culture, and the state that protects it, can implement policies of assimilation or integration intended to eliminate

65 Gargarella, “Latin America’s Contribution,” 31–32.

66 W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995), 34.

67 J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1997), 189.

68 C. Joppke and S. Lukes, “Introduction: Multicultural Questions,” in C. Joppke and S. Lukes (eds.), *Multicultural Questions* (Oxford: Oxford University Press, 2002), 9–10.

69 Kymlicka, *Multicultural*, 85. 70 Kymlicka, *Multicultural*, 86.

71 S. Benhabib, “‘Nous’ et ‘les Autres’ The Politics of Complex Cultural Dialogue in a Global Civilization,” in C. Joppke and S. Lukes (eds.), *Multicultural Questions* (Oxford: Oxford University Press, 2002), 54.

cultural minorities.⁷² Consequently, cultural rights emerge as legal and political instruments that allow for leveling the playing field of cultural reproduction within the state and that enable cultural minorities to defend themselves against the homogenizing impulses of the majorities.⁷³ They also allow cultural minorities to use their traditions to effectively regulate the public and private life of their communities.

These justifications for the multicultural liberal state model were articulated paradigmatically by the liberal political philosophy responsible for the cultural shift that took place in the 1990s. The arguments, presented by authors like Charles Taylor and Will Kymlicka, had a global impact. They influenced the discussions on how to recognize and include cultural minorities in both the Global North and South. Similarly, they influenced the establishment of international treaties that regulate matters related to cultural minorities, like ILO Convention 169. These international instruments were a relevant variable for constructing the Latin American multicultural constitutions, along with the work of cultural minority organizations, liberal and progressive political parties, national and international human rights NGOs, and pressure from engaged citizens such as students and workers.

The second of the abovementioned sub-tensions is generated by the conflict between the principle of political unity, which imagines the *polis* as a single entity cohering around a legal and political order,⁷⁴ and the rights of self-government, concretized in rights like the collective ownership of land, the right to determine who can travel across or settle on ancestral territories, and the right to prior consultation. Self-government rights serve as foundation for the creation of jurisdictions over which indigenous communities, and occasionally Afro-Latin American communities, have legal and political authority. This tension between rights and principles generates conceptual and practical problems of magnitude, such as conflicts over the authorities that are competent to judge the crimes committed by individuals of the majority culture in indigenous territory;⁷⁵ conflicts of jurisdiction

72 Modood, *Multiculturalism*, 44.

73 M. Bachvarova, "Multicultural Accommodation and the Ideal of Non-Domination," *Critical Review of International Social and Political Philosophy* 17 (2013), 652–73.

74 C. L. Carr, *Liberalism and Pluralism: The Politics of *E pluribus unum** (New York: Palgrave Macmillan, 2010), 87–92.

75 R. Ariza, "Teoría y práctica en el ejercicio de la jurisdicción especial indígena en Colombia," in R. Huber, J. C. Martínez, C. Lachenal, and R. Ariza (eds.), *Hacia sistemas jurídicos plurales. Reflexiones y experiencias de coordinación entre el derecho estatal y el derecho indígena* (Bogotá: Konrad-Adenauer-Stiftung, 2008), 261–81.

connected to the presence of military forces within indigenous territories to confront subversive activities or activities related to drug trafficking;⁷⁶ and conflicts over the exploitation of non-renewable natural resources situated within indigenous lands.⁷⁷ Attempts to understand these conceptual and practical problems must bear in mind that Latin American multicultural constitutions recognize the rights of due process and freedom of movement, acknowledge that military and police forces must maintain public order throughout the territory, and declare that the state or the nation is the owner of the subsoil.

The multicultural liberal state model, thus far discussed in abstract, takes shape paradigmatically in the Colombian constitution of 1991 and the Brazilian constitution of 1988.⁷⁸ Among Latin American states, the Colombian multicultural liberal constitution perhaps embodies the model best and most completely. The Colombian multicultural state, via the jurisprudence of the Constitutional Court, has also attempted most directly and extensively to resolve the tensions that cut across the model and to develop the content of each of the cultural principles and rights that form it. The multicultural narrative constructed by the constitution of 1991 consists of the following three sets of elements: cultural principles, self-government rights, and special representation rights. The cultural principles declare that the “Colombian Social State of Law” (*Estado Social de Derecho*) is pluralist;⁷⁹ that the state must recognize and protect the nation’s ethnic and cultural diversity;⁸⁰ and that the state must protect the nation’s cultural richness.⁸¹ Furthermore, article 1 declares that Colombia is a unitary republic.⁸²

The rights of self-government recognize that the indigenous and culturally diverse Afro-Colombian communities can govern themselves autonomously “in conformity with the constitution and the laws.”⁸³ Self-government rights open the space to indigenous and Afro-Colombian jurisdictions;⁸⁴ they recognize collective ownership of indigenous reservations (*resguardos*) and

76 C. A. Osorio, “Autonomía indígena y democracia en Colombia,” *El Ágora USB* 17 (2017), 111.

77 N. Zúñiga, “Conflictos por recursos naturales y pueblos indígenas,” *Pensamiento Propio* 22 (2006), 3–4.

78 This model of state is also embodied in the Constitución Política de los Estados Unidos Mexicanos of 1914, article 2; Constitución Política del Perú of 1993, article 2–19, article 17, 89; Constitución Política de Paraguay of 1992, articles 1, 62, 63, 140; Constitución del Ecuador of 2006, articles 1, 2, 11–12, 56, 57, 58, 59, 60, 377.

79 Constitución Política de la República de Colombia of 1991, article 1.

80 *Ibid.*, article 7. 81 *Ibid.*, article 8. 82 *Ibid.*, article 1.

83 *Ibid.*, articles 287, 330, Transitory article 55; Law 70 of 1993.

84 *Ibid.*, article 246, Transitory article 55; Law 70 of 1993.

Afro-Colombian territories;⁸⁵ they allow for declaring indigenous lands as territorial entities of the state;⁸⁶ they establish the right to prior consultation;⁸⁷ and they allow indigenous languages to be declared official in their territories. Special representation rights are granted to indigenous and Afro-Colombian communities in special electoral districts.⁸⁸ Finally, the 1991 constitution promulgates a broad bill of rights that applies to all citizens, includes the individual rights defended by political liberalism⁸⁹, and declares that sovereignty resides in the people, who exercise it directly or by means of their representatives.⁹⁰

The structure of the multicultural constitution of 1991 directly contradicts the legal and cultural monism of the classic nation-state and is a pristine reproduction of the multicultural liberal state model. The culturally homogeneous nation of the 1886 constitution is replaced by a culturally heterogeneous nation. The indigenous and Afro-Colombian individuals, who made up the nation from its beginning, are now being formally recognized by the legal and political system, the constitution breaks with the identification between the state and the Catholic religion, and indigenous languages are recognized as official within their territories. Likewise, legal monism is replaced by a weak legal pluralism that includes the authorities of cultural minorities as a source of legal creation. The indigenous and culturally diverse Afro-Colombian authorities are part of the bureaucratic structure of the Colombian state and are empowered to create legal norms to govern their communities. Nevertheless, these culturally diverse public officials and legal norms are subordinated to the constitution and to the laws promulgated by the national congress. Finally, the constitution makes explicit the conflict between cultural unity and cultural diversity that cuts across multicultural Latin American constitutions: Self-government rights collide with the unitary nature of the state and with the individual rights that give shape to its bill of rights. The classic nation-state's ideal of absolute sovereignty, which now resides in the people, remains firm.

The Brazilian constitution of 1988 is less ambitious than the Colombian one of 1991 with respect to the recognition and inclusion of cultural minorities. It recognizes fewer cultural principles and rights, and some of their content is more general. The heart of the multicultural constitution of 1988

85 *Ibid.*, article 329, Transitory article 55; Law 70 of 1993. 86 *Ibid.*, article 286.

87 *Ibid.*, article 330, paragraph. 88 *Ibid.*, articles 171, 176; Law 70 of 1993.

89 *Ibid.*, Title II, Chapter 1. 90 *Ibid.*, article 3.

is contained in the preamble and in title VIII, chapter VIII, which regulates matters related to indigenous communities.⁹¹ First, the constitution stipulates that the state should have the objective of promoting a pluralist society.⁹² It recognizes indigenous communities' self-government rights;⁹³ the original and permanent possession of their ancestral territories; the usufruct of natural resources that are on the surface of their lands,⁹⁴ lands which are declared inalienable and imprescriptible;⁹⁵ and the right to be heard regarding the exploitation of mineral or water resources situated within their territories.⁹⁶ Similarly, the constitution recognizes that indigenous individuals, communities, and organizations have the capacity to defend their rights in court.⁹⁷ The constitution of 1988 also recognizes a set of rights that aim to protect the cultural identities of indigenous and Afro-Brazilian communities, such as the right of indigenous communities to use their languages and methods of learning in public education;⁹⁸ the recognition that the state must protect indigenous and Afro-Brazilian cultural forms of expression;⁹⁹ and the recognition of the historic value of *quilombos* (settlements founded by people of African origin).¹⁰⁰ Finally, the constitution of 1988 declares that all power emanates from the people;¹⁰¹ it recognizes a broad spectrum of individual, social, and collective rights;¹⁰² and it indicates that all citizens can gather peacefully (but without weapons) in public spaces and prohibits associations of a paramilitary nature.¹⁰³

The constitution of 1988 is structured around the multicultural liberal model in a clear and precise manner. It locates the majority culture – imagined as white, Portuguese speaking, and Catholic – at the center of the

91 The 1988 constitution includes other articles that regulate matters related to cultural minorities. However, these articles typically refer to the powers that the federal government has over matters of interest to indigenous communities, among others, art. 20–XI, which declares that the lands traditionally occupied by indigenous groups are property of the Union; art. 22–XIV, which states that the Union is solely responsible for legislating on indigenous populations' issues; art. 49–XVI, which recognizes the exclusive competence of the national congress to authorize, in indigenous lands, the exploitation and use of hydrological resources and the search and extraction of mineral wealth as well as art. 176–I, which indicates that the exploitation of mineral resources in indigenous territories may be authorized for reasons of national interest; art. 109, which grants jurisdiction to federal judges to process and judge conflicts over indigenous rights; and art. 129–V, which gives the public prosecutor the function of judicially defending the rights of indigenous people.

92 Constitución de la República Federativa de Brasil of 1988, Preamble.

93 Ibid., article 231. 94 Ibid., article 231. 95 Ibid., article 31–4.

96 Ibid., article 231–3. 97 Ibid., article 232. 98 Ibid., article 210–2.

99 Ibid., article 15–I. 100 Ibid., article 15–V–5. 101 Ibid., article 1, paragraph.

102 Ibid., Title II, ch. I, II, IV. 103 Ibid., article 5–XVI and XVII.

state, and it places cultural minorities, primarily indigenous communities, spinning around it, with culturally diverse Afro-Brazilian communities in the margins. In order to protect cultural minorities from the undue interference by the state and the majority culture, the constitution bestows on them a series of cultural rights. Finally, it recognizes all individual rights protected by political liberalism, declares that sovereignty is rooted in the people, and grants the state the monopoly of force. Nevertheless, the narrative constructed by the Brazilian constitution of 1988, Latin America's first multicultural constitution drafted before the promulgation of ILO Convention 169, has fewer dimensions and is less complex on cultural matters than others in Latin America. Contrary to, for example, the Colombian constitution of 1991, it does not recognize the collective ownership of indigenous territories (only the possession – ownership resides in the federal state). It does not explicitly recognize an indigenous jurisdiction or the right to prior consultation – although it could be inferred that these are derived from the general rights of self-government, which are in effect recognized – and it does not grant any special representation rights. Finally, the culturally diverse Afro-Brazilian communities are awarded only marginal recognition in the constitution of 1988.

As mentioned above, the Colombian constitution of 1991 and the Brazilian constitution of 1988 paradigmatically reflect the multicultural liberal and pluralist model in Latin America. However, the model is also reproduced, with nuances and variations, in other countries of the Global North and South. The multicultural liberal and pluralist model has been configured as a global discursive and practical pattern since the end of the 1980s. For example, the tensions between individual and self-government rights or between the principle of political unity and rights of self-government that cut across the constitutions of Colombia and Brazil also structure central legal or political matters for states as dissimilar as South Africa, India, Spain, Great Britain, and the Netherlands. In South Africa, the Constitutional Court has engaged widely with the relationship between customs and individual rights, discussing matters such as the differences between static customs and live customs, the authorities that can determine what the customs of a particular cultural minority are, or the limits of customs in light of the right to gender equality.¹⁰⁴ In India, the Supreme

¹⁰⁴ C. Albertyn, "Cultural Diversity, 'Living Law,' and Women's Rights in South Africa," in D. Bonilla (ed.), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge: Cambridge University Press, 2013), 163–210.

Court has ruled extensively on the tensions between individual rights and minority religions, the conflicts between the rights of majority religions and those of minority religions, and on how to weigh the territorial rights of indigenous peoples against the rights of the state or private companies interested in exploiting the natural resources situated in such territories.¹⁰⁵ Finally, the challenges of integrating non-Christian cultural minorities in the Netherlands are an iteration of the tensions between individual rights and cultural rights which are common in the Latin American multicultural liberal states. Likewise, the political and legal conflicts between the Spanish state and Catalonia or between Scotland and the British state powerfully reproduce the tensions between the principle of political unity and the rights of self-government of cultural minorities that shape the multicultural liberal and pluralist state.¹⁰⁶

The Radical Intercultural State

In the first decade of the twenty-first century, Ecuador and Bolivia initiated a new process of constitutional reforms.¹⁰⁷ The Ecuadorian constitution of 2008 and the Bolivian constitution of 2009 question parts of the multicultural liberal model that impelled the previous constitutional transformations in the region.¹⁰⁸ They represent a new, radically intercultural model, which looks to the recent constitutional past to challenge its descriptive and normative limits.¹⁰⁹ It proposes that the constitutional present must reflect the society more precisely and construct a type of state that protects and promotes this reality. The type of cultural diversity that constitutes countries like Ecuador and Bolivia does not fit within the cultural majority / minorities approach that is at the center of the multicultural liberal model.¹¹⁰ In Bolivia, indigenous peoples have historically been a demographic majority (around

105 G. Mahajan, "Keeping the Faith: Legitimizing Democracy through Judicial Practices in India," in D. Bonilla (ed.), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge: Cambridge University Press, 2013), 211–42.

106 E. Dalle Mulle and I. Serrano, "Between a Principled and a Consequentialist Logic: Theory and Practice of Secession in Catalonia and Scotland," *Nations and Nationalism* 25(2) (2019), 630–51.

107 C. Gregor, "Nuevas narrativas constitucionales en Bolivia y Ecuador: el buen vivir y los derechos de la naturaleza," *Latinoamérica* 59 (2014), 10.

108 Bonilla, "El constitucionalismo," 6.

109 J. Lazarte, "Plurinacionalismo y multiculturalismo en la Asamblea Constituyente de Bolivia," *Revista Internacional de Filosofía Política* 33 (2009).

110 Bonilla, "El constitucionalismo," 9.

60 percent of the population), although they have been a minority in terms of the relative power they have had at their disposal.¹¹¹ In Ecuador, indigenous peoples have historically constituted around 40 percent of the population.¹¹² These cultural minorities understand themselves as nations that have not been granted participation, or representation of their legitimate interests in the multicultural liberal state. The legal and political past is once again understood as a set of structures that cannot contribute to creating a collective identity that truly embraces the complexity of the cultural diversity of the political communities it regulates.

Consequently, the radical intercultural model is structured around the principles of plurinationality and interculturality.¹¹³ The concept of an “internally diverse nation” is replaced by that of “nations.” The state is no longer imagined as formed by an internally multiple transtemporal collective subject, but by a set of transtemporal collective subjects. In the radical intercultural state, the central noun of the multicultural liberal state narrative – “nation” – is pluralized. The previous structure of a majority culture in the center and minorities cultures surrounding it like satellites is replaced by one in which all nations that form the state occupy the center of the political community. All nations are imagined as equal parts of the whole, as pieces that have equal relations with the unit. However, the radical intercultural model remains committed to the cultural rights that are the core component of the multicultural liberal model. Radical interculturalism considers cultural rights to be a useful instrument for confronting the imbalance of power that has historically existed between the nations that form the Ecuadorian and Bolivian political communities. The constitutions of both countries recognize that indigenous nations have the right, among others, to self-government, cultural identity, prior consultation, collective ownership of their lands, and to use their languages in public life (the indigenous languages are declared official).¹¹⁴

111 Economic Commission for Latin America and the Caribbean (ECLAC), *Guaranteeing Indigenous People's Rights in Latin America: Progress in the Past Decade and Remaining Challenges* (Santiago: ECLAC, 2014), 37.

112 M. Becker, “Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador,” *Latin American Perspectives* 38 (2011), 48.

113 Constitución Política de la República de Ecuador of 2008, article 1; Constitución Política del Estado Plurinacional de Bolivia of 2009, article 1; Bonilla, “El constitucionalismo,” 9.

114 Constitución Política del Estado Plurinacional de Bolivia of 2009, articles 2, 5, 30–2, 289, 394–3, 403; Constitución Política de la República de Ecuador of 2008, articles 2, 57, 58, 59, 60, 171.

The relations between nations and the way in which they contribute to the construction of the state also changes. While the multicultural liberal model does not explicitly commit to a political principle that regulates interactions between the majority and the minorities, the radical intercultural model is committed to the principle of interculturality.¹¹⁵ In the multicultural liberal model, the political inertia that comes from the classic nation-state model, as well as the power differentials that characterize the relationship between the cultural majority and cultural minorities, tend to convert cultural minorities into political and cultural monads in order to protect them from interference by the majority. In contrast to this, the radical intercultural model envisions the dialogue between nations as the principle that guides the joint construction of the state.¹¹⁶ The transtemporal collective subjects that form the state do not exist as isolated and autonomous units which share a territory and only interact when there is a conflict of jurisdictions. Rather, the guiding normative principle for nations is the interaction between one another, and therefore their mutual influence and transformation.¹¹⁷ In the radical intercultural model, the state is constructed by the dialogue among nations. Its structure, contours, and macro discursive and practical dynamics are defined and redefined by processes of communication among these collective subjects.¹¹⁸

Finally, the radical intercultural state maintains the weak legal pluralism that characterizes the multicultural liberal model, although it deepens it. The system of sources for legal creation includes indigenous nations' institutions in addition to the institutions that commonly have the capacity to promulgate legal rules and principles in a liberal democracy (the legislative and executive branches of government).¹¹⁹ However, the model also includes principles and rules that allow for equal participation in the state's institutions, such as the multicultural formation of the Bolivian constitutional court¹²⁰ and the provincial assemblies and municipal councils in Ecuador and Bolivia, as well as the creation of indigenous jurisdictions that have a horizontal relation with the state's jurisdiction.¹²¹ Nevertheless, the deepest changes in the legal pluralism that shapes the radical intercultural state result from the inclusion of

115 Bonilla, "El constitucionalismo," 10–11. 116 *Ibid.*, 10–11.

117 *Ibid.*, 10. 118 *Ibid.*, 10.

119 Constitución Política del Estado Plurinacional de Bolivia of 2009, articles 146, 190, 192; Constitución Política de la República de Ecuador of 2008, article 171.

120 Constitución Política del Estado Plurinacional de Bolivia of 2009, article 197.

121 *Ibid.*, articles 179–2, 192–3; Constitución Política de la República de Ecuador of 2008, article 171.

the rights of nature and the principle of good living in the Ecuadorian and Bolivian legal orders.¹²² These two innovations generated by Andean constitutionalism originate in indigenous epistemologies and worldviews, which historically had been marginalized in the political life of Ecuador and Bolivia. Indigenous cultures provide some of the structural elements of the constitutions that govern all the nations which configure the Ecuadorian and Bolivian states. The rights of nature and the principle of good living question the dominant geopolitics of legal knowledge that considers indigenous cultures to be poor contexts for the creation of original legal products.¹²³

The rights of nature regard *pachamama* (“Mother Earth”) as a subject of rights. Consequently, they call into question the idea, central in modern constitutionalism, that only autonomous and rational individuals, subjects with agency, can be considered holders of rights and obligations. In the Ecuadorian and Bolivian legal orders, nature, a nonhuman entity, has rights such as the right to life and to the recovery of its vital cycles.¹²⁴ The rights of nature recognized by the Bolivian and Ecuadorian constitutions question the anthropocentrism that has traditionally sustained the relations between human beings and nature in modernity and forms the basis for one of the central components of modern liberal democracies: the market economy.¹²⁵ From this point of view, nature is not a thing created for human beings; it is not a means to satisfy their aims. Nature is not a resource that human beings can exploit indefinitely to satisfy their needs and desires. In this perspective, nature and human beings do not have a vertical relationship. In the radical intercultural model, biocentrism, which understands human beings as only another element of nature – an element that has rights as well as obligations toward other components of the unit – replaces anthropocentrism.¹²⁶ The rights of nature are thus a hybrid that mixes elements of the vocabulary and grammar

122 Constitución Política de la República de Ecuador, Title II, Chapter 7; Title VII; Constitución Política del Estado Plurinacional de Bolivia, articles 8 and 9; Law 300 of 2012 of the Estado Plurinacional de Bolivia.

123 Bonilla, “El constitucionalismo,” 11.

124 Constitución Política de la República de Ecuador of 2008, articles 71, 72; Law 300 of 2012 of the Estado Plurinacional de Bolivia.

125 R. Lalander, “Entre el ecocentrismo y el pragmatismo ambiental: Consideraciones inductivas sobre desarrollo, extractivismo y los derechos de la naturaleza en Bolivia y Ecuador,” *Revista Chilena de Derecho y Ciencia Política* 6 (2015), 118–19; E. Gudynas, “La ecología política del giro biocéntrico en la nueva Constitución de Ecuador,” *Revista de Estudios Sociales* (2009), 37–39; S. Radcliffe, “Development for a Postneoliberal Era? Sumak kawsay, Living Well and the Limits to Decolonisation in Ecuador,” *Geoforum* 43 (2012), 241.

126 Gudynas, “La ecología,” 37–39.

of modern constitutionalism, like “rights,” “subject of rights,” “obligations,” “agency” and “autonomy” with elements of the cultures of indigenous peoples, for example, the concept of nature as a living being.

The principle of good living defends a holistic view of the universe that calls into question the atomism that has dominated a part of the liberal tradition.¹²⁷ The subject is no longer understood as a fundamentally closed and isolated unit seeking to construct its good life projects autonomously and rationally. From this perspective, the subject is always interpreted in relation to its environment. The individual is always constructed and developed in networks of relationships that include both the human “other” and other organic and inorganic components of the universe. The backbone of the holism of *sumak kawsay*, the Quechua term for “good living,” is formed by the following four principles: (i) relationality (individuals are parts of a whole, not isolated subjects, who share the same space and construct society by the aggregation of their decisions); (ii) complementarity (the parts complement each other; they are not *a priori* in conflict and should not compete among themselves); (iii) balance (the aim of the interaction should be to achieve an equilibrium between the parts that is always contingent and always in transformation); and (iv) reciprocity (the parts should be disposed to a constant giving and receiving in order to achieve the desired balance).¹²⁸ The principle of good living is perhaps the only contribution to the radical intercultural state model that does not originate or represent a turn in the grammar of modern constitutionalism. It is a principle that emerges and is nurtured on the cosmogonies of the Andean indigenous communities.

The legal innovations articulated by the Latin American intercultural model are in dialogue with the discursive patterns around which some legal creations in other countries of the Global North and South have been structured in the twenty-first century. The recognition of rights to the Whanganui river in New Zealand, the Yarra river in Australia, and the Ganges and Yamuna rivers in India, as well as the recognition of rights to ecosystems in some small US towns like Toledo and Grant Township, enter into implicit or explicit dialogue with the recognition of rights to nature and the principle of good living in Ecuador and Bolivia. In New Zealand, Australia, India, and the United States, as happens in the Andean countries, the recognition of the

127 R. Llasag Fernández, “El *sumak kawsay* y sus restricciones constitucionales,” *Revista de Derecho UASB* 12 (2009), 113–25.

128 C. Silva Portero, “¿Qué es el buen vivir en la Constitución?,” in R. Ávila (ed.), *La Constitución del 2008 en el contexto andino. Análisis desde la doctrina y el derecho comparado* (Quito: Ministerio de Justicia y Derechos Humanos, 2008), 112–19.

rights to certain ecosystems intersects with notable epistemological and ethical changes. On one hand, a vindication of indigenous cultures (New Zealand and Australia) or religious traditions (India) provides rich spaces for the production of legal knowledge. On the other hand, there is an explicit defense of biocentric perspectives that question the anthropocentrism that has been the focal point in modern law and culture.¹²⁹

Constellation of Sovereignties and Strong Legal Pluralism

In Latin America, the discontinuities between the classic nation-state model, the multicultural liberal state model, and the radical intercultural state model are notable. The Latin American multicultural liberal state reacts to the monocultural and monist nature of the nation-state model by recognizing and including cultural minorities, primarily by means of cultural principles and rights and the articulation of a weak legal pluralism in its system of legal sources. The radical intercultural model reacts to the notion of a culturally diverse nation that structures the model it replaces (the multicultural liberal state), as well as to the conceptual regime that situates the majority culture at the state's center and cultural minorities as satellites that revolve around it. Likewise, the intercultural model breaks with the notion that cultures are monads which repel or try to conquer each other. The radical intercultural model replaces these discourses and practices with the principles of plurinationality, interculturality, and good living, as well as with the rights of nature. The radical intercultural model therefore breaks with the political economy of legal knowledge dominant in both the classic nation-state model and in the multicultural liberal model. The epistemologies and worldviews of historically marginalized nations come to form central dimensions of the constitutional model that is now applied to all citizens.

However, the continuities between the models are equally notable. In all three models, there is a commitment to the vocabulary and grammar of modern constitutionalism, and they all are structured around individual rights and the principle of absolute sovereignty of the state, which includes the state's monopoly of force. In the multicultural liberal model and the intercultural model, there is a commitment to cultural rights as instruments for protecting and promoting the cultures of minorities. Both models configure their

129 M. Tănăsescu, "Rights of Nature, Legal Personality, and Indigenous Philosophies," *Transnational Environmental Law* 9(3) (2020), 429–53.

legal systems around a weak legal pluralism that usually corresponds to an internally complex rule of recognition constructed in a cultural key. The rule of recognition is not a rule on paper. Rather, it is a practice by which public officials, primarily, identify which norms belong to the legal system by using criteria that recognize both the typical institutions of a contemporary liberal democracy and the institutions of cultural minorities as sources of law.

Extralegality and Illegality: Strong Legal Pluralism

The normative project of the Latin American multicultural and intercultural states that seek to construct a single legal and political system with multiple hierarchized sources, applied throughout the state's territory, and backed by a single official coercive apparatus, has not yet fully materialized. Since the late eighties, as before, in various degrees and forms, the sovereignty of Latin American states and official law have constantly competed with illegal or extralegal normative systems that control sections of the state territory.¹³⁰ These alternative normative systems do not, or only partially, recognize the sovereignty of the state. Nevertheless, in practice, the state legal system and the alternative normative systems interact, overlap, and transform each other.¹³¹ Some of these normative systems are illegal; others, extralegal.¹³² The former, the normative systems of some guerrilla or paramilitary groups, for example, not only ignore and violate state law but intend to replace it.¹³³ Other illegal normative systems, like those of the transnational Central American gangs or the large Mexican drug trafficking organizations, do not seek to replace official law entirely, although they violate it and want to neutralize its operation in the areas they control.¹³⁴ The extralegal normative systems differ from this in that they ignore official law but do not necessarily violate it. Examples are the alternative systems to state-regulated private property that operate in a significant part of the peripheral neighborhoods of Latin American cities.¹³⁵

¹³⁰ M. Goodale, "Legalities and Illegalities," in D. Poole (ed.), *A Companion to Latin American Anthropology* (Hoboken: Blackwell, 2008), 214–29.

¹³¹ Bonilla, "Extralegal Property," 219–26; B. de Sousa Santos, "Two Democracies, Two Legalities: Participatory Budgeting in Porto Alegre, Brazil," in B. de Sousa Santos and C. A. Rodríguez-Garavito (eds.), *Law and Globalization from Below: Towards A Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005), 311.

¹³² Sieder, "Legal Pluralism," 56–57.

¹³³ T. P. Wickham-Crowley, "The Rise (and Sometimes Fall) of Guerilla Governments in Latin America," *Sociological Forum* 2 (1987), 478.

¹³⁴ Sieder, "Legal Pluralism," 59. ¹³⁵ Bonilla, "Extralegal Property," 215–19.

Thus, it emerges that the multicultural liberal and radical intercultural states in Latin America are constituted by a constellation of sovereignties. The principle of absolute sovereignty that dominates the modern legal/political consciousness imagines the state as a galaxy formed by a single star where political power and the capacity to create law are concentrated. In contrast, the Latin American constellation of sovereignties is made up of a varied set of stars that have diverse forms and concentrate varying levels of legal and political power – dwarf stars, giant stars, red and white stars, for example. As in any constellation, these sovereign stars attract, repel, crash into, nurture, and sometimes destroy each other. Consequently, the constellation of sovereignties that exists within the Latin American states operates around two conceptual oppositions: legal/illegal and legal/extralegal. State law, which usually concentrates greater power than the alternative normative systems, categorizes as illegal all those rules and principles that are outside of its limits and violate its norms.¹³⁶ State law also seeks to destroy any normative system that calls into question the sources from which it emanates, even if these alternative normative systems do not violate its rules and principles.¹³⁷ Official modern law always has imperial aspirations; it wants to dominate the entire space that exists within state borders.¹³⁸ Ideally, state territory and official law should correspond one to one, should overlap perfectly, should dovetail fully. Typically, the sovereign should be one and only one, the nation and the people.

The constellation of sovereignties that exists within Latin American states shows that the sovereign people or nations that are represented by the institutions of indirect liberal democracies compete with other imagined sovereigns, like the “true people” or part of the “true people” who are represented by another type of institution, such as the guerrilla commander, the central command, the drug lord, the gang boss, the community organization. The normative systems created by guerrilla groups like the “Shining Path” (*Sendero Luminoso*) in Peru, the Zapatista National Liberation Army (*Ejército Zapatista de Liberación Nacional*, EZLN) in Mexico, the Revolutionary Armed Forces (*Fuerzas Armadas Revolucionarias*, FARC) and the National Liberation

¹³⁶ Sieder, “Legal Pluralism,” 56–57.

¹³⁷ J. Lemaitre, “¿Constitución o barbarie? Cómo repensar el derecho en las ‘zonas sin ley’” in C. Rodríguez (ed.), *El derecho en América Latina. Un mapa para el pensamiento jurídico del siglo XXI* (Buenos Aires: Siglo XXI Editores, 2011), 51–52.

¹³⁸ M. García, “Estado, territorio y ciudadanía en Colombia,” in M. García (ed.), *Jueces sin Estado: La justicia colombiana en zonas de conflicto armado* (Bogotá: Siglo del Hombre Editores, 2008), 19.

Army (*Ejército de Liberación Nacional*, ELN) in Colombia are good examples of a first type of strong pluralism that has developed in Latin America.

In these cases, the illegal normative systems not only do not recognize the state legal system, but they also seek to replace it by means of violence.¹³⁹ These alternative normative systems call upon political reasons to justify their existence. Generally, these reasons revolve around arguments of class or redistribution, as in the case of *Sendero Luminoso*, FARC, and the ELN.¹⁴⁰ These arguments sometimes intersect with ethnic or recognition arguments, as in the case of EZLN.¹⁴¹ The state legal system is therefore seen as illegitimate or unjust, as a consequence of the triumph of a social class (the bourgeoisie) over the people, or as the triumph of a majority culture over minority cultures.¹⁴² The guerrilla normative system is seen as the correct vehicle of the true interests of the people or indigenous minorities, and therefore also as just and legitimate.¹⁴³ Nevertheless, none of these guerrilla normative systems has managed to replace the state legal system completely. Guerrilla groups have not managed to defeat the state by military means, and it does not seem that those still in existence after the peace process between FARC and the Colombian state and the near total defeat of *Sendero Luminoso* could do so.

However, although they may not succeed in controlling the state, these illegal normative systems have been applied systematically and continuously in areas of state territory that have been (or were) historically controlled by guerrilla movements. In areas like Ayacucho in Peru, Chiapas in Mexico, and the Colombian Orinoco and Amazon basins, the conduct of citizens is (or, historically, was) regulated, and conflicts arising between them are or were solved, by the guerrilla normative systems and their institutions such as revolutionary courts or the revolutionary “tax” collection units. In these areas, guerrilla legal systems usually coexist with state legal systems. For example, revolutionary judges coexist with judges assigned by the state to the farthest municipalities of national geographies, as well as the police, military forces, and some executive branch authorities like mayors and municipal councils.

139 Lemaitre, “¿Constitución o barbarie?,” 58.

140 G. H. McCormick, “The Shining Path and Peruvian Terrorism,” *Journal of Strategic Studies* 10 (1987), 113; R. Gott, *Guerrilla Movements in Latin America* (Garden City: Doubleday, 1971), 230–68.

141 C. Cortéz-Ruiz, “The Struggle Towards Rights and Communitarian Citizenship: The Zapatista Movement in Mexico,” in L. Thompson and C. Tapscott (eds.), *Citizenship and Social Movements: Perspectives from the Global South* (London: Zed Books, 2010), 160–61.

142 Wickham-Crowley, “The Rise,” 477. 143 *Ibid.*, 478–85.

In these spaces, typically distant from the centers of state legal and political power, the two normative systems, the guerrilla and the official, compete for control of citizens' consciences and actions. However, in these areas, the normative systems of the subversive groups are the ones imposed *de facto* and the ones that effectively regulate the territory and its inhabitants. In Chiapas, Ayacucho, or Arauca, for example, guerrilla rules and principles control (or controlled) issues as varied as land disputes, romantic infidelities, robberies, homicides, or the effective use of state resources managed by municipalities.¹⁴⁴ In these areas, state law generally only exists on paper; the state institutions are isolated and ineffective and cannot act without the authorization of guerrilla institutions, such as front commanders, the central command, or revolutionary councils. In these areas of Mexico, Ayacucho, and Arauca, guerrilla law is the law in action, the law that is effectively applied to individuals.

The guerrilla does not recognize state law but, of course, the state legal order does not recognize guerrilla normative systems either. Rather, it categorizes them as illegal and tries to eliminate them by using the coercive apparatus at its disposal. However, states like Peru, Mexico, and Colombia have not managed to achieve this objective, due to their historical weakness in political, economic, and military matters. These states therefore accept the existence of the normative systems that seek to subvert the established legal and political order as a fact, albeit an undesirable one. Nevertheless, they simultaneously assert the legitimacy of the state legal system and the illegitimacy of the guerrilla normative order. The official legal order is presented as a consequence of the social contract upon which the state is founded, and as created by institutions where these three liberal democracies concentrate the power to make law. In contrast, in the eyes of the state, the normative systems of the subversive groups are artifacts created by politically illegitimate minority factions, imposed only by means of violence.

The coexistence of the state legal system and the guerrilla normative systems in countries like Peru, Mexico, and Colombia is powerful evidence of Latin America's strong legal pluralism. In the territories of these countries, at least two sovereigns and two rules of recognition compete. The sovereign people who are recognized in the constitutions and represented, primarily, by congresses and presidents, compete with the "true people" who are recognized in the statutes of the guerrilla movements and represented by central commands, revolutionary councils, or front commanders. Consequently, the

¹⁴⁴ G. Trejo, "Redefining the Territorial Bases of Power: Peasants, Indians and Guerrilla Warfare in Chiapas, Mexico," *International Journal of Multicultural Societies* 4 (2002), 7.

criteria employed by both public officials and guerrilla authorities to identify the norms that form each system, the rules of recognition of each normative order, are mutually exclusive. Of course, this does not mean that the two normative systems are isolated from each other. On the contrary, these systems continuously interact and modify each other. Interlegality is one of the principles regulating not only the weak state pluralism that is a consequence of the constitutional recognition of cultural diversity, but also the strong legal pluralism that arises as a consequence of the incomplete materialization of the monocultural, multicultural, or intercultural nation-state models in some parts of Latin America.¹⁴⁵ State law not only enters into dialogue, but it intersects with, transforms, and collides with the law of Latin American indigenous and black minorities. State law also reluctantly enters into dialogue with, intersects, transforms, and collides with the guerrilla normative orders that partially dominate some regions of the state's territory.¹⁴⁶

For example, judges who work in areas of the Colombian departments of Norte de Santander and Santander, which are controlled by ELN, do not initiate proceedings related to certain types of severe crimes like homicides. They open them formally but do not take any action to find the guilty parties, or they act to fulfill this objective only when the front commander allows them to do so. Likewise, in Peru, the activities of the peasant patrols (*rondas campesinas*), the Peruvian state judges, and *Sendero Luminoso* judges intersect (or rather, they used to) for resolving matters related to cattle theft in rural areas of the Cajamarca region.¹⁴⁷ Similar arrangements can be found with the police units stationed in small towns of the department of Cauca in Colombia or the state of Chiapas in Mexico. In these towns, the police, one of the state agencies in charge of enforcing the state's legal system, only has the capacity for operating in the areas surrounding the station where their agents live and work. In the rest of the town, as well as in the rural areas of the municipality, the guerrilla fronts are the ones who control the territory and its inhabitants.¹⁴⁸ In addition, citizens recognize the guerrilla authorities as sources for the creation of norms actually applicable within the municipality, the norms that effectively determine until what time bars are open, the type of compensation that must be paid if you harm another individual's

145 B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London and New York: Routledge, 1995), 473.

146 Goodale, "Legalities and Illegalities," 216.

147 E. Picolli, "El pluralismo jurídico y político en Perú: el caso de las Rondas Campesinas de Cajamarca," *Íconos. Revista de Ciencias Sociales* 31 (2008), 28–31.

148 Trejo, "Redefining the Territorial," 7.

interests, or the punishment you must submit to if you commit a robbery or a homicide, for example.

The constellation of sovereignties that constitutes Latin American states is also formed by the normative systems created by transnational criminal structures like the Mexican drug-trafficking cartels, the *Comando Vermelho* (Red Command) and the *Primeiro Comando da Capital* (First Capital Command) in Brazil, and the *Mara Salvatrucha* and *Barrio 18* (Neighborhood 18) gangs in El Salvador and Guatemala. However, the normative systems created by these illegal organizations do not seek to subvert the established political order and replace the entire state legal system. Rather, these organizations aim to neutralize the application of those norms of the official legal system that create obstacles to their illicit activities and to promulgate norms that allow for maintaining order and safety in the areas they control.¹⁴⁹ In the municipalities of Chihuahua State controlled by the Juárez cartel, in the *favelas* of Rio de Janeiro dominated by *Comando Vermelho*, and in the marginal neighborhoods of San Salvador occupied by *Mara Salvatrucha*, for example, the daily life of the population is controlled in part by the norms created by the drug lords and gang bosses that lead these criminal organizations.¹⁵⁰ Access to these rural or urban spaces, interactions between the criminal organizations and the “civilians” that inhabit these spaces, the payment of “taxes” to guarantee the safety of businesses, and silence with respect to any illicit activity in the area, for example, are all matters regulated by the normative systems created by these illegal organizations.¹⁵¹ Furthermore, in the areas dominated by these criminal structures, the state has no – or only a nominal or fragmentary – presence, and the official legal system becomes a set of norms on paper when its mandates collide with the interests of the cartels or transnational gangs. Of course, the state legal system does not recognize these illegal normative systems and periodically tries to eliminate or weaken them. The state legal system, as well as the institutions that enforce it, maintain a sporadic or partial presence by means of police or military operations, providing some social services, or demanding payment of property taxes, among other measures.

149 E. Desmond, *Drugs and Democracy in Rio de Janeiro: Trafficking, Social Networks, and Public Security* (Chapel Hill: The University of North Carolina Press, 2006), 202–4.

150 R. Duarte, C. de Macedo, and M. Ferreira, “Violent Nonstate Actors and the Emergence of Hybrid Governance in South America,” *Latin American Research Review* 56 (2021), 40–42; E. Ellis, “Las drogas, las pandillas, el crimen organizado transnacional y los ‘espacios mal gobernados’ en las Américas,” *Air & Space Power Journal* (2014), 19–27.

151 Trejo, “Redefining the Territorial,” 7.

In these areas of Mexico, Brazil, El Salvador, and Guatemala, at least two sovereigns and two rules of recognition thus compete. The people and congress compete with the drug lord and the gang boss; the state legal system competes with the normative system of the cartel or gang; the criteria utilized by citizens and members of criminal organizations to identify the valid norms partially exclude the criteria utilized by public officials to fulfill this same goal. Strong legal pluralism describes these phenomena well. However, as in the case of the guerrilla normative systems and the state legal system, in this situation (the coexistence of gangs, cartels, and the state), the normative systems in competition constantly interact and transform each other.¹⁵² In this set up, the state legal system transforms and re-accommodates itself as a consequence of its interaction with the illegal normative systems created by cartels and transnational gangs. This takes the shape of state policies of non-intervention in certain neighborhoods, municipalities, or illegal economic activities, or policies to reduce prison sentences. Further examples, as articulated in Mexico by former president Enrique Peña Nieto in Mexico, or by the Salvadorian president Nayib Bukele, are policies that seek to improve gang members' conditions of imprisonment in exchange for a reduction in the violence exercised by drug-trafficking organizations or multinational gangs.¹⁵³

These discursive and practical patterns that are common in Latin America are only one species of the genus "strong legal pluralism" that is materialized globally. In Asia and Africa, for example, strong legal pluralism is present paradigmatically in two central phenomena in the continents' recent legal and political history: the coexistence of traditional indigenous legal systems, postcolonial state legal systems, and colonial legal norms after decolonization began at the end of the Second World War and ended in the late 1970s,¹⁵⁴ and the coexistence of several legal orders during the post-conflict processes that ended with internal armed conflicts.¹⁵⁵

The constellation of sovereignties in Latin American states is constituted by two conceptual oppositions. First, that of legal/illegal, which cuts across the relations between state law and the normative systems of guerrillas,

152 Goodale, "Legalities and Illegality," 216.

153 J. García, "Una investigación arroja nuevas pruebas de la negociación de Bukele con las pandillas de El Salvador," *El País* (2021), <https://elpais.com/internacional/2021-08-24/se-publican-nuevas-pruebas-sobre-la-negociacion-de-bukele-con-las-pandillas-de-el-salvador.html> (last accessed Oct. 1, 2021).

154 B. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global," *Sydney Law Review* 30(3) (2008).

155 L. Grenfell, *Promoting the Rule of Law in Post-Conflict States* (Cambridge: Cambridge University Press, 2013), 59–90.

cartels, and transnational gangs. Second, that of legal/ extralegal, which influences relations in many ways. It cuts across the relations between the official legal system and the community normative systems governing questions like property and possession of real estate in the peripheral neighborhoods of large Latin American cities;¹⁵⁶ labor relations in remote rural areas; resolution of conflicts between members of some peasant communities¹⁵⁷ and the ways small businesses are organized without forming corporations.¹⁵⁸

In all these cases, the non-state normative systems do not have the objective of subverting the official legal system, partially replacing it, or violating the norms that form it, although this does happen sometimes. Rather, the aim of these unofficial normative systems is to regulate activities that are not controlled effectively by the state legal system and that are developed on the margins of the parts of society that the state formally controls.¹⁵⁹ The state legal systems have a set of norms at their disposal which discursively regulate these activities throughout national territory. Nevertheless, as a consequence of the political or economic weaknesses of the region's states, these legal norms are not applied or are only partially applied in the margins of Latin American societies. Here, the extralegal normative systems not only coexist with the state legal system, but both interact with and transform each other. Again, as in the case of the illegal normative systems, interlegality is the principle that regulates this encounter, and two mutually exclusive sovereigns and sets of rules exist side by side. On one hand, there are the people represented by the legislative and executive branches of government, as well as the laws and decrees they promulgate to regulate particular matters of the national reality. On the other, there are the people who, given the absence of the state and the ineffectiveness of its legal system, use the institutions established to represent their interests, like communal action councils or peasant

156 B. de Sousa Santos, "The Law of The Oppressed: The Construction of and Reproduction of Legality in Pasargada," *Law and Society Review* 12 (1977), 89.

157 D. Goldstein, "In Our Own Hands': Lynching, Justice, and the Law in Bolivia," *American Ethnologist* 30 (2003), 24–25.

158 Instituto Libertad y Democracia, *Evaluación preliminar de la economía extralegal en 12 países de América Latina y el Caribe* (Lima: ILD, 2007).

159 R. S. Meinzen-Dick and R. Pradhan, *Legal Pluralism and Dynamic Property Rights* (CGIAR Systemwide Program on Collective Action and Property Rights, CAPRI Working Paper No. 22) (Washington: IFPRI, 2002), 1–2 and 26, available at <http://ideas.repec.org/p/fpr/worpps/22.html> (last accessed Jan. 2, 2023); F. von Benda-Beckmann, K. von Benda-Beckmann, and J. Eckert, "Rules of Law and Laws of Ruling: Law and Governance Between Past and Future," in F. von Benda-Beckmann, K. von Benda-Beckmann, and J. Eckert (eds.), *Rules of Law and Laws of Ruling: On The Governance of Law* (Farnham: Ashgate Publishing, 2009), 3–5; Goldstein, "In Our Own," 24–25.

organizations, to create a set of norms parallel to state norms to regulate matters that are necessary for the proper functioning of social life.

A paradigmatic and very widespread example of this type of strong pluralism in Latin America is that of the extralegal property systems in coexistence with the rules and principles of the state legal systems for regulating “official” property.¹⁶⁰ In the legal systems of Latin American liberal democracies, the concept of property is designed, justified, and then regulated based on liberal political philosophy.¹⁶¹ In the great majority of Latin American constitutions or civil codes, the individual right to property is seen as either absolute or limited by its social and ecological functions. Latin American liberal legal orders regulate this right in great detail, in categories such as title, mode, and registration procedures in public institutions, like the office for registration of public instruments, or private persons and institutions with public functions, for example, notaries. Consequently, individuals have the right to use, abuse, and collect profits from the things that they own. However, in some cases, these rights are limited by duties imposed on owners by statutes or the constitution to use real estate productively or to protect the environment. Finally, owners can transfer their rights by means of instruments such as public deeds, donation contracts, or inheritances, which are formalized through processes before state institutions.

Nevertheless, approximately 50 percent of the Latin American population lives in peripheral neighborhoods, where real estate is not regulated by the state legal system.¹⁶² These neighborhoods were constructed on public or private lands that were occupied by individuals with few socioeconomic resources or by illegal builders. Given their illegal origin, the state cannot recognize any property rights over the lots and the houses built on these lands. However, neighborhood organizations or communal action boards in cities like São Paulo, Lima, La Paz, Quito, and Bogotá have created extralegal normative systems that regulate ownership of real estate in the areas under their jurisdiction.¹⁶³ Generally, as happens in the Jerusalén neighborhood of

160 K. A. Gould, D. R. Carter, and R. K. Shrestha, “Extra-legal Land Market Dynamics on a Guatemalan Agricultural Frontier: Implications for Neoliberal Land Policies,” *Land Use Policy* 23 (2006), 408; G. Barnes, “Lessons Learned: An Evaluation of Land Administration Initiatives in Latin America Over the Past Two Decades,” *Land Use Policy* 20 (2003), 367.

161 J. Locke, *Segundo Tratado sobre el gobierno civil: un ensayo acerca del verdadero origen, alcance y fin del gobierno civil* (Madrid: Alianza, 1990), ch. 5.

162 Bonilla, “Extralegal Property,” 209.

163 C. Hinchey Trujillo, “La Puesta en Práctica de la Campaña de Seguridad en la Tenencia de la Vivienda en América Latina y el Caribe,” in *Las campañas mundiales de seguridad en la tenencia de la vivienda y por una mejor gobernabilidad urbana en América Latina y el Caribe* (SERIE seminarios y conferencias 12) (Santiago de Chile: CEPAL, 2001), 25.

the Ciudad Bolívar district in Bogotá, this extralegal system is constituted by a set of rules and principles that use categories of state law, resignifying them. In Jerusalén, to continue with the example, the communal action board (*Junta de Acción Comunal*, JAC) determined that the owner of a piece of land is the person who works on it, in particular, the person who builds on it. Likewise, the JAC created a book to register owners, as well as changes in the ownership of real estate. Finally, this extralegal property system in Jerusalén recognizes the validity of private documents that the neighborhood's inhabitants call "contract of sale" or "promise of sale." These documents use categories of the state legal system but do not meet the formal requirements that this system demands to recognize them as valid. Nevertheless, within the neighborhood, these documents are the accepted means of transferring property.

In Jerusalén, therefore, as in many other peripheral neighborhoods of Latin American cities, the extralegal legal system is in constant interaction with the state legal system.¹⁶⁴ For example, the official legal system has in many cases had to give formal recognition to the existence of these neighborhoods, even though it cannot recognize property rights over the real estate inside them. As such, the state has been able to construct or improve streets in these peripheral neighborhoods and provide essential public services like water, sewer systems, and electricity, and to charge "property" taxes. Likewise, the extralegal legal system constantly makes use of the state legal system to achieve aims it considers valuable, such as authenticating the extralegal documents of property transfer before public notaries and formalizing sworn statements where the neighborhood's inhabitants recognize that they are the owners of real estate.

Community organizations do not create these extralegal property systems because they are in discord with the aims or contents of the state property system. Rather, they create them because it is impossible to apply official property rules and principles in the neighborhood. This, in turn, is due to the fact that much of the land occupation was illegal and that the state is generally absent as well as indifferent to their interests – and yet a matter as important, and one that could potentially generate many conflicts, as property must be regulated. The state constantly articulates policies to "legalize" these neighborhoods, and, as such, to eliminate the sovereigns, rules, and principles that compete with their property law. However, these policies are not always effective, for reasons that range from citizens' lack of confidence

¹⁶⁴ Bonilla, "Extralegal Property," 224–25.

in the state to the economic costs for the neighborhoods' inhabitants and the bureaucratic obstacles that must be overcome to materialize them.

The coexistence of the state and extralegal systems of property in many cities of Latin America offers particularly strong evidence of some of the arguments that justify legal monism and explain extralegal strong legal pluralism. Arguably, a single statewide legal property system is based on a series of values that are central for liberal modernity and generate a series of practical advantages for citizens of a liberal democracy. On one hand, the concept of a single state system of property is founded on the principles of equality, universality, legal security, and autonomy.¹⁶⁵ The state property system starts from the basis that all citizens are equal and therefore all legal norms should be applied to them equally. The rights and duties generated by the recognition of individual property by the state must be applied to all members of the political community without distinction. This also guarantees that citizens know what the legal consequences of their actions are, and that they can therefore decide autonomously and in an informed manner what courses of action they wish to take with respect to their properties and the properties of others. Likewise, a monist state property system reduces the cognitive costs related to determining the norms applicable to conflicts over property that arise between citizens;¹⁶⁶ it contributes to the proper functioning of the market economy, which needs a common concept of property and some common rules on property to guarantee the unimpeded exchange of goods and services;¹⁶⁷ and it legitimizes the legal norms that aim to solve the problems arising around matters as complex and difficult as property.¹⁶⁸

Nevertheless, legal monism in the realm of property is only a normative project in Latin America. In the region, six of every eight buildings are constructed outside the state market economy's limits, and around 80 percent of the real estate is not controlled by the state legal property system.¹⁶⁹ Extralegal strong legal pluralism is therefore the rule rather than the exception. This legal pluralism regarding property is also generally constructed in bottom-up processes as a consequence of the state's absence or the state legal system's indifference to the social reality of the most socioeconomically vulnerable individuals in the political community.¹⁷⁰

165 Bonilla, "Extralegal Property," 204–7.

166 J. Waldron, *The Right to Private Property* (Oxford: Oxford University Press, 1990), 43.

167 H. Soto, *The Mystery of Capital* (London: Black Swan, 2001), 7 and 10.

168 Waldron, *The Right*, 162. 169 Soto, *The Mystery*, 85.

170 Bonilla, "Extralegal Property."

As happens with other forms of pluralism, this extralegal strong legal pluralism as it exists in Latin America is an iteration of a pattern that cuts across the reality of a good part of the globe. In countries like Egypt, the Philippines, and Vietnam, the strong pluralism of property is also the rule rather than the exception.¹⁷¹ Extralegal strong legal pluralism in Latin America is a species of a genus that is present in a good part of the globe: In Africa and Asia, it is also manifest in areas other than urban real estate, for example, in issues like the use of water and rural land¹⁷² and fishing rights.¹⁷³

Sovereignty, International Law, and Weak Legal Pluralism

The monist, monocultural sovereign state, as argued earlier, was a normative project that ignored the legal and cultural reality of Latin American societies. The societies of Latin America were (and are) culturally diverse and legally plural. The normative projects of the sovereign states, legally pluralist and multicultural or intercultural, sought to close the gap between the official legal and political structure and the social reality. Consequently, these projects recognized and accommodated the legal and cultural diversity that existed in Latin American societies. The primary discursive and practical instrument these models of state used to achieve this objective was weak legal pluralism. Using this legal tool, the multicultural and intercultural state models made their rule of recognition more complex and included indigenous and Afro-Latin American institutions among those generating law. This internal weak legal pluralism was primarily an achievement of the actions taken by indigenous and Afro-Latin American peoples, non-governmental organizations that defend the interests of these communities, some liberal or progressive parties, and the constitutional reform processes which opened spaces for a politically engaged citizenry that questioned the weaknesses of the hegemonic monocultural and monist model in Latin America at the end of the 1980s. The weak legal pluralism is therefore a consequence primarily of

171 Soto, *The Mystery*, 254; Bonilla, "Extralegal Property," 209.

172 R. Meinzen-Dick and L. Nkonya, "Understanding Legal Pluralism in Water and Land Rights: Lessons from Africa and Asia," in B. van Koppen, M. Giordano, and J. Butterworth (eds.), *Community-Based Water Law and Water Resource Management Reform in Developing Countries* (Cambridge: Ebrary, 2007).

173 M. Bavinck, M. Sowman, and A. Menon, "Theorizing Participatory Governance in Contexts of Legal Pluralism – A Conceptual Reconnaissance of Fishing Conflicts and Their Resolution," in M. Bavinck, L. Pellegrini, and E. Mostert (eds.), *Conflict over Natural Resources in the Global South: Conceptual Approaches* (Leiden: CRC Press, 2014).

domestic variables, of internal factors that acted in a coordinated or separate manner to transform the legal and political systems of the region. The move from the monist and monocultural state to the legally plural states that recognize cultural diversity thus generates a discontinuity in Latin American legal and political history with respect to the categories culture and law.

However, with respect to the third category that shapes the Latin American state models analyzed in this chapter, sovereignty, interpreted as an absolute concept, there is a profound continuity in Latin American legal and political history. The monist and monocultural model as well as the multicultural and intercultural pluralist models are all committed to the concept of absolute sovereignty. At the same time, this concept is questioned from within by a strong legal pluralism that is also the consequence of internal discursive and practical patterns: illegal or extralegal normative orders created by guerrilla groups, transnational criminal structures, or peripheral communities in which the state law only operates marginally. Like the weak legal pluralism established by the constitutions, Latin American strong legal pluralism is also a consequence, primarily, of internal variables that act jointly or in a coordinated manner to question or challenge the sovereign state.

However, all these processes of internal legal and political change are not isolated from international discursive or practical patterns. The legal pluralism that recognizes Latin American cultural diversity, as well as the strong legal pluralism of the region, are influenced by variables such as the international law on cultural minorities, primarily ILO Convention 169; international law that promotes and regulates the war on drugs, especially the Single Convention on Narcotic Drugs of 1961 (modified in 1972), the Convention on Psychotropic Substances of 1971, and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988; the international law on migrations; the globalization of classic liberalism and its concept of individual property; and the political, economic, cultural, and military influence of the United States in the region. These international factors are not the primary source of the strong and weak legal pluralisms that characterize Latin American states; rather, they interact with the internal variables that constitute the center from which these diverse legal forms emerge.

However, over the last thirty-six years, the sovereign and legally plural Latin American state model has become even more complex as a consequence of its interaction with international law.¹⁷⁴ The dialogue between

174 A. Serbín, "Regionalismo y soberanía nacional en América Latina: los nuevos desafíos," *Documentos CRIES* 15 (2010), 5–6.

and mutual influence of the national legal systems and the international legal orders has generated an external weak legal pluralism that coexists with the internal strong and weak legal pluralisms that I examined above. The rules of recognition in the region's countries are further complicated by the inclusion of criteria that incorporate international law into the internal system of sources of law.¹⁷⁵ This process of interaction and mutual influence of national and international law has primarily occurred through the following two legal mechanisms: that of the constitutional bloc, which has energized the relationship between the internal legal systems and international human rights law (including the Inter-American system), and the multiplication of multilateral and bilateral trade and integration treaties signed by the region's countries. These instruments have led to an increased questioning of the concept of absolute sovereignty that the monist and monocultural model of state is committed to, as are the Latin American multicultural and intercultural state models. The constitutional bloc as well as multilateral and bilateral trade and integration treaties have thrown the porous nature of the Latin American states' sovereignty into sharp relief, and they have deepened the weak legal pluralism of the region's legal system from the outside.

The constitutional bloc and the notable increase in multilateralism and bilateralism in Latin America also echo, nurture, or dialogue with global discursive and practical patterns. For example, the human rights systems in both Europe and Africa confront challenges analogous to those of Latin American countries with respect to the relationship that regional human rights law, and the courts that interpret it, should have with national laws and courts. Questions like the margin of member countries' discretionality, the weakening of the classic concept of sovereignty, the efficacy of regional court rulings, and the political tensions between authoritarian governments and human rights tribunals cut across the African and European human rights systems.¹⁷⁶ Finally, Latin American multilateralism and bilateralism reflect, echo, or dialogue with the large number of multilateral and bilateral treaties signed in Asia, Africa, and Europe that create regional blocs around political or economic values, such as the European Union, the African Union of Nations, the Community of East Africa, the South African Development Community, the

175 H. Nogueira, "Las constituciones y los tratados en materia de derechos humanos: América Latina y Chile," *Ius et Praxis* 6 (2000), 237–41; M. G. Monroy, "El derecho internacional como fuente del derecho constitucional," *Anuario Colombiano de Derecho Internacional* 1 (2008), 108–9.

176 A. von Bogdandy, H. Fix-Fierro, and M. Morales (eds.), *Ius constitutionale commune en América Latina: Rasgos, potencialidades y desafíos* (Mexico City: Universidad Nacional Autónoma de México, 2014).

West African Economic and Monetary Union, the Association of Southeast Asian Nations, the South Asian Association for Regional Cooperation, the Bay of Bengal Initiative, the South Asian Free Trade Area, the Eurasian Economic Community, and the [Asian] Economic Cooperation Organization.

The Constitutional Bloc

The constitutional bloc is a legal mechanism that expands the concept of the supreme norm of the legal system.¹⁷⁷ The supreme norm of a national legal order is generally identified with its constitution and this, in turn, is identified with its text. The political charter is nothing other than the set of articles collected in the document that we name “constitution.” Constitutional bloc, instead, allows for imagining the supreme norm as including not only the constitution but also other legal norms, such as international human rights treaties and organic and statutory laws. The constitutional bloc can fulfill a variety of functions, such as expanding the rights that are recognized in the internal legal order, serving as a tool for interpreting the legal system, or being used as a parameter of constitutionality,¹⁷⁸ that is, as a standard for evaluating the processes by which the subordinate norms of the system are created, as well as their contents. As will be shown below, this mechanism has been incorporated into legal systems of various Latin American countries by means of constitutional reforms or via constitutional jurisprudence.

The concept of the constitutional bloc has some common roots in Latin America.¹⁷⁹ It is originally a legal transplant from the French legal system.¹⁸⁰ In 1971, the Constitutional Council of France decided that it would include not only the constitution then in force (that of 1958), but also the Universal Declaration of Human Rights and the principles of the constitution of 1946 within the parameters of constitutionality.¹⁸¹ This decision sought to solve

177 R. Uprimny, “El bloque de constitucionalidad en Colombia. Un análisis jurisprudencial y un ensayo de sistematización doctrinal,” in D. O’Donnell, I. M. Uprimny, and A. Villa (comp.), *Compilación de Jurisprudencia y doctrina nacional e internacional* (Bogotá: Oficina Alto Comisionado de Naciones Unidas para los Derechos Humanos, 2001), 2–5.

178 Uprimny, “El bloque,” 3; Nogueira, “Las constituciones,” 243–45.

179 M. E. Góngora, “La difusión del bloque de constitucionalidad en la jurisprudencia Latinoamericana y su potencial en la construcción del *ius constitutionale commune* latinoamericano,” in A. von Bogdandy, H. Fix-Fierro, and M. Morales (eds.), *Ius constitutionale commune en América Latina: Rasgos, potencialidades y desafíos* (Mexico City: Universidad Nacional Autónoma de México, 2014), 305–6.

180 A. A. Zeballos, “Supremacía constitucional y bloque de constitucionalidad: el ejercicio de armonización de dos sistemas de derecho en Colombia,” *Pensamiento Jurídico* 47 (2018), 26.

181 Uprimny, “El bloque,” 6–8.

the problem generated by the absence of a bill of rights in the constitution of 1958. This transplant arrived in Latin America, in part directly from France and in part through the Spanish legal system, which had also imported it from the French legal order and used it as a tool to solve problems of competencies between the national state and autonomous communities. In addition to the constitution of 1978, the Spanish constitutional bloc includes the autonomic statutes and the organic laws that distribute competencies between the state and autonomous communities.¹⁸² The Spanish concept of constitutional bloc does not include international law or grant constitutional hierarchy to the statutes that form it, although the Spanish constitution does contain a reference to international human rights law as a hermeneutic instrument for interpreting the legal system. This transplant traveled to Latin America as a consequence of the constitutional reforms made in the region over the last thirty-six years in Argentina, Colombia, Peru, Ecuador, and Bolivia, for example, or it migrated through the jurisprudence of several Constitutional Courts like that of Costa Rica and the Supreme Court of Justice of Panamá.¹⁸³

However, this imported legal product hasn't remained stable in Latin America, but has undergone a series of adaptations as a consequence of local interpretations and cross-fertilization generated by the dialogue between Latin American legal systems, primarily their constitutional courts and their legal scholars. In Latin America, the constitutional bloc has the following general characteristics: It is formed (i) by a set of constitutional norms that refer to international human rights law and incorporate it into internal law; (ii) and/or by a set of rulings issued by constitutional courts that interpret these clauses or import directly the institution; (iii) and, sometimes, by a set of statutes, like the statutory or organic laws, that have a higher status than ordinary laws. Likewise, (iv) the constitutional referral clauses or the jurisprudence that typically interprets them recognize international human rights law treaties as having constitutional or supralegal status; and (v) these referral clauses or judicial opinions allow these treaties to be applied internally by means of constitutional or legal procedures or actions like concrete and diffuse judicial review (*amparo* or *tutela*) or abstract judicial review (*actio popularis*). So, while the European constitutional bloc incorporates national legal norms as a parameter of constitutionality, Latin American constitutional bloc

182 V. Suelt-Cock, "El bloque de constitucionalidad como mecanismo de interpretación constitucional. Aproximación a los contenidos del bloque en derechos en Colombia," *Vniversitas* 133 (2016), 317–19.

183 Góngora, "La difusión," 302–5.

includes international legal norms.¹⁸⁴ Likewise, while the constitutional bloc in Europe does not always grant constitutional hierarchy to the internal legal norms that are part of the parameters of constitutionality, the Latin American constitutional bloc, in the great majority of countries, grants constitutional hierarchy to international human rights treaties.¹⁸⁵

The constitutional clauses that remit to international law in Latin America are primarily of two types: interpretative and constitutive. The former seeks to have internal law, particularly constitutions and their bills of rights, to be filled with content by means of international human rights law.¹⁸⁶ The latter grants international human rights law constitutional status, enabling it to serve, with some statutes like statutory or organic ones, as a standard for evaluating the constitutionality of inferior legal norms, like ordinary laws or decrees.¹⁸⁷ In some countries, the constitutional bloc also includes clauses that recognize rights accepted in international human rights law or which are considered as “inherently” part of what it means to be human, as fundamental rights even though they are not specified in the constitution.¹⁸⁸ Finally, the constitutional bloc in Latin America sometimes also includes clauses that regulate particular legal procedures, such as the approval of and withdrawal from human rights treaties.¹⁸⁹

The precise contents and interpretations of these clauses vary from country to country. For example, Colombia has emphasized the difference between constitutional bloc in the broad sense and in the strict sense,¹⁹⁰ Peru has used the mechanism primarily to resolve issues of competency between the central state and the provinces,¹⁹¹ and yet others like Argentina have concentrated part of the discussion on the different uses of the institution: either as a hermeneutic tool that should permeate the entire legal system or as an instrument

184 Góngora, “La difusión,” 308.

185 C. León and V. Wong, “Cláusulas de apertura al derecho internacional de los Derechos Humanos: Constituciones iberoamericanas,” *Foro, Nueva Época* 18(2) (2015), 102–23.

186 Constitución Política de Colombia of 1991, article 93; Constitución Política del Estado Plurinacional de Bolivia of 2009, articles 13, 256; Constitución Política del Perú of 1993, fourth final and transitory provision.

187 Constitución Política de Colombia of 1991, articles 151, 152, 153.

188 Constitución Política de la República del Ecuador of 2008, articles 17, 18, 19; Constitución Política de Colombia of 1991, article 44; Constitución Política de la Nación Argentina of 1853 (amended in 1994), article 33; Constitución Política del Perú of 1993, article 3.

189 Constitución Política de la Nación Argentina of 1853 (amended in 1994), article 75.

190 Constitutional Court of Colombia, judgment C-191/98 (May 6, 1998).

191 A. D. Meza, “El denominado bloque de constitucionalidad como parámetro de interpretación constitucional, ¿es necesario en el Perú?,” *Revista Oficial del Poder Judicial* 7 (2012), 158–59.

for the courts to apply their powers of judicial review.¹⁹² This way, while the concept “constitutional bloc” makes the will of the states in the region explicit by integrating international human rights law into internal law, and it has some common general characteristics, no uniform understanding of the mechanism “constitutional bloc” exists in the region. In addition, the constitutional bloc has been used to discuss an enormous diversity of issues. For example, it served to declare unconstitutional the General Forestry Law in Colombia,¹⁹³ section 2 of article 459 of the Criminal Code in Argentina,¹⁹⁴ and article 240 of the Organic Judicial Branch Law in Costa Rica.¹⁹⁵

The transplant of the constitutional bloc and its adaptations, as well as its continuous use in the region by the courts and civil society, can be explained by the following intersecting elements: (i) states have historically used internal law to violate human rights, not to protect them, or they have interpreted bills of rights as norms on paper or aspirational norms rather than norms in action or for direct and immediate application; (ii) the incorporation of international human rights law (IHRL) into internal law allows for confronting rooted patterns of human rights violations in the region. The mechanism has been widely used by social organizations, academia, and the judiciary to defend human rights;¹⁹⁶ (iii) the prestige that international law has in Latin America, as well as the internal and external political cost triggered by violations, allows for a more effective defense of human rights;¹⁹⁷ (iv) the implicit application of a functionalist perspective on comparative law, which assumes that Latin American societies importing legal knowledge have problems analogous to the European societies exporting it, that European societies have the most efficient tools for confronting these problems, and that both groups of legal orders are part of the same legal family, civil law, which facilitates the importation/exportation of

192 M. E. Góngora, “El Bloque de Constitucionalidad en Argentina y su relevancia en la lucha contra la impunidad,” Centro de Derechos Humanos de Nuremberg (2007), 10.

193 Constitutional Court of Colombia, decision C-030/08-030 (Jan. 23, 2008); D. Bonilla, “Derecho internacional, diversidad cultural y resistencia social: el caso de la Ley general forestal en Colombia,” *International Law, Revista Colombiana de Derecho Internacional* 27 (2015), 84–86.

194 Supreme Court of Argentina, *Giroldi, Horacio David y otro s/ recurso de casación*, case no. 32/93 (Apr. 7, 1995), considerando 12; Góngora, “El bloque,” 24.

195 Supreme Court of Costa Rica, Sala Constitucional, judgment no. 1147-90 (Sept. 21, 1990); V. Orozco, “El valor normativo de los Instrumentos Internacionales en materia de Derechos Humanos en el Sistema de Justicia Constitucional Costarricense: El caso particular de la jurisprudencia de la Corte Interamericana de Derechos Humanos,” *Revista Judicial* 113 (2014), 16.

196 D. Bonilla (ed.), *Justicia colectiva, medio ambiente y democracia participativa* (Bogotá: Ediciones Uniandes, 2010).

197 Bonilla, “Derecho internacional,” 43.

legal knowledge;¹⁹⁸ (v) the implementation of the dominant geopolitics of legal knowledge, which assumes that Latin America is a poor context for the creation of legal knowledge and therefore should import legal products from the Global North to confront the social problems afflicting it;¹⁹⁹ (vi) the low cognitive and economic costs of importing a legal product that is interpreted as legitimate and efficient;²⁰⁰ (vii) the legitimation of the courts and social organizations that use international human rights law internally to defend fundamental rights; (viii) the possibility of creating internal and external alliances between dissimilar social and political groups for defending human rights around IHRL given its legitimacy and the multiplicity of rights it consecrates;²⁰¹ (ix) the fact that the processes of democratization which impelled the constitutional reforms at the end of 1980s and beginning of the 1990s sought to re-legitimize states, in part, by means of the effective protection of human rights; (x) the need to specify the place that international law should occupy in the national system of sources of law; and (xi) the ease with which human rights travel: They have historically been interpreted as rights which all human beings have from birth or rights that, while contingent (not natural), should be made universal to protect valuable principles like autonomy and equality.

In sum, the constitutional bloc is a legal mechanism that opens national legal systems to the international legal order, puts the two types of legal systems in dialogue, and enables their mutual transformation. The constitutional clauses remitting to international law and the jurisprudence that interprets them are therefore tools by which a weak external legal pluralism is created in the region. The constitutional bloc maintains the distinction between the national legal orders and the international legal order. However, it also functions like a lock and sluice gates: It allows international human rights law to enter the waters of national law, and it carries international human rights law towards the source of the system of internal laws, such that it comes to occupy the same place as the constitution in this hierarchy. The constitutional bloc expands the concept of supreme norm and incorporates international human rights law as one of its components.

The constitutional bloc therefore shows the porous nature of state sovereignty in contemporary Latin American states. International treaties are

198 A. Watson, *Society and Legal Change* (Philadelphia: Temple University Press, 2001); A. Watson, "Legal Transplants and European Private Law," *Electronic Journal of Comparative Law* 4 (2000).

199 D. Bonilla, "Introduction," in D. Bonilla (ed.), *Constitutionalism of the Global South* (Cambridge: Cambridge University Press, 2013), 1–39.

200 Bonilla, "Derecho internacional," 43–44. 201 Bonilla, "Derecho internacional," 45.

generally created between parties that do not have the same power; their contents are not the consequence of an agreement reached by abstract collective subjects of equal status. Rather, they are agreements where collective subjects with greater economic, political, military, and cultural power impose or influence the central contents of these treaties in a notable, sometimes disproportionate, manner.²⁰² Although international human rights treaties are incorporated into Latin American national legal systems by means of a decision of the primary constituent (referral clauses) or by a decision of the executive (negotiation and agreement) and the legislature (ratification), who represent the sovereign people, their contents depend at least partially on the will of other sovereign states and the international institutions in charge of applying them. Of course, the constitutional bloc does not eliminate the concept of state sovereignty. Nevertheless, it punctures it at various points on the surface, makes it porous. Sovereignty no longer resides absolutely in the people or the nation but slides towards the international community to some degree, particularly towards its most powerful members. The classic model of modern sovereignty is weakened. The sovereign state that acts as an instrument of the people or the nation, also sovereign, yields spaces to and intersects with international law and the multilateral or bilateral states and institutions that construct it.

The constitutionalization of international law and the internationalization of constitutional law in the region is not a unique Latin American process. Rather, it is nurtured by and interacts with other experiences like that of the European Union, where the interaction with and overlap of international human rights law, supranational human rights law, and the constitutional law of the member states is the rule rather than the exception.²⁰³

The Constitutional Bloc in Operation: The Inter-American Human Rights System

The Inter-American Human Rights System is structured around the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Inter-American Commission on Human Rights (IACHR),

202 C. F. Murphy, "Coacción económica y tratados desiguales," *Estudios Internacionales* 14 (1970), 82–86; United Nations Conference on the Law of Treaties, *Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties* (1969); M. W. Mutua, "What Is TWAIL?," *Proceedings of the ASIL Ann. Meeting* 94 (2000), 31.

203 S. Piattoni, "Multi-level Governance: A Historical and Conceptual Analysis," *European Integration* 31 (2009), 163–80.

and the Inter-American Court of Human Rights (IACourtHR) (see also Sections 6.2 and 6.3).²⁰⁴ The Commission was created in 1959, and went into operation in 1960; the Court was created in 1969 and took up work only in 1979. Currently, twenty countries accept the jurisdiction of the IACourtHR: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, and Uruguay.²⁰⁵ As the Inter-American system has been operating in the region for a little more than five decades, it predates the period that this chapter focuses on. Nevertheless, the constitutional bloc is an institution that has facilitated and energized the relationship between the Inter-American system and the national legal systems. In particular, it has enabled a dialogue, albeit one not free of tensions, between international human rights law and Latin American constitutional law.²⁰⁶ Consequently, it is a good example of how the external weak legal pluralism consolidated by the constitutional bloc operates and how this pluralism has deepened the weakening of the modern, absolute concept of sovereignty in the region's states.

The primary interlocutor for the dialogue between international law and Latin American constitutional law has been the IACourtHR; this court has subsidiary competence with respect to the national legal systems and the constitutional courts in the region. The jurisdiction of the IACourtHR on contentious cases and its reception by the Latin American constitutional courts can be interpreted in two ways. On one hand, the American Convention on Human Rights can be viewed as an Inter-American bill of rights that is applied by the IACourtHR. Consequently, member states' constitutional courts would be among the instruments for the Inter-American system to apply the IACourtHR's rulings locally. This interpretation would then argue that international human rights law has primacy over national law, that the IACourtHR has a status above that of the national courts in the defense of Latin American human rights, and that the dialogue between the IACourtHR and national courts is vertical in nature. The external weak pluralism consolidated by the

204 M. Castañeda, *El Derecho Internacional de los Derechos Humanos y su recepción nacional* (Mexico City: Comisión Nacional de los Derechos Humanos, 2018), 135–60; F. Arias and J. Galindo, "El sistema interamericano de Derechos Humanos," in G. R. Bandeira, R. Uruña, and A. Torres (eds.), *Protección Multinivel de Derechos Humanos* (Barcelona: Red de Derechos Humanos y Educación Superior, 2013), 131–35.

205 Corte Interamericana de Derechos Humanos, *ABC de la Corte Interamericana de Derechos Humanos: El qué, cómo, cuándo, dónde y porqué de la Corte Interamericana. Preguntas frecuentes* (San José: Corte IDH, 2018), 6.

206 V. Abramovich, "Poderes regulatorios estatales en el pluralismo jurídico global," *Global Campus Human Rights Journal* 1 (2017), 146.

constitutional bloc would also give a normative basis to this interpretation. In many countries of Latin America, the constitutional bloc gives constitutional status to the American Convention on Human Rights, as part of international human rights law. This convention would therefore be one of the parameters of constitutionality employed to evaluate internal law, and the authorized interpreter of the convention is the IACourtHR. Consequently, the jurisprudence of the IACourtHR would be mandatory for national courts, who would contribute to implementing it. This argument is further supported by the so-called “control of conventionality” that all authorities of the convention’s member states would be obligated to accept.²⁰⁷ This interpretation would also guarantee that there is an Inter-American human rights law that is applied homogeneously throughout the region.²⁰⁸ It would likewise create some common standards for containing those Latin American governments that violate human rights. The IACourtHR’s rulings on whether nationally granted amnesties are admissible under the convention are a good example of how this interpretation operates and of its support by the IACourtHR.²⁰⁹

The weak pluralism created by this interpretation of the constitutional bloc and its relationship with the Inter-American Human Rights System would be vertical in nature and would significantly weaken the concept of absolute sovereignty which the states in the region are committed to. The will of the sovereign states would be limited by the decisions of an international tribunal formed by a set of judges, the great majority of which are foreigners, who are not democratically elected, and who may be citizens of countries that have not ratified the convention and have therefore not recognized the competency of the IACourtHR, although these states must belong to the OAS, the Organization of American States.²¹⁰ These same sovereign states would be limited by the convention that these judges interpret and apply, a convention that was created by a set of collective subjects with different degrees of political, economic, military, and cultural power a little more than four decades ago.

207 M. F. Quinche, “El control de convencionalidad y el sistema colombiano,” *Revista Iberoamericana de Derecho Constitucional Procesal* 12 (2009), 167–68; Arias and Galindo, “El sistema interamericano,” 131–35.

208 A. von Bogdandy, “Ius Constitutionale Commune en América Latina: una mirada a un constitucionalismo transformador,” *Revista Derecho del Estado* 34 (2015), 10–13; R. Urueña, “Luchas locales, cortes internacionales. Una exploración de la protección multinivel de los derechos humanos en América Latina,” *Revista Derecho del Estado* 30 (2013), 301–28.

209 *Masacres de El Mozote y lugares aledaños vs. El Salvador*, judgment (merits, reparations and costs), Inter-American Court of Human Rights (series C) no. 252 (Oct. 25, 2012), parag. 284.

210 Convención Americana de Derechos Humanos, article 52.

On the other hand, the relationship between the IACourtHR and the national courts can be interpreted as a form of horizontal external weak pluralism. This interpretation would argue that the Inter-American Human Rights System does not create a vertical relationship between the IACourtHR and national courts. The IACourtHR has subsidiary competency, which only operates when national courts have failed in the protection of human rights. The system does not include any principle or rule that locates the IACourtHR above national courts, and it does not include a mechanism to guarantee compliance with the rulings of the IACourtHR by national courts (or other branches of government in the member states). However, the IACourtHR has a generic competency in supervising compliance with its rulings, and the national authorities also have a generic obligation to comply with them and to apply control of conventionality to their legal systems. Rather, it is argued from this second perspective that the system has been structured, and so operates in practice, as a horizontal Inter-American legal space where the IACourtHR and the national courts are in constant interaction, to give content to the American Convention of Human Rights, to harmonize it with national law, and to apply it in member states.²¹¹ This dialogue becomes evident, for example, in a notable number of rulings by the Colombian Constitutional Court,²¹² the Argentine Supreme Court of Justice,²¹³ and the Peruvian Constitutional Tribunal.²¹⁴ In these rulings, the national courts apply the jurisprudence of the IACourtHR to solve cases related to abstract or concrete judicial review. Furthermore, the IACourtHR has used the jurisprudence of courts in Argentina, Costa Rica, and Colombia in some of its contentious cases.²¹⁵ This interpretation also allows for the understanding that all these courts have the same objective in the region: protecting human rights.

211 Urueña, "Luchas locales," 301–28.

212 Constitutional Court of Colombia, judgment C-578 (Dec. 4, 1995), decision C-358 (Aug. 5, 1997), judgment C-228 (Apr. 3, 2002), decision C-578/02 (July 30, 2002), judgment C-590/05 (June 8, 2005).

213 Supreme Court of Argentina, *recurso de hecho*, *Simón, Julio Héctor s/Privación de la libertad y otros*, case no. 17.768 (June 14, 2005); L. A. Franco, "Recepción de la jurisprudencia interamericana en el ordenamiento jurídico argentino," in S. García and M. Castañeda (eds.), *Recepción nacional del derecho internacional de los derechos humanos y admisión de la competencia contenciosa de la Corte Interamericana* (Mexico City: UNAM, 2009), 157–71.

214 Constitutional Court of Peru, *John McCarter*, file no. 0174-2006-PHC/TC (July 7, 2006); *César Alfonso Ausin de Irruarizaga*, file no. 8817-2005-PHC/TC (July 7, 2006); *Santiago Martín Rivas*, file no. 4587-2004-AA/TC (Nov. 29, 2005).

215 *Bedoya Lima et al. v. Colombia*, judgment (merits, reparations and costs), Inter-American Court of Human Rights (series C) no. 431 (Aug. 26, 2021).

This horizontal external weak pluralism creates a common Inter-American space for protecting human rights in both the international and the national context. It is argued from this second perspective that this type of dialogue-driven weak pluralism is facilitated and energized by the mechanism “constitutional bloc.” This mechanism allows national courts to apply both the convention and the jurisprudence of its authorized interpreter, the IACourtHR, directly. The constitutional bloc, by incorporating international human rights into internal law, and by granting constitutional status to these types of treaties, creates a dynamic channel of communication between international law and national law that is mediated by national courts. This interlegality also generates a virtuous circle that allows for legitimizing both the IACourtHR and national courts. The former is perceived not as a foreign and faraway court that is imposed on national courts, but as a tribunal that acts jointly with national courts to defend human rights on the continent. The latter are legitimized by using international law – an instrument that, as I mentioned above, enjoys high prestige in the region. National courts are also legitimized by presenting themselves as institutions that use all the legal resources available nationally and internationally to protect citizens’ human rights. However, as with the first interpretation, the second also calls into question the concept of absolute sovereignty that cuts across the political and legal history of the region, in part due to its ties with the principle of non-intervention, in part because of its connections with the Calvo and Drago doctrines.²¹⁶ Again, a set of foreign judges who are appointed, not elected, and who may be citizens of any country that belongs to the OAS, even though it may not be party to the convention, and who are interpreting an international treaty created by multiple states with different degrees of power in drafting it, have notable influence on national legal and political systems.

Multilateral and Bilateral Trade and Integration Treaties

The external weak pluralism created by the concept of constitutional bloc puts the Latin American state, law, and society into dialogue. These three categories interact and transform each other as a consequence of the interpretation and application of international human rights law in the national legal systems. The constitutionalization of international law and the internationalization of

²¹⁶ F. Arias, “Dinámica del derecho a la no-intervención en América del Siglo XIX,” *Pensamiento Jurídico* 36 (2013), 194–200.

constitutional law limit the actions of the region's states and protect the fundamental interests of civil society and the citizens that form it. This type of external weak legal pluralism creates a national/international public order that has the objective of protecting the human rights of all citizens in the region.²¹⁷ The external weak legal pluralism created by means of the dialogue and interaction between internal law as well as by the multilateral and bilateral trade and integration treaties that have multiplied notably in the last thirty-six years includes another category in the equation: the market. All these treaties include international trade as a central component of the dialogue between internal and international law.²¹⁸ In this second form of external weak legal pluralism, the state, law, and society interact to obtain economic benefits for all countries that are party to the treaties, though some of these treaties also include other objectives, such as the integration of political communities in the region. All these treaties, then, are transactional treaties where each party must provide capacities or goods, for example, the capacity to regulate matters of customs or international tariffs, in order to receive others, such as favorable access to other countries' markets.²¹⁹

The notable number of international trade and integration treaties that have been signed in Latin America over the last three-and-a-half decades, including MERCOSUR, the Andean Community of Nations (CAN), the Union of South American Nations (UNASUR), the Bolivarian Alliance for the Peoples of Our America (ALBA), the World Trade Organization (WTO), and the trade treaties between the United States and Peru and the United States and Colombia, thus limit state sovereignty in order to obtain economic and political benefits that are considered particularly valuable for Latin American states.²²⁰ These treaties also render Latin American external weak pluralism more complex; they include new criteria in the rules of recognition that structure the internal legal systems, as well as new institutions and normative orders that enter into dialogue with internal law such as the Andean Parliament, the Andean Tribunal, the Council of Heads of State and Government and the Secretariat General of UNASUR, the WTO Dispute Settlement Body, and the panels of

217 G. Aguilar, "La internacionalización del derecho constitucional," *Estudios Constitucionales* 5 (2007), 229.

218 F. Quispe-Remón, "Problemas y perspectivas de procesos de integración en América Latina," *International Law: Revista Colombiana de Derecho Internacional* 16 (2010), 280.

219 J. C. Fernández Rozas, "Los modelos de integración en América Latina y el Caribe y el Derecho internacional privado," *Iberoamérica ante los procesos de integración. Actas de las XVIII Jornadas de Profesores de Derecho Internacional y Relaciones Internacionales* (Madrid: Boletín Oficial del Estado, 2000), 22.

220 Quispe-Remón, "Problemas y perspectivas," 265–79.

arbitrators appointed to resolve the disputes resulting from the application of the free trade treaty between the United States and Colombia.

The international treaties that have been created in the region during the last three-and-a-half decades can be divided into two large groups: the classic liberal trade treaties and the post-liberal political integration treaties. The first, which sometimes include some political dimensions, have the primary objective of trade liberalization, the creation of economies of scale, the deregulation of the economy, the firm insertion of Latin American economies into the world economic system, and the limitation of the state's regulatory power.²²¹ CAN, MERCOSUR, the Community of Latin American and Caribbean States, the World Trade Organization, the bilateral trade treaties that countries such as Peru, Chile, and Colombia have signed with the United States, and the not-yet-concluded American Free Trade Area (AFTA) are paradigmatic examples of this type of treaty. The second group of treaties, which sometimes comprise some economic dimensions, have as primary aims the integration of the region (excluding the United States from the regional blocs), questioning the Washington Consensus that forms the basis for classic liberal trade treaties, the return of "developmentalist" policies, the strengthening of the state's capacities for regulation, the strengthening of the state's competencies for intervening in the economy, the consolidation of a state capitalism, and the consolidation of democracy in the region.²²² This second type of treaty is in turn divided into those led by Brazil, like UNASUR, and those led by Venezuela, like ALBA. This division has been generated by the geopolitical interests of each of these countries (each wants to position itself firmly as a leader in the region); by the acceptance (Brazil) or rejection (Venezuela) of globalization of markets; and by the relationship they want to promote with the United States (Brazil aims for a respectful distance and Venezuela wants confrontation and rejection).²²³

So it emerges that Latin American multilateralism is profoundly heterogeneous and fragmented. There are many competing trade or integration treaties developed in parallel fashion, though they pursue analogous aims, and treaties that try to materialize contradictory objectives, such as the promotion of an interventionist state or that of a minimal state. In addition, most treaties have a governmental origin without the continuous and systematic intervention by civil society, business people, unions, or non-governmental

221 A. Malamud, "Conceptos, teorías y debates sobre la integración regional," *Norteamérica* 6 (2011), 230–37; Huerta, "Los tratados," 13–15; Fernández Rozas, "Los modelos," 14–15.

222 Serbín, "Regionalismo y soberanía," 10. 223 *Ibid.*, 13.

organizations. Similarly, most of these treaties have not created a dense multilateral institutionality or a supranational normativity that effectively allows for achieving the long-term aims they pursue.²²⁴

On an abstract level, all these treaties, as well as the external weak legal pluralism they generate, can be interpreted in light of the conceptual opposition fragmentation/unity.²²⁵ On one hand, historically the countries of Latin America have been committed to the principle of absolute national sovereignty and to a series of related international law principles that complement and develop it, such as the principles of non-intervention and self-determination. Consequently, this discursive and practical dynamic promotes the separation and isolation of states from one another. On the other hand, the multilateralism or bilateralism that incentivizes these treaties drives the union of states and the creation of supranational entities and rules which limit state sovereignty, as well as the principles of self-determination and non-intervention.²²⁶ The constellation of normative orders and institutions that create these treaties promotes the creation of blocs of countries that share a set of political or economic objectives. Nevertheless, to fulfill these aims, this legal and institutional constellation restricts the state's capacity to decide internal matters of enormous importance, such as regulation of the market, taxes imposed on citizens or companies, goods and services for import or export, subsidies that should be given to key sectors of the economy like agriculture, and subsidies that should be granted to public services.

In practice, however, the limitations placed on state sovereignty by these treaties is not always notable. Factors like the lack of resources, the asymmetries of power between countries, continuous noncompliance with agreed-upon rules, the lack of concrete and precise objectives and means, ideological differences among governments, and the intergovernmental and presidentialist nature of the creation and application of treaties have resulted in a significant part of multilateral or bilateral Latin American treaties not having been successfully implemented in the long term.²²⁷ A few classic liberal multilateral or bilateral trade treaties are the exception to this rule. These treaties focus primarily on economic matters and present a notable imbalance of power between the member states. For example, within the WTO

224 Quispe-Remón, "Problemas y perspectivas," 286.

225 M. P. Ospina, "El proceso de toma de decisiones en el Mercosur y el TLCAN: la disyuntiva entre integración regional y soberanía nacional en América Latina," *Colombia Internacional* 100 (2019), 240–45.

226 Fernández Rozas, "Los modelos," 15–16; Ospina, "El proceso," 240–45.

227 Quispe-Remón, "Problemas y perspectivas," 282–87.

framework, the United States, Canada, and Western Europe interact with the states of Latin America, and in the bilateral free trade treaties the United States interacts with countries like Colombia, Chile, and Peru.

The unequal distribution of power among member states of these bilateral treaties, as well as the economic benefits they generate for the strongest parties, have led to the development of rules and institutions which significantly limit state sovereignty. The following three examples illustrate this argument paradigmatically. The first is that of the tribunals of arbitrators that should typically decide on how to resolve the controversies arising between member states.²²⁸ These tribunals, which replace national legal systems, have historically been constituted primarily of jurists of the Global North, and have traditionally ruled continuously and systematically against the countries of the Global South, including those in Latin America.

The second example concerns the legal security or legal stability clauses that have been interpreted by the arbitrators or the institutions created by the treaties as stipulating that there cannot be any change in the expectations that international investors had when they entered national markets.²²⁹ This interpretation has led to a radical limitation of the state's regulatory powers; any new national legal norm that negatively affects the business of international investors is understood as a violation of free trade treaties. For example, this interpretation has led to the understanding that the state doesn't have the competency to subsidize public services in times of crisis or to modify the rules related to taxes when there are significant changes in the national, regional, or global political and economic situation.²³⁰

The third example is the principle of not permitting distinctions between national products and international products, or between national industry and multinational industries.²³¹ This severely limits the capacity of Latin American states to intervene in the economy or to submit multinational companies to certain types of requirements. For example, these principles have prohibited states in the region from requiring that multinational companies produce goods or provide services only in certain economic sectors; from subsidizing certain sectors such as farming, which is central for political

228 T. Allee and P. Hardt, "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions," *International Studies Quarterly* 54 (2010), 3–5; Abramovich, "Poderes regulatorios," 148–89.

229 Abramovich, "Poderes regulatorios," 148–49.

230 J. Estay, "América Latina en las negociaciones comerciales multilaterales y hemisféricas," in J. Estay (ed.), *La economía mundial y América Latina. Tendencias, problemas y desafíos* (Buenos Aires: Consejo Latinoamericano de Ciencias Sociales, 2005), 199.

231 Acuerdo General sobre Aranceles Aduaneros y Comercio de 1994, article 3.

reasons or food security; or from requiring that the multinationals transfer technology or limiting the earnings that these companies can send to their headquarters, typically located in other countries.²³²

In summary, the trade and integration treaties that have been created in Latin America over the last thirty-six years make the external weak legal pluralism generated by the constitutional bloc more complex. All these treaties, with greater or lesser success, construct a set of international norms and institutions that interact and modify (and are modified by) national legal systems. Moreover, they make the rules of recognition of domestic legal orders more complex by including criteria for identifying the national system's valid norms that refer to multilateral or bilateral international norms that promote Latin American trade or integration.

Conclusions

The state remains the unit that shapes Latin American societies legally and politically. However, this unit has mutated significantly over the last thirty-six years. The monist and monocultural sovereign state that emerged with independence from Spain and Portugal in the nineteenth century and was dominant until the end of the 1980s was transfigured into multicultural states or legally plural intercultural states with porous or limited sovereignties. Consequently, the changes experienced by the states in the region during the last three-and-a-half decades have revolved around the following three axes: First, around political and legal recognition and inclusion of the cultural diversity that characterizes Latin American societies. Second, around the recognition of internal and external weak legal pluralism. The former opens the rule of recognition of the national legal systems to more complexity, so that the institutions of indigenous or Afro-Latin American peoples can be considered sources of legal creation. The latter makes the rule of recognition more complex in order to enable the inclusion of international human rights law and multilateral or bilateral trade or integration treaties in the national law system. In both cases, the state legal system enters into dialogue and interacts with other legal orders: those of cultural minorities and international law. And in both cases, the concept of absolute sovereignty that Latin American states have historically been committed to is weakened. Finally, the Latin American multicultural or intercultural state has tried to eliminate, with

232 A. Huerta, "Los tratados de libre comercio impulsados por Estados Unidos en América Latina y la profundización del subdesarrollo," *Contaduría y Administración* 221 (2007), 17.

partial success, the constellation of sovereignties that forms the strong legal pluralism which has historically cut across, and further decreased, its sovereignty. Multicultural and intercultural states in Latin America have tried to eliminate the normative systems created by, among others, guerrilla groups, transnational criminal organizations, and the marginalized communities of the region's large cities. However, all these transformations are not happening in isolation. Rather, they materialize in, and in turn modify, global discursive and practical patterns related to how states should recognize and include cultural diversity and human rights, how the market economy and regional integration should be promoted, and what strategies should be articulated and implemented to confront the illegal or extralegal normative orders that compete with official law.

Both the state and official law in Latin America have been challenged and transformed, by illegal and extralegal internal normative orders as well as by the international legal system over the last three-and-a-half decades. However, these alternative internal or external normative systems do not appear to have the potential to make the state or official law disappear in the region. The state is the political form through which Latin American political communities will continue to organize themselves in the foreseeable future. Likewise, state law will be one of the central normative structures for social control in Latin America in the decades to come. The solidity, legitimacy, and fairness of these political and legal structures, however, are another matter. Consolidating the rule of law and making it an instrument for material justice is a process that will also be part of the future of all Latin Americans.