

INTERNATIONAL LEGAL THEORY

Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America

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Abstract

In the last two decades, the concept of plurinationalism has appeared in discussions about nationalism, statehood and multilevel governance, being formulated as a new state model that accommodates cultural diversity within the liberal state with the aim of solving nationalistic conflicts in countries marked by profound ethnic grievances, mainly in Europe. However, these discussions have paid less attention to the meaning of plurinationalism in ex-colonial contexts, particularly in recent experiences of state transformation in Bolivia and Ecuador, where the role of indigenous peoples in the plurinational project has been crucial. To fill this gap, this article explores the legal and political foundations, challenges and local and international dynamics in the building of the plurinational model in both countries. Under a critical engagement with Third World Approaches to International Law (TWAIL), this article argues that plurinationality from indigenous perspectives departs from multicultural liberal models associated with current European plurinational views, and addresses two challenges: a global political economy of resource extraction, and a racialized state structure working as a barrier to actual plurinational implementation. These limitations explain an intrinsic tension in the Bolivian and Ecuadorian experience: on the one hand, plurinational governments try to unify the people around the ‘national interest’ of developing extractive industries; and on the other hand, they attempt to recognize ethno-political differences that often challenge the transnational exploitation of local resources.

Keywords

indigenous peoples; Latin America; plurinationalism; resource extraction; self-determination

I. INTRODUCTION

In the last two decades, the concept of plurinationalism has appeared in discussions about nationalism, statehood, and multilevel governance.¹ It has been formulated

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¹ M. Keating, ‘Europe as a multilevel federation’, (2017) 24 *Journal of European Public Policy* 615; M. Keating, ‘Plurinational Democracy in a Post-Sovereign Order’, (2001) *XV Congreso de Estudios Vascos* 387; M. Keating, *Plurinational Democracy. Stateless Nations in a Post-Sovereignty Era* (2005); M. Keating, ‘Rethinking Sovereignty: Independence-lite, devolution-max and national accommodation’, (2012) 16 *Revista d’Estudis Autònoms i Federals* 9; S. Tierney, *Constitutional Law and National Pluralism* (2004); N. Stojanovic, ‘When Is a Country

as a new state model that accommodates cultural diversity within the liberal state, with the aim of solving nationalistic conflicts in countries as varied as Spain, the United Kingdom, Canada and Bolivia.² From this perspective, the constitution of the nation states' international system has concealed a problem of sovereignty in countries where there are rival versions of sovereign rights rooted in competing historiographies.³ Whereas the mechanisms that have been used in an effort to manage these conflicts still rely on the idea of 'one nation'⁴ (even in the case of federal variants, where national identity equates federation with the nation⁵), plurinational theorists argue that after centuries of attempts to consolidate the nation-state model, plurinational realities persist.⁶

Although these positions are relevant for current discussions of statehood in Europe, they have paid less attention to the meaning of plurinationalism in ex-colonial contexts, particularly in recent experiences of state transformation in Latin America, where the role of indigenous peoples in the plurinational project has been crucial. To fill this gap, inspired by TWAIL and, more generally, by the historical turn in international law,⁷ this article explores the national and international dynamics of the building of the plurinational state in Bolivia and Ecuador, the only two countries that have institutionalized a plurinational state fostered by indigenous peoples. Indeed, plurinationality from indigenous perspectives departs from multicultural liberal models associated with current European plurinational views and addresses two challenges: a global political economy of resource extraction, and a racialized state structure working as a barrier to actual plurinational implementation. These limitations explain an intrinsic tension in the Bolivian and Ecuadorian experience: on the one hand, plurinational governments try to unify the people around the 'national interest' of developing extractive industries; and on the other, they attempt to recognize ethno-political differences that often challenge the transnational exploitation of local resources.

This article builds on TWAIL's critique of the imperial use of the concepts and institutions of international law but problematizes how internal struggles are relevant in the construction of Third World nation-states. TWAIL scholars have explained how the international system was born racialized because, at its centre, it holds as an epistemological premise that legality was the creation of unique and civilized institutions, and that only states possessing them could be part of

Multinational? Problems with Statistical and Subjective Approaches', (September 2011) 24 *Ratio Juris* 267; N. MacCormick, 'Liberalism, Nationalism and the Post-sovereign State', (1996) 44 *Political Studies* 553.

² M. Caminal and F. Requejo (eds.), *Federalism, Plurinationality and Democratic Constitutionalism. Theory and Cases* (2012); F. Requejo and M. Caminal, 'Liberal democracies, national pluralism and federalism', in F. Requejo and M. Caminal (eds.), *Political Liberalism and Plurinational Democracies* (2011), 1.

³ Caminal and Requejo, *Ibid.*

⁴ Keating, *Plurinational Democracy. Stateless Nations in a Post-Sovereignty Era*, *supra* note 1; Requejo and Caminal, *supra* note 2.

⁵ Caminal and Requejo, *supra* note 2.

⁶ *Ibid.*

⁷ For references and discussions on the historical turn of international law as a reaction against the ethical turn in the 1990s see M. Craven, 'Theorizing the Turn to History in International Law', in A. Orford and F. Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (2016), 21.

international society.⁸ Legal doctrines such as discovery, just war, and *terra nullius* therefore, in fact, supported the meaning of sovereignty, land appropriation and the exclusion of non-European peoples.⁹ The decolonization process was not the end of indigenous dispossession but the beginning of internal colonialism, in which the power over land not only allowed resettlement and exploitation but also the territorial foundation of the settler society.¹⁰ Recognition of new nation-states, therefore, did not solve the problem of determining the status of indigenous peoples;¹¹ on the contrary, it obscured their legal existence.

In this context, TWAIL explores how international law can be used to further the interests of Third World peoples and, among other goals, it proposes the construction of an alternative legal architecture for international governance.¹² Nevertheless, it fails to accurately evaluate internal disputes around the building of the nation-state and the way in which Third World elites have struggled for the recognition of their nation-states by international society even as they have excluded other ways of imagining the modern state.¹³ Whereas some TWAIL scholars express concerns about these issues, emphasizing the role of resistance by social movements in confronting state policies and using international law for counter-hegemonic purposes,¹⁴ ‘social movements’ tend to be conceived as a broad category that represents the interests of those assimilated within the Third World, obscuring the role of unassimilated or less-assimilated indigenous peoples.¹⁵ Thus, in a kind of marginalization of indigenous worldviews in TWAIL,¹⁶ it tends to attribute all forms of hierarchy and oppression in the Third World to Northern/Western imperial powers, relegating internal forms of hierarchy and oppression.¹⁷

Beyond discussions about integrating indigenous peoples into the category of the Third World or admitting that they pursue a parallel project¹⁸ as a Fourth World in

⁸ A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004); M. Mutua, ‘What is TWAIL?’, (2000) *American Society of International Law, Proceedings of the Annual Meeting* 31.

⁹ Anghie, *supra* note 8; J. Gilbert, *Indigenous Peoples’ Land Rights under International Law: From Victims to Actors* (2006); J. Cornstassel and T. Hopkins, ‘Indigenous “Sovereignty” and International Law: Revised Strategies for Pursuing “Self-Determination”’, (1995) 17 *Human Rights Quarterly* 343; J. Tully, ‘Aboriginal Property and Western Theory: Recovering a Middle Ground’, (1994) 11 *Social Philosophy and Policy* 153; S. Dodds, ‘Justice and Indigenous Land Rights, Inquiry’, (1998) 41 *An Interdisciplinary Journal of Philosophy* 187; D. Short, ‘Reconciliation, Assimilation, and the Indigenous Peoples of Australia’, (2003) 24 *International Political Science Review* 491; D. Ritter, ‘The “Rejection of Terra Nullius” in Mabo: A Critical Analysis’, (1996) 18 *Sydney Law Review* 5, at 7; S. Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (2007); L. Eslava, M. Fakhri and V. Nesiha, ‘Introduction: The Spirit of Bandung’, in L. Eslava, M. Fakhri and V. Nesiha (eds.), *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (2017), 3.

¹⁰ J. Tully, ‘The Struggles of Indigenous Peoples for and of Freedom’, in I. Duncan, P. Patton and W. Sanders (eds.), *Political Theory and the Rights of Indigenous Peoples* (2000), 36.

¹¹ Anghie, *supra* note 8.

¹² A. Anghie, ‘TWAIL: Past and Future’, (2008) 10 *International Community Law Review* 479. S. Pahuja, *Decolonising International Law. Development, Economic Growth and the Politics of Universality* (2011).

¹³ V. Phillips, ‘Indigenous Peoples and the Role of the Nation-State. Proceedings of the Annual Meeting’, (2007) 101 *American Society of International Law* 319.

¹⁴ B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003).

¹⁵ Phillips, *supra* note 13.

¹⁶ P. Singh, ‘Indian International Law: From a Colonized Apologist to a Subaltern Protagonist’, (2010) 23 *Leiden Journal of International Law* 79.

¹⁷ S. Burra, ‘TWAIL’s Others: A Caste Critique of TWAILers and their field of analysis’, (2016) 33 *The Windsor Yearbook of Access to Justice* 111.

¹⁸ A. Bhatia, ‘The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World’, (2012) 14 *Oregon Review of International Law* 131.

the international arena,¹⁹ this article argues that indigenous politics and the study of comparative constitutional building complement TWAIL scholarship by raising fundamental issues related to the reframing of the nation-state structure and how it is embedded in the global political economy of resource extraction. In particular, by contesting the traditional idea of sovereignty over natural resources as an unconditional prerogative of nation-states (supported by Third World scholars as a means of overcoming the colonial past),²⁰ indigenous politics has unveiled how this version of sovereignty remained in constitutional designs and over time benefited national and international economic elites by protecting foreign direct investment over indigenous territories.²¹ This article explores these issues by engaging with the call of a new branch of TWAIL scholars to promote bridges of mutual learning between scholarship on indigenous resistance and scholarship on the Global South as expressions of two dimensions of local/global dynamics.²²

The following section provides the general context for nation-state building in Latin America, analyzing the place of indigenous peoples in this process and the emergence of multiculturalism. Sections 3 and 4 focus on the politics and legality of the process of constitution of plurinationality in Bolivia and Ecuador, emphasizing the internal tensions and international dynamics surrounding state sovereignty and the political economy in these two experiences. Finally, Section 5 discusses the main issues raised by the case study analyses.

2. SEEDS OF PLURINATIONALISM: NATION-STATE BUILDING AND MULTICULTURALISM IN LATIN AMERICA

Most studies of state-building in Latin America explain how vast social and ethnic exclusion made the construction of a national community difficult.²³ Although some local groups helped forge a national narrative through negotiation and struggle with elites,²⁴ political and social identities were mainly based on race, class, and caste rather than on culture or nationality.²⁵ These theories argue that where states build a national society, they overcome the opposition of those unwilling to be part of the national community through conquest or co-optation.²⁶

To further understand the place of indigenous peoples in the nation-state-making project, we must remember that in order to facilitate tax collection and religious indoctrination, Spanish colonial policies recognized two republics: the

¹⁹ R. Ryser, *Indigenous Nations and Modern States. The Political Emergence of Nations Challenging State Power* (2012).

²⁰ A. Alvez, 'Constitutional Challenges of the South: Indigenous Water Rights in Chile Another Step in the Civilizing Mission?', (2016) 33 *The Windsor Yearbook of Access to Justice* 87.

²¹ S. McVeigh and S. Pahuja, 'Rival Jurisdictions: The Promise and Loss of Sovereignty', in C. Barbour and G. Pavlich (eds.), *After Sovereignty: On the Question of Political Beginnings* (2010), 97, at 104–10.

²² S. Xavier, et al., 'Placing TWAIL Scholarship and Praxis: Introduction to the Special Issue of the Windsor Yearbook of Access to Justice', (2016) 33 *The Windsor Yearbook of Access to Justice*.

²³ M. Centeno and A. Ferraro (eds.), *State and Nation Making in Latin America and Spain: Republics of the Possible* (2013).

²⁴ J. Tutino and L. Orensanz, 'La negociación de los Estados nacionales, el debate de las culturas nacionales: "Peasant and nation" en la América Latina del siglo XIX', (1997) 46 *Historia Mexicana* 531. References in D. Nugent, 'Building the State, Making the Nation: The Bases and Limits of State Centralization in "Modern" Peru', (1994) 96 *American Anthropologist, New Series* 333.

²⁵ M. Centeno, *Blood and Debt: War and the Nation-State in Latin America* (2002).

²⁶ References in Nugent, *supra* note 24.

Spanish republic and the Indian republic (configured as ‘indigenous communities’), with the Spanish monarchy acting as the ultimate mediating institution between them.²⁷ Although this scheme recognized a special body of laws to the Indians and certain degrees of local governance (which helped maintain cultural cohesion), the Crown tolerated abuse by local elites of *encomenderos*²⁸ and rich settlers acting in collusion with corrupt royal officials, as it needed the revenues collected by colonial authorities to carry out its imperial project overseas. The Spanish colony thus consolidated a society of unequal racial segregation.²⁹

The new republican order born with independence rejected differentiated political recognition of the Indians and ended the system of the two republics. Under liberal ideals, Simon Bolivar argued that indigenous communities were colonial institutions that had to be removed in order to transform Indians into free citizens with property rights in a society of equal *mestizo* people. The Indians remained on the margins of legality, however, as they were considered citizens in name only, with most elites maintaining deeply racist attitudes toward them.³⁰ Although the new countries formally abolished Indian tribute, it was re-imposed in Ecuador, Peru, and Bolivia in the form of ‘contributions’ to expand the budget of the precarious new states, whereas systems of forced labour survived in Andean mining regions. As Indians were unfamiliar with the market economy, republican policies resulted in the dispossession of indigenous land and the emergence of a new class of feudalists (the *hacendados*), transforming the Indians into servants (*peons*).³¹

As large indigenous populations and large extensions of communal land were obstacles to the elites’ project of nation-state building,³² they applied policies of assimilation and exclusion, which included forced conversion to Christianity, compulsory use of the Spanish language, or open genocide.³³ The elites’ aim was to create a Catholic, white, European nation,³⁴ with no place for autonomous indigenous peoples.³⁵ A key element in this project was the importation of concepts of international law, such as sovereignty, to support the contention that they were part of the international system of ‘civilized states’.³⁶ This was indeed a Creole legal consciousness that claimed to be part of the international community of civilized states while justifying the disciplining of local peoples.³⁷ In short, the

²⁷ R. Grote, ‘The Status and Rights of Indigenous Peoples in Latin America’, (1999) 59 *Heidelberg Journal of International Law* 497; M. Thurner, ‘“Republicanos” y “la comunidad de peruanos”: comunidades políticas inimaginadas en el Perú postcolonial’, (1996) 20 *Histórica* 93.

²⁸ Spanish colonial rule allowed the exploitation of natives through the constitution of *encomiendas*, a title granted to conquerors with the condition that they settle down and live in the area.

²⁹ Grote, *supra* note 27.

³⁰ Centeno and Ferraro, *supra* note 23.

³¹ Grote, *supra* note 27; J. Matos Mar and F. Fuenzalida, ‘Proceso de la sociedad rural’, in J. Matos Mar, *Hacienda, comunidad y campesinado en el Perú* (1976), 15.

³² J. Galindo, ‘Cultural Diversity in Bolivia: From Liberal Interculturalism to Indigenous Modernity’, in M. Janssens (ed.), *The Sustainability of Cultural Diversity: Nations, Cities and Organizations* (2010), 97.

³³ D. Sanders, ‘The UN Working Group on Indigenous Populations’, (1989) 11 *Human Rights Quarterly* 406.

³⁴ R. Stavenhagen, ‘Challenging the Nation-State in Latin America’, (1992) 45 *Journal of International Affairs* 421.

³⁵ F. Arocena, ‘Multiculturalism in Brazil, Bolivia and Peru’, (2008) 49 *Race & Class* 1.

³⁶ A. Becker, *Mestizo International Law. A Global Intellectual History 1842–1933* (2015).

³⁷ L. Obregón, ‘Between Civilisation and Barbarism: Creole Interventions in International Law’, (2006) 27 *Third World Quarterly* 815; Eslava, Fakhri and Nesiah, *supra* note 9. This modernization project remained in the twentieth century: L. Obregón, ‘Noted for Dissent: The International Life of Alejandro Alvarez’, (2006) 19

use of racialized concepts by local elites that were part of transnational communities entailed the denial of other legalities that existed long before the imposition of Western institutions.³⁸

Although agrarian reforms across Latin America in the 1950s and 1960s recognized indigenous land claims for the first time, the reforms consolidated the process of assimilation by granting them political, social and economic rights, not as indigenous peoples with specific cultural identities, rather as peasants with a homogeneous cultural and economic status.³⁹ The product of this trend was the Pátzcuaro Agreement (the outcome of the First Inter-American Indigenous Congress in Mexico in 1940) and the International Labour Organization's (ILO) Convention 107 of 1957 (ratified by all the independent countries of Latin America), which consolidated this integrationist strategy. Under them, the means to ensure indigenous inclusion in the dominant society was to provide education, technical training, and economic assistance.⁴⁰ This approach represented a fundamental change, not in the essence of assimilation policies but in their form. In other words, assimilation, which previously was violent, became friendly.

In the second half of the last century, indigenous peoples began to organize transnationally to overcome assimilation policies. In Latin America, international movements included peasant unions promoted by leftist parties in the 1950s; ethnic federations with a strong feeling of ethnic identity in the 1970s (especially in the Amazon basin), and Indian movements consolidated with the creation of the Indian Council of South America (CISA) in 1980, led by the Bolivian *Movimiento Indio Tupac Katari*.⁴¹ These movements originally appealed to the modern legal configuration of 'self-determination' as formulated by international political leaders in the context of the decolonization of Africa.⁴² Self-determination was the basis of statehood⁴³ and became a founding principle of the United Nations foundational Charter.⁴⁴ In 1960, the UN General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples,⁴⁵ referring to self-determination in relation to formal colonial rule⁴⁶ as a right to independence from a colonial authority.

Leiden Journal of International Law 983; J. Esquirol, 'Alejandro Álvarez's Latin American Law: A Question of Identity', (2006) 19 *Leiden Journal of International Law* 931; C. Landauer, 'A Latin American in Paris: Alejandro Álvarez's Le droit international américain', (2006) 19 *Leiden Journal of International Law* 957.

³⁸ Stavenhagen, *supra* note 34.

³⁹ Arocena, *supra* note 35.

⁴⁰ Sanders, *supra* note 33; D. Suagee, 'Human Rights of Indigenous Peoples: Will the United States Rise to the Occasion?', (1997) 21 *American Indian Law Review* 365; E. Stamatopoulou, 'Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic', (1994) 16 *Human Rights Quarterly* 58; R. Pitty, 'Indigenous Peoples, Self-determination and International Law', (2001) 5 *The International Journal of Human Rights* 44; Stavenhagen, *supra* note 34; Grote, *supra* note 27.

⁴¹ R. Smith, 'Los indígenas amazónicos suben al escenario internacional: Reflexiones sobre el accidentado camino recorrido', in F. Morin and R. Santana (eds.), *Lo transnacional, instrumento y desafío para los pueblos indígenas* (2003).

⁴² M. Craven, 'Statehood, Self-Determination and Recognition', in M. Evans (ed.), *International Law* (2010), 203.

⁴³ D. Philpott, 'In Defense of Self-Determination', (1995) 105 *Ethics* 352; A. Peang-meth, 'The Rights of Indigenous Peoples and Their Fight for Self-Determination', (2002) 174 *World Affairs* 101.

⁴⁴ V. Napoleon, 'Aboriginal Self Determination: Individual Self and Collective Selves', (2005) 29 *Atlantis* 1.

⁴⁵ United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514/15, UN Doc. A/RES/1514(15) (adopted 14 December 1960).

⁴⁶ A. Muehlebach, 'What Self in Self-Determination? Notes from the Frontiers of Transnational Indigenous Activism', (2003) 10 *Identities: Global Studies in Culture and Power* 241.

This conception of self-determination problematized traditional ideas of statehood under which the nation-state contains a substantial aspect based on national identity, and a formal aspect based on international legal recognition.⁴⁷ Because political collectives in many ethnically diverse countries contested the idea of one national identity, international scholars differentiated between ‘external self-determination’ as a right to independence and ‘internal self-determination’ as a right to maintain certain degrees of autonomy under the authority of the nation-state. Indigenous peoples’ claims to self-determination were thus framed as ‘internal self-determination’.⁴⁸ The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, adopted by the UN General Assembly in 1966, refer to this kind of self-determination and are the sources of Article 3 of the Declaration on the Rights of Indigenous Peoples of 2007 (UNDRIP⁴⁹). This declaration recognizes the ‘right of self-determination’ as a foundational right that respects the political unity of the sovereign state.⁵⁰

This kind of self-determination excludes broader notions of ‘indigenous sovereignty’⁵¹ and relies on the human rights framework under the paradigm of the unitary nation-state, rather than the decolonial framework in which ‘self-determination’ was born as a specific collective political right rooted in the resistance against colonization.⁵² It also consolidated the multicultural turn in human rights, which began in Latin America in the 1990s with the recognition of the ‘autonomy’ of indigenous communities as ethnic minorities, importing for these purposes the theoretical apparatus of multiculturalism.⁵³

Latin American multicultural policies thus emerged with the constitutional reforms and new constitutions of this decade,⁵⁴ in a context of growing relevance

⁴⁷ Craven, *supra* note 42.

⁴⁸ Stavenhagen, *supra* note 34; S. Errico, ‘The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview’, (2007) 7 *Human Rights Law Review* 741.

⁴⁹ P. Oldham and M. Frank, ‘“We the Peoples . . .”: The United Nations Declaration on the Rights of Indigenous People’, (2008) 24 *Anthropology Today* 5; Stamatopoulou, *supra* note 40; Gilbert, *supra* note 9.

⁵⁰ E. Daes, ‘An overview of the history of indigenous peoples: self-determination and the United Nations’, (2008) 21 *Cambridge Review of International Affairs* 7; Peang-meth, *supra* note 43; Muehlebach, *supra* note 46.

⁵¹ S. Wheatley, ‘Conceptualizing the Authority of the Sovereign State over Indigenous Peoples’, (2014) 27 *Leiden Journal of International Law* 371. Others understand indigenous self-determination as a parallel sovereignty to that of the state: F. Lenzerini, ‘Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples’, (2006–7) 42 *Texas International Law Journal* 155, at 187. The genealogy of indigenous sovereignty can be found in the imperial history of colonization: P. Fitzpatrick, ‘Necessary fictions: indigenous claims and the humanity of rights’, (2010) 46 *Journal of Postcolonial Writing* 446.

⁵² K. Engle, ‘On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights’, (2011) 22 *European Journal of International Law* 141; R. Merino, ‘Law and politics of Indigenous self-determination: the meaning of the right to prior consultation’, in I. Watson (ed.), *Indigenous Peoples as Subjects of International Law* (2017), 120.

⁵³ Multiculturalism implies the deployment of institutional arrangements and legal provisions for the protection of ‘cultural minorities’ (W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995)). The minorities to which most Western scholars on multiculturalism refer, however, belong to the European and US-American context, where numerous immigrants seek to maintain their customs and habits and demand respect and tolerance. These authors do not refer to contexts such as those of Latin America, where indigenous nations preceded existing states and demand self-determination by being cultural survivors despite constant exclusion from and violent inclusion in colonial and post-colonial processes.

⁵⁴ R. Sieder, *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy* (2002). The constitutions enacted included those of Brazil (1988), Colombia (1991), Paraguay (1992), Peru (1993), Guatemala (1993), Bolivia (1995), Ecuador (1998), and Venezuela (1999), whereas Mexico (1992) and Argentina (1994) made significant constitutional reforms.

of international recognition of indigenous rights through ILO Convention 169 (1989),⁵⁵ decisions by the Inter-American Court of Human Rights,⁵⁶ and soft law enacted by global governance institutions, such as the World Bank, the Inter-American Development Bank (IADB), the World Intellectual Property Organization (WIPO), and various UN offices, forums, and programmes.⁵⁷ The acknowledgment of a significant indigenous population was also crucial. In Latin America there are between 42 million and 45 million indigenous people, representing an estimated 8 per cent to 12 per cent of the total population.⁵⁸ In Bolivia and Guatemala, indigenous people make up the majority of the population, whereas in Mexico, Ecuador, and Peru they constitute between 10 per cent and 40 per cent of the population.⁵⁹

Although multicultural constitutions recognized indigenous collective rights, such as land rights, customary law, language rights,⁶⁰ and some degree of autonomy (limited territorial control and the recognition of indigenous systems of justice), indigenous self-determination has never been fully recognized.⁶¹ When Latin American multicultural constitutions recognized the right of self-determination or autonomy, what they protected was the right of each community to govern itself within the boundaries of limited territorial units. They did not recognize the self-determination of an entire indigenous nation.⁶² The multicultural era in Latin America is connected to the ethical turn in international law of the 1990s⁶³ and attempts to institutionalize social inclusion and tolerance towards indigenous populations, rather than an actual commitment to indigenous self-determination. In contrast, the turn to history in international law of the last decade informs deeper institutional transformations based on historical claims that have now become transnational struggles for the making of plurinationalism.

⁵⁵ ILO Convention 169 (1989) superseded the open assimilationist approach of ILO Convention 107, whose Art. 12 justified the displacement of indigenous people from their territories in the interest of national and economic development (L. Sweptson and R. Plant, 'International Standards and the Protection of the Land Rights of Indigenous and Tribal Populations', (1985) 124 *International Labour Review* 91).

⁵⁶ The American Convention on Human Rights (1969), ratified by 25 American countries, has been interpreted by the Inter-American Commission and Court of Human Rights in favour of indigenous peoples.

⁵⁷ J. Anaya, 'International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State', (2004) 21 *Arizona Journal of International & Comparative Law* 15.

⁵⁸ The World Bank, *Indigenous Latin America in the Twenty-First Century* (2015); The International Work Group for Indigenous Affairs, *The Indigenous World* (2016); The Economic Commission for Latin America and the Caribbean, *Guaranteeing indigenous people's rights in Latin America* (2014).

⁵⁹ D. Van Cott, 'Multiculturalism versus neoliberalism in Latin America', in K. Banting and W. Kymlicka (eds.), *Multiculturalism and the Welfare State: Recognition and Redistribution in Contemporary Democracies* (2006).

⁶⁰ L. Horton, 'Contesting State Multiculturalisms: Indigenous Land Struggles in Eastern Panama', (2006) 38 *Journal of Latin American Studies* 829.

⁶¹ See D. Van Cott, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America* (2000), and *supra* note 42; C. Hale, 'Neoliberal Multiculturalism: The Remaking of Cultural Rights and Racial Dominance in Central America', (2005) 28 *Political and Legal Anthropology Review* 10; Horton, *supra* note 60; Sieder, *supra* note 54.

⁶² Merino, *supra* note 52.

⁶³ M. Koskeniemi, 'The Lady Doth Protest Too Much: Kosovo and the Turn to Ethics in International Law', (2002) 26 *Modern Law Review* 159.

3. RE-MAKING THE NATION: FOUNDATIONS AND CHALLENGES OF PLURINATIONALISM IN BOLIVIA

From the very origins of the republic, indigenous peoples in Bolivia envisioned a republic of Indians opposed to the whitening of the Bolivian state.⁶⁴ They rebelled against the elite policies that constituted the liberal state after independence; they also rose up against the social state in the 1950s and against the neoliberal state in the 1990s.⁶⁵ International law was key in their struggles; for example, the Coca Growers Federations in the valleys (since 1990) and the Confederation of Indigenous People of Bolivia (CIDOB) in the lowlands (since 1982) fostered the ratification of ILO Convention 169 in 1991 as a means of extending indigenous rights.⁶⁶

Bolivia is deeply ethnically diverse. There are 35 recognized peoples, with five dominant groups: Quechua, Aymara, Guarani, Chiquitano and Moxeno. These groups are dispersed across the Bolivian territory, usually in small areas.⁶⁷ Despite the fragmentation, indigenous organizations were crucial for the creation of the Pact of Unity and Commitment (*Pacto de Unidad y Compromiso*), a grassroots alliance formed to support Evo Morales' rise to the presidency in 2006 as the first indigenous president in the country's history. The event was celebrated as the end of a particular Andean form of apartheid that had marginalized the majority indigenous population since the Spanish conquest.⁶⁸

The main goals of Morales' administration were to foster a constituent process to enact a plurinational state and to reshape relations between the state and the market, specifically management of the hydrocarbon sector, which has been contentious in Bolivian history.⁶⁹ The fact that Morales assumed the presidency at a time of macro-economic stability due to global demand for natural gas helped him proclaim the 'nationalization' of the hydrocarbon sector as the core of his economic developmental strategy.⁷⁰ Indeed, instead of asset expropriation, 'nationalization'

⁶⁴ W. Ari, *Earth Politics: Religion, Decolonization and Bolivia's Indigenous Intellectuals* (2014).

⁶⁵ E. Rodríguez Veltzé, 'The Development of Constituent Power in Bolivia', in J. Crabtree and L. Whitehead (eds.), *Unresolved Tensions: Bolivia Past and Present* (2014).

⁶⁶ B. Gussen, 'A comparative analysis of constitutional recognition of aboriginal peoples', (2017) 40 *Melbourne University Law Review* 3.

⁶⁷ *Ibid.*

⁶⁸ B. Kohl, 'Bolivia under Morales: A Work in Progress', (2010) 37 *Latin American Perspectives* 107.

⁶⁹ In 1921, the Standard Oil Company of New Jersey (now ExxonMobil) acquired all concessions for oil exploration but the government did not obtain significant taxes from its operations. This situation and the crisis produced by the Bolivian defeat in the Chaco War were used to justify the nationalization of the sector in 1936 and the creation of a state petroleum company, *Yacimientos Petrolíferos Fiscales Bolivianos* (YPFB). In 1985, Bolivia reduced the role of YPFB to comply with requirements of the International Monetary Fund. As a consequence of the lack of financing, YPFB decreased its productive capacity and was accused of being inefficient and corrupt. This was the justification for the implementation of neoliberal policies in the 1990s, under President Sánchez de Lozada. These policies triggered the gas war in 2003, when the government attempted to export liquefied natural gas to the United States through a Chilean port. The protests led to the fall of Sánchez de Lozada and a referendum on the hydrocarbon sector was organized by Vice President Carlos Mesa. Bolivians voted to nationalize the sector, recapitalize YPFB, and increase taxes on transnational firms. Unable to implement these reforms, Mesa resigned in June 2005 and six months later Evo Morales was elected (T. Perreault and G. Valdivia, 'Hydrocarbons, popular protest and national imaginaries: Ecuador and Bolivia in comparative context', (2010) 41 *Geoforum* 689; B. Kaup, 'A Neoliberal Nationalization?: The Constraints on Natural-Gas-Led Development in Bolivia', (2010) 37 *Latin American Perspectives* 123).

⁷⁰ Kaup, *ibid.*; Kohl, *supra* note 68; Perreault and Valdivia, *ibid.*

actually meant renegotiating contracts with the aim of increasing state ownership and taxation.⁷¹

Although plurinationalism had been a historical demand, it was expressly formulated for the first time in the political thesis of the Unified Confederation of Rural Workers of Bolivia in 1983,⁷² as constitutional recognition of indigenous nations and self-government as a condition for decolonization.⁷³ The new Constitution attempted to concretize this project by giving the branches of government a plurinational character, deepening intercultural policies (such as intercultural education and health), incorporating designated seats in Congress and the Supreme Court for indigenous representatives, and establishing new language requirements for state employees, amongst other measures.⁷⁴ In this way, Bolivia moved from a multicultural state, which recognizes some cultural rights and rights to participation for indigenous peoples in the Constitution of 1994, towards a plurinational state in which indigenous peoples are conceived as nations.⁷⁵

The main feature of the plurinational state is the right of indigenous peoples to self-governance through the constitution of Indigenous First Peoples' Peasant Autonomies (*Autonomías Indígena Originaria Campesinas*).⁷⁶ This form of autonomy is different from the ancestral communal lands (*tierras comunales de origen*) of the 1990s (Agrarian Reform Law of 1995), which, under an agrarian perspective, constituted an archipelago of lands without indigenous political authority or effective territorial control.⁷⁷ In the new constitutional scheme, territorial autonomies are not simply administrative delimitations for mainly economic purposes but are political components of the state's multilevel governance.⁷⁸ This new framework exchanged the term 'land' for 'territory'; instead of 'communal lands', the term used is 'Ancestral Peasant Indigenous Territory' (*Territorio Indígena Originaria Campesinas*). This is not just a semantic change. This concept of territory attempts to break a historical tradition of international law in which indigenous peoples hold property rights but not territorial rights.

The problematic aspect of this process is its implementation. The Constitution and the Framework Law on Autonomies and Decentralization (*Ley Marco de Autonomías y Descentralización*) of 2010 establish three means of achieving indigenous autonomy: the conversion of already existing municipalities, the conversion of indigenous territories, and the creation of regional indigenous autonomies composed of two or more converted municipalities. Any of these modes restrict the

⁷¹ J. Grugel and P. Riggirozzi, 'Post-neoliberalism in Latin America: Rebuilding and Reclaiming the State after Crisis', (2012) 43 *Development and Change* 1; Kohl, *supra* note 68.

⁷² S. Rivera, *Oprimidos pero no vencidos. Luchas del campesinado Aymara y Quechua de Bolivia 1900-1980* (1986).

⁷³ E. Cruz, 'Redefiniendo la nación: luchas indígenas y Estado Plurinacional en Ecuador (1990-2008)', (2012) *Nómadas. Revista Crítica de Ciencias Sociales y Jurídicas*.

⁷⁴ R. Merino, 'An alternative to "alternative development"?: Buen vivir and human development in Andean countries', (2016) 44 *Oxford Development Studies* 271.

⁷⁵ Galindo, *supra* note 32.

⁷⁶ J. Tockman and J. Cameron, 'Indigenous Autonomy and the Contradictions of Plurinationalism in Bolivia', (2014) 56 *Latin American Politics and Society* 46.

⁷⁷ B. Gustafson, 'Manipulating Cartographies: Plurinationalism, Autonomy and Indigenous Resurgence in Bolivia', (2009) 82 *Anthropological Quarterly* 985.

⁷⁸ M. Valencia and I. Egidio, 'Bolivia: ¿Estado indio? Reflexiones sobre el Estado Plurinacional en el debate constituyente boliviano', (2009) 42 *Law and Politics in Africa, Asia and Latin America* 55.

implementation of indigenous autonomies, because the autonomies' boundaries remain the same as those of the municipalities and indigenous territories already created.⁷⁹ In addition, this applies only to rural indigenous communities, which represent half of the total indigenous population (which is around 6.5 million, or 60 per cent of the population).⁸⁰ Moreover, the 2013 Law of Territorial Units prohibits the creation of autonomies from indigenous territories that are not continuous, which excludes many indigenous territories recognized since 2011. In contrast to precolonial territorial frontiers, which included areas much larger than contemporary municipalities, the law restricts the constitution of indigenous autonomies to much smaller areas based on formal boundaries already defined by the state.⁸¹

In addition, and despite the ongoing process of the state's structural transformation, many public officials understand indigenous autonomy only in terms of the provision of public services, rather than actual territorial control. In fact, during the negotiations towards the new constitutional design, indigenous peoples accepted the state's dominium over natural resources in exchange for consultation processes and participation in the benefits of projects;⁸² this becomes problematic, however, with the implementation of aggressive extractive policies and the lack of proper mechanisms for consultation.⁸³ Indeed, despite the repeated assertion in the Constitution of the need for industrialization in order to break the country's dependence on extraction (Arts. 316, 319) and to increase the autonomy of indigenous peoples (Arts. 1, 2, 289, 290), the state dominates all natural resources (Arts. 298, 309, 316), allowing access by new transnational capital, particularly foreign public companies from China and Russia;⁸⁴ and the right to *consultation* (Arts. 11, 352, 403) is weaker than the international standard of free, prior and informed *consent*. In practice, the economic extractive model has not been challenged, so indigenous peoples' territories are constantly under threat.⁸⁵

This economic regime is a type of *progressive neo-extractivism* that finances redistributive policies with revenues from extractives industries⁸⁶ under discourses of 'nationalization' and indigenous rights, but which ultimately affects indigenous territorial rights and environmental sustainability.⁸⁷ For example, when the government attempted to build a highway into the ecological area Isiboro Sécure National Park and Indigenous Territory (TIPNIS), CIDOB demanded that the project be stopped, using an argument based on plurinationalism to incorporate

⁷⁹ Tockman and Cameron, *supra* note 76; Cruz, *supra* note 73.

⁸⁰ Gussen, *supra* note 66.

⁸¹ Tockman and Cameron, *supra* note 76.

⁸² Valencia and Egido, *supra* note 78.

⁸³ Tockman and Cameron, *supra* note 76.

⁸⁴ J. Webber, *From Rebellion to Reform in Bolivia: Class Struggles, Indigenous Liberation and the Politics of Evo Morales* (2011).

⁸⁵ Merino, *supra* note 74; N. Postero, *The Indigenous State. Race, Politics, and Performance in Plurinational Bolivia* (2017).

⁸⁶ E. Gudynas, 'El Buen Vivir: Today's tomorrow', (2011) 54 *Development* 441.

⁸⁷ A. Laing, 'Resource Sovereignities in Bolivia: Re-Conceptualising the Relationship between Indigenous Identities and the Environment during the TIPNIS Conflict', (2015) 34 *Bulletin of Latin American Research* 149; A. Bebbington and D. Humphreys, 'An Andean Avatar: Post-Neoliberal and Neoliberal Strategies for Securing the Unobtainable', (2011) 16 *New Political Economy* 131.

plural understandings of development, democracy and resource management,⁸⁸ whereas the government argued that infrastructure would facilitate ‘economic development’. This also reflects internal conflicts among indigenous groups, because governmental politics tend to marginalize lowland indigenous peoples, reproducing colonial hierarchies of exclusion.⁸⁹

The making of plurinationalism then becomes a venue for the struggle between a developmentalist state and indigenous peoples’ self-determination. Whereas the former appeals to international market demand for commodities and an internal discourse of ‘sovereignty over natural resources’, the latter appeals to international standards of indigenous rights and local mobilizations to call for the genuine constitution of a plurinational state. TWAIL’s critique is crucial here for unveiling the way in which the national discourse of ‘nationalization’ of resources unjustly granted to transnational corporations relies on a kind of state sovereignty over natural resources that challenges the neo-liberal status quo but not colonial legacies.⁹⁰ This kind of state sovereignty does not challenge deeper transnational economic structures that make the country dependent on (re-accommodated to) international hegemonies (from Canadian and American corporations to Chinese corporations) and which internally deepen the country’ historical cleavages.

In this context, the tensions between the Bolivian government and the ‘international community’, as a signifier of transnational investments,⁹¹ represent just one – and not even the most contentious – dimension of the tensions around extractive industries. The most critical issue is how the model of sovereignty still in effect, expressed in the official version of plurinationality, produces plurinational subalterns by considering indigenous autonomy to be a threat to development.⁹² A TWAIL perspective able to understand internal exclusions inside the ‘Third World’ is fundamental to show how the state’s centralized control over natural resources contradicts the plurinational goal of strengthening indigenous peoples’ self-determination.⁹³ This occurs because profound international and national structures remain embedded in a colonial logic of resource exploitation and human segregation that limits the plurinational project as envisioned by indigenous peoples. Local contestations and counter-hegemonic uses of international law by indigenous movements express a (continuing) struggle to imagine and build a different kind of state sovereignty in which indigenous peoples hold real power over their territories and livelihoods.

⁸⁸ Laing, *ibid.*

⁸⁹ *Ibid.* Another problem is that the discourse of autonomy is being appropriated by regional conservative elites in Santa Cruz, who demand autonomy for their region to control hydrocarbon resources and develop their own economic projects (see Gustafson, *supra* note 77; Kaup, *supra* note 69; Kohl, *supra* note 68; Perreault and Valdivia, *supra* note 69).

⁹⁰ T. McCreary, ‘Historicizing the Encounter between State, Corporate and Indigenous Authorities on Gitksan Lands’, (2016) 33 *The Windsor Yearbook of Access to Justice* 163.

⁹¹ McVeigh and Pahuja, *supra* note 21.

⁹² Tockman and Cameron, *supra* note 76.

⁹³ I. Radhuber, ‘Indigenous Struggles for a Plurinational State: An Analysis of Indigenous Rights and Competences in Bolivia’, (2012) 11 *Journal of Latin American Geography* 167.

4. OIL NATIONALISM AND THE LIMITS OF THE PLURINATIONAL PROJECT IN ECUADOR

In Ecuador, recognition of plurinationalism also resulted from a long political struggle, which became more visible as of the 1960s, when indigenous peoples organized themselves in confederations with demands for self-determination,⁹⁴ promoting new regulations and influencing governmental discourses.⁹⁵ Beginning in the 1990s, the indigenous movement pursued an ambitious effort to re-signify the Ecuadorian nation by articulating not only indigenous demands but also the demands of other social sectors opposed to neoliberal reforms. They moved from deploying a particular indigenous struggle to proposing a national project articulated under the concept of plurinationalism.⁹⁶

In January 2007, Rafael Correa assumed the presidency of Ecuador. Indigenous organizations strongly supported Correa's political agenda, which included constitutional reform, anti-free trade policies, and nationalization of Ecuador's petroleum industry.⁹⁷ The indigenous project for a new state included actual territorial governance and indigenous participation in political institutions and government. For the indigenous political party *Pachakutik*, this entailed a broader definition of autonomy related to education, health, the economy, and control over natural resources.⁹⁸

The new Constitution, which took effect in 2008, established plurinationality as a key feature of the state (Art. 1) and a principle of political and territorial organization (Art. 257) that allows the conformation of indigenous territorial circumscriptions with autonomic territorial governments. It establishes, however, that governments at the provincial level (*parroquias*, *cantones* and provinces) where there is a majority-indigenous population can adopt this special administrative regime after a consultation process in which it is approved by more than two-thirds of the valid votes. Thus, as in Bolivia, the criterion for delimiting territories responds not to the cultural integrity of the indigenous peoples but depends on boundaries already formally defined by the state.

As the proposed constitutional design did not recognize a stronger version of indigenous self-determination, the most important indigenous organization, the Confederation of Indigenous Nationalities of Ecuador (CONAIE), gave 'critical approval' to the referendum that ratified the Constitution.⁹⁹ Today, indigenous opposition to governmental policies is even stronger because of the lack of government commitment to indigenous rights and self-determination, and the way in which it promotes aggressive policies for natural resource extraction. The government pursues these policies even though the new Constitution includes a catalogue

⁹⁴ Grote, *supra* note 27.

⁹⁵ K. Clark and M. Becker, 'Indigenous Peoples and State Formation in Modern Ecuador', in K. Clark and M. Becker (eds.), *Highland Indians and the State in Modern Ecuador* (2007).

⁹⁶ Cruz, *supra* note 73.

⁹⁷ P. Martin and F. Wilmer, 'Transnational Normative Struggles and Globalization: The Case of Indigenous Peoples in Bolivia and Ecuador', (2008) 5 *Globalizations* 583.

⁹⁸ N. Chong, 'Indigenous Political Organizations and the Nation-State: Bolivia, Ecuador, Mexico', (2010) 35 *Alternatives* 259.

⁹⁹ Cruz, *supra* note 73.

of 'the rights for living well' (*derechos de buen vivir*), beginning with the rights to water, food, and a healthy environment. Moreover, the Ecuadorian Constitution is the first in the world that recognizes the 'rights of nature' (Arts. 71, 72).

Indeed, the Ecuadorian Constitution expresses strong tension between a progressive catalog of social, environmental, and cultural rights and the constitutional bases of a developmental state. The Constitution establishes that the state dominates all natural resources (Arts. 317, 408) and can even exploit natural protected areas (Art. 407). Although the Constitution recognizes the right of indigenous peoples to be consulted before the state's enactment of norms that might affect their collective interests, there is no proper recognition of the international standard of free, prior and informed *consent*.¹⁰⁰ These tensions became evident just after the Constitution was approved, when President Correa called the coalition of environmentalists, leftists, and indigenous people 'childish' because of their support for inclusion of the 'rights for living well' and 'rights of nature' in the Constitution.¹⁰¹

Despite his initial strong environmental rhetoric, once in office President Correa focused on maximizing revenues for the Treasury based on oil production, introducing legislation to increase the government's share of windfall profits and taxes (the current administration seems to have the same orientation). As in Bolivia, the Ecuadorian government has used the threat of expropriation strategically to force multinational companies to renegotiate contracts, while granting new concessions to transnational companies.¹⁰² Like gas in Bolivia, the oil economy in Ecuador is particularly important. Since the discovery of large oilfields in the Amazon region in 1967, petroleum has become a key element in the country's economy, despite the strong social protest it generates. By 2010, oil production generated 40 per cent of all export earnings and one third of all tax revenues. However, oil and gas concessions cover vast territories of the megadiverse Western Amazon and overlap protected areas and indigenous territories. Extractives activities that appear to produce economic growth, therefore, do so at the expense of indigenous peoples.¹⁰³

In this context, indigenous organizations have resorted to national and international litigation to sue the state and companies for massive pollution in their communities and the threat of impacts on their livelihoods.¹⁰⁴ Amazonian communities also opposed oil projects in the Amazon, and Andean peasant communities have mobilized against mining concessions and oil operations overlapping their territories.¹⁰⁵

¹⁰⁰ Merino, *supra* note 74.

¹⁰¹ M. De la Cadena, 'Indigenous Cosmopolitics in the Andes: Conceptual Reflexions beyond "Politics"', (2010) 25 *Cultural Anthropology* 334.

¹⁰² Grugel and Riggiozzi, *supra* note 71.

¹⁰³ Perreault and Valdivia, *supra* note 69; Martin and Wilmer, *supra* note 97; G. Valdivia, 'Governing relations between people and things: Citizenship, territory, and the political economy of petroleum in Ecuador', (2008) 27 *Political Geography* 456.

¹⁰⁴ C. Lambert, 'Environmental Destruction in Ecuador: Crimes Against Humanity Under the Rome Statute?', (2017) 30 *Leiden Journal of International Law* 707.

¹⁰⁵ K. Jameson, 'The Indigenous Movement in Ecuador: The Struggle for a Plurinational State', (2010) 38 *Latin American Perspectives* 63; G. Kuecker, 'Fighting for the Forests: Grassroots Resistance to Mining in Northern Ecuador', (2007) 34 *Latin American Perspectives* 94.

These tensions between governmental policies and indigenous politics rest on the fact that the emphasis of the latter is the actual constitution of a plurinational state, whereas the former focuses on the implementation of a leftist developmental state under the banner of a ‘citizen revolution’.¹⁰⁶ The argument is that social reforms urgently require revenues from extractive industries, which implies expanding the oil frontier and opening up to large-scale mining.¹⁰⁷ The government is, thus, reluctant to implement the practical governance of indigenous territories, as that would jeopardize the expansion of extractivism. Again, like Bolivia, Ecuador is not a Third World champion against neoliberalism just because it promotes development policies under a discourse of nationalization. Beyond its post-neoliberal impetus, Ecuador retains a colonial structure of resource extraction favoured by both Western and non-Western (for example, Chinese) international hegemonies, which excludes the same indigenous subjects. In the next section, a critical TWAIL perspective will help to decipher the contentious meanings of ‘sovereignty’ and ‘nation’ in these plurinational experiments and from indigenous viewpoints.

5. STRUGGLES AROUND THE ‘NATION’ IN LATIN AMERICA’S PLURINATIONALISM

Although the Bolivian and Ecuadorian constitutions are seen as post-neoliberal and post-multicultural,¹⁰⁸ because of their emphasis on market regulation, rights expansion and political agency of social collectives,¹⁰⁹ and their recognition that indigenous peoples are nations with territorial rights, these projects maintain racialized and colonial notions of sovereignty and state power on indigenous territories, demonstrating an intrinsic tension between the construction of national identities, national development policies, and indigenous self-determination. Although they seek to implement a plurinational state where ‘indigenous nations’ are components of multilevel state governance, governmental and economic elites simultaneously promote ‘nationalism’ based on the claim that the country as a whole has sovereignty over hydrocarbons and mining.¹¹⁰ Global and local dynamics shape these two narratives. At the international level, development discourse and institutions that support states’ seeking of economic growth and the protection of foreign direct

¹⁰⁶ M. Becker, ‘Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador’, (2011) 38 *Latin American Perspectives* 47.

¹⁰⁷ Bebbington and Humphreys, *supra* note 87.

¹⁰⁸ Plurinationalism differs from multiculturalism in form and substance. In substantive terms, multiculturalism describes a society in which a dominant cultural collective co-exists with cultural minorities under the liberal principle of tolerance, whereas plurinationalism describes the existence and interactions of multiple nations within a territory in a process that seeks to overcome colonial patterns in legal, political and social structures. In formal terms, the state in the first case is a reformed liberal state that recognizes minority rights for cultural communities; in the second case, the state is structurally transformed into a plurinational state that recognizes indigenous nations and their territorial rights. This is not nationalism in the modern sense (E. Cruz, ‘Estado plurinacional, interculturalidad y autonomía indígena: Una reflexión sobre los casos de Bolivia y Ecuador’, (2013) 14 *Revista Via Iuris* 55). Instead of struggling for secession, it attempts to reorder social-territorial inequalities by dismantling racialized spatial and legal cartographies and institutions (Gustafson, *supra* note 77).

¹⁰⁹ D. Nolte and A. Schilling-Vacaflor, ‘Introduction: The Times They are a Changin’: Constitutional Transformations in Latin America since the 1990s’, in D. Nolte and A. Schilling-Vacaflor (eds.), *New Constitutionalism in Latin America. Promises and Practices* (2012).

¹¹⁰ Laing, *supra* note 87; Perreault and Valdivia, *supra* note 69.

investment enter into tension with the globalization of indigenous rights increasingly recognized by international conventions and soft law. At local levels, opposing interests between the government and indigenous populations regarding extractive industries trigger social unrest.

From an indigenous standpoint, plurinationalism is not necessarily a 'post-neoliberal project' under a socialist agenda.¹¹¹ Rather than committing to anti-neoliberal discourses and policies, indigenous organizations place their current political discourses within international frameworks of indigenous rights, such as ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples.¹¹² Meanwhile, the Ecuadorian and Bolivian governments emphasize the economic growth they have achieved with their 'nationalist' political economy, although it greatly benefited from rising demand for oil and minerals in China.¹¹³ Moreover, 'nationalization' in Bolivia and Ecuador is not synonymous with 'expropriation' but implies the renegotiation of contracts with transnational corporations to increase tax revenues. Although these governments frame 'nationalization' as a progressive policy, political leaders from all sides of the ideological spectrum in Latin America have advocated, pursued, or sustained it.¹¹⁴ Rather than ideology, institutional and economic constraints explain this kind of nationalization and – more deeply – the economic dependence on resource extraction.¹¹⁵

In this context, instead of enabling indigenous nations to have actual decision-making power within their territories, state structures and technocratic elites maintain racialized discourses that conceive indigenous peoples as threats to 'national development'. These discourses are translated into legal provisions that allow the exploitation of indigenous territories on behalf of the 'national interest'. They also explain the policy paralysis in the practical implementation of indigenous self-government. The nation-state survives in the political economy of the country, subordinating indigenous nations and its plurinational project.

These intrinsic tensions around the contentious meaning of plurinationalism derive from a colonial history of indigenous exploitation and dependence on extraction of resources. The different forms of the state (liberal, social, neoliberal, post-neoliberal/plurinational) have preserved the colonial premise that some subjects could be located at the edge of legality by being constantly threatened with exclusion from their territories and livelihoods on behalf of the 'national interest'. Whereas these subjects have always been indigenous populations, the meaning

¹¹¹ Grugel and Riggirozzi, *supra* note 71.

¹¹² Laing, *supra* note 87; Gussen, *supra* note 66.

¹¹³ Grugel and Riggirozzi, *supra* note 71.

¹¹⁴ R. Berrios, A. Marak and S. Morgenstern, 'Explaining hydrocarbon nationalization in Latin America: Economics and political ideology', (2010) *Review of International Political Economy* 1, at 22. These authors found that of 14 leftist governments elected in South America in the last 90 years, half came to power with nationalized industries, only one moved towards privatization, and six moved the industry towards nationalization. In the case of center-right governments, of the 49 presidents in that category, 24 did not privatize their public enterprises, 19 left their private industries untouched, and four moved their private companies towards the public sector. Thus, although more leftists nationalize, presidents of all ideologies have not privatized state hydrocarbon industries. Even extreme neoliberal presidents, such as Pinochet in Chile or Cardoso in Brazil, did not privatize key extractive industries.

¹¹⁵ Kaup, *supra* note 69, at 135.

of 'national interest' is dominated by local elites connected to whatever international hegemony is in power at the time. The plurinational model as implemented by these governments does not challenge this mode of operating, since it is built on the classic Western notions of nation-state and sovereignty. Although indigenous peoples are symbolically recognized as 'nations' and hold a limited control on their territories, the state still pretends to represent 'the nation' with absolute sovereignty over all natural resources.

A profound TWAIL critique invites reconsideration of these concepts from indigenous perspectives. The international discourse deployed by these countries as Third World champions against neoliberalism must be deciphered to understand the voices that reclaim a true decolonial meaning for the plurinational project. From these perspectives, state sovereignty must be shared, because indigenous nations hold the foundational right to define their own models of development. The plurinational project therefore requires structural adjustments in multilevel territorial governance and arrangements that enable indigenous nations to exercise decision-making power regarding the expansion, limitation, or stopping of extractivism in their territories. As McCreary explains,¹¹⁶ decolonization should not refer to incorporating indigenous authority within the reigning political economy, but to understanding it as a practice of emancipation that requires these peoples to define their future beyond imposed political economic structures.

Plurinationalism as a Third World model dominated by national elites is not so different from a multicultural nation-state. Unlike this official concept of plurinationalism, the plurinational project from indigenous perspectives constitutes a challenge to classical meanings of sovereignty and nationality by not subordinating indigenous peoples to the 'national interest' and by deploying institutional arrangements that allow indigenous peoples to exercise genuine control over their territories and their development path. In this way, the indigenous plurinational project differs from European notions of plurinationalism. The first difference is the theoretical and ideological basis. European plurinationalism emphasizes the 'accommodation of minorities' within national liberal and multicultural democracies¹¹⁷ and assumes that this model is 'intrinsically liberal in character'.¹¹⁸ Indigenous nations in Latin America invoke a politics of decolonization by which, rather than merely 'accommodating' ethnic diversity within liberal frameworks, they seek a political transformation of the very foundations of the nation-state. The state is a means for overcoming centuries of racial segregation and economic deprivation based on colonialism.

In the indigenous concept of plurinationality, therefore, the universality of Western categories such as human rights, democracy, ownership of the natural environment, and so forth, are subjected to critical assessments aiming at a redefinition beyond ethnocentric and individualist premises – for example, by conceiving the natural environment as being subject of rights rather than merely an object of

¹¹⁶ McCreary, *supra* note 90.

¹¹⁷ Requejo in Requejo and Caminal, *supra* note 2; Tierney, *supra* note 1.

¹¹⁸ MacCormick, *supra* note 1.

appropriation. This perspective does not appear in the European discussions of plurinationalism.

Another difference is the type of ethnic conflicts these projects seek to solve. Whereas in Europe, plurinational proposals emerge to provide a solution to the secessionist impetus, in Latin America ethnic conflicts have not been generally a secessionist phenomenon.¹¹⁹ Indigenous organizations struggle for decision-making power in their territories and in state structures, so they generally do not oppose the fact that the recognition of plurinationality in constitutional texts is accompanied by a solemn proclamation of state unity.¹²⁰ Whereas Latin American plurinationalism rests on indigenous identities organized as nations that compose the country, European plurinationalism relies on national identities that seek political autonomy from the state.

Another important difference is that indigenous plurinationalism challenges the political economy of resource extraction when it affects the livelihoods of indigenous peoples, whereas European plurinationalism does not challenge the political-economic matrix, but seems to focus on economic redistribution. Thus, plurinationalism in Latin America has been raised by indigenous populations that are more excluded from society (though then co-opted by national elites), whereas European plurinationalism seems more related to middle-class and working-class sectors concerned about financial instability and economic constraints.

Finally, unlike Europe, plurinational projects in Latin America are spreading across the region despite tensions and contradictions in their implementation. In a meeting convened by the Andean Coordinator of Indigenous Organizations (CAOI) in 2008, with the participation of indigenous organizations from Peru, Ecuador, Chile, Argentina, and Bolivia, indigenous leaders announced:

[T]he decision of Indigenous Peoples of Abya Yala [the Americas] to reconstruct our Peoples, struggling for inclusion and the construction of Plurinational States and Intercultural Societies, with new governments that recognize our territories and collective rights and implement public policies, intercultural and democratic knowledges, and hold for societies the principle of “Unity in Diversity” and [seek] the construction of alternative societies based on the proposals of Indigenous Peoples.¹²¹

In the current process of constitutional reform in Chile, there is also a strong discussion regarding the possibility of implementing a plurinational state as a response to the demands of the Mapuche people.¹²²

6. CONCLUSION

Plurinationalism in Bolivia and Ecuador has entailed the building of an innovative state model that seeks to address indigenous demands for recognition of territorial rights and self-determination. By transforming the state’s multilevel governance

¹¹⁹ M. Becker, ‘Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador’, (2011) 38 *Latin American Perspectives* 47.

¹²⁰ Grote, *supra* note 27.

¹²¹ Enlace Indígena 2008, in Gustafson, *supra* note 77, at 1001.

¹²² Alvez, *supra* note 20.

through territorial rearrangements and granting indigenous peoples representation in the executive, legislative and judicial branches of government, plurinationalism seeks to transform the foundations of a historically racialized state. This means that the exclusion, marginalization or assimilation that have been historically reflected in state policies would be reversed by policies for indigenous self-determination.

These governments also portray themselves as Third World champions against neoliberalism and emphasize the need for nationalization, redistribution, and equality. However, the practical implementation of plurinationalism has been marked by the conflict between national development priorities and actual protection of indigenous territories. Because these governments depend heavily on extractive industries such as oil and gas production and mining, they formulate a discourse of 'nationalism' based on the argument that revenues derived from extractive exploitation are crucial for economic development and justified by the interest of 'the nation'. Under the banner of 'economic sovereignty', they also proclaim a better distribution of revenues from extractive exploitation between the state and transnational corporations. Constitutional provisions of both countries and the international market for minerals and gas support this political economy, which ultimately perpetuates the practical existence of the nation-state model: indigenous peoples' sovereignty in their territories is more symbolic than real and is subordinated to the central government as representative of the nation.

The making of plurinationalism is, thus, a venue for struggle between a developmentalist project fostered by national elites and a self-determination project fostered by indigenous peoples. Whereas the former relies on the global market for commodities and an internal discourse of 'nationalism' and state sovereignty over natural resources, the latter appeals to international standards of indigenous rights and local mobilizations to demand the genuine constitution of a plurinational state. They are, in practice, two contradictory versions of plurinationalism that coexist within Third World countries, one an imagined plurinationalism that would break a history of indigenous exclusion, forced assimilation and exploitation, and the other an official plurinationalism still committed to the institutional arrangements and political economy of the nation-state.

Inspired by the TWAIL critique of international law, we are able to decipher these contradictions. The national and international dynamic of conflict involving indigenous peoples and extractive industries in these two experiences responds to the fact that the notion of and legal structure for the 'nation' and 'sovereignty' are embedded in colonial legacies. Despite the critique of neoliberalism, plurinational governments maintain the historical dependence on extractive exploitation, so they must reinforce the idea that extractivism is deployed on behalf of the 'nation' and on the basis of state sovereignty over natural resources, when in reality their sovereignty relies on (re-accommodated) international hegemonies and deepens the countries' historical cleavages. This situation triggers conflicts marked by local and global dynamics. Indigenous organizations resort to international forums to promote the implementation of the plurinationalism they envision, whereas corporations and state officials use an international discourse of economic development and institutionality for the protection of investors which, crucially, does not

contradict the official version of plurinationalism. These conflicts are difficult to assess without consideration of the colonial and post/colonial history of constitution building and indigenous politics. Engaging more with these legal, political and epistemological struggles is fundamental for unveiling exclusions within the Third World and expanding the analytical dimension and policy implications of TWAIL.

In sum, instead of a specific state model, plurinationalism is a contentious and unfinished process of state transformation with competing meanings: one from indigenous nations and the other from national elites. Whereas the latter reproduces the same logic of the nation-state (be it neoliberal or post-neoliberal), the former tries to redefine sovereignty by providing actual territorial control to indigenous nations. This latter indigenous project faces tremendous challenges, as the racialized structures of the state in Latin America have been formed by centuries of external and internal colonization and a political economy of resource extraction that persists today. The experiences of Bolivia and Ecuador are crucial for understanding the possibilities and limitations of this project.