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MINING LEGAL SYSTEM, *ANTINATURA* RATIONALITY, AND NEOEXTRATIVISM

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ABSTRACT

This work analyzes the mining legal system in Brazil associated with the historical understanding of the colonization process, from the transmodern perspective of Enrique Dussel and decolonial thought in Latin America. Mining was guided by an instrumental reason of Eurocentric matrix, supported by the man-nature disjunction, as well as a universalist and objectifying view of the environment. Therefore, It has sought to confront this exploratory model with the assumptions of decolonial thinking and the proposal of overcoming from the emerging Andean Latin America environmental constitutionalism. The discussion of mining under the political ecology in Latin America was deepened, especially the contemporary theoretical developments by the neoextractivism concept and the new role of the State in the global commodity market. Next, the epistemological foundations of the mining regulation in Brazil and the proposals for legislative change in Bill 5.807/2013, Provisional Measure 790/2017, and Bill 191/2020 were analyzed. In the end, it can surmise

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that the exploitation model in the country keeps politically aligned with an ultraliberal and mercantilized dimension of nature, founded on an *antinatura* rationality.

Keywords: decoloniality; mining; neoextractivism; political ecology.

REGIME JURÍDICO DE MINERAÇÃO, RACIONALIDADE ANTINATURA E NEOEXTRATIVISMO

RESUMO

O presente trabalho analisa o regime jurídico da mineração no Brasil, associado a compreensão histórica do processo colonização, a partir da perspectiva transmoderna de Enrique Dussel e do pensamento decolonial na América Latina. A atividade extrativa mineral orientou-se por razão instrumental de matriz eurocêntrica, escorada na disjunção homem-natureza, bem como por uma cosmovisão univestalista e objetivadora do meio ambiente. Por meio da utilização do método dialético, buscou-se confrontar esse modelo exploratório dela decorrente com os pressupostos do pensamento decolonial e a proposta de superação advinda do emergente constitucionalismo ambiental latino-americano andino. Aprofundou-se, ainda, a discussão da atividade mineira à luz da ecologia política na América Latina, notadamente os contemporâneos desenvolvimentos teóricos da noção de neoextrativismo e o novo papel do Estado no mercado global de commodities. Em seguida, analisaram-se os alicerces epistemológicos dos regimes jurídicos de mineração no Brasil e as propostas de mudança legislativa do Projeto de Lei n. 5.807/2013, da Medida Provisória n. 790/2017 e o Projeto de Lei n. 191/2020. Ao final, depreende-se que o modelo de exploração de recursos minerais no país mantém alinhado a uma dimensão politicamente ultraliberal e mercantizada da natureza, fundada numa racionalidade antinatura.

Palavras-chave: *decolonialidade; ecologia política; mineração; neoextrativismo.*

INTRODUCTION

In 2015, an ore tailings dam operated by Sarmarco Mineração S/A, controlled by a joint venture between Vale S/A and the Anglo-Australian company BHP Billinton, broke down in the city of Mariana (MG, Brazil). The spillage of 55 million cubic meters of mud traveled 853 km down the Rio Doce bed between Minas Gerais and Espírito Santo, reaching the Atlantic Ocean. Having caused the death of 19 people, it was considered the largest environmental tragedy in Brazilian history. Then, in 2019, the ore tailings dam managed by Vale S/A broke in the city of Brumadinho (MG, Brazil). 14 million tons of mud and tailings were released in the region, resulting in 252 dead, 13 missing, and the contamination of the Paraopeba River.

The construction method of upstream heightening dams and eventual failures in the inspection of environmental licenses could be pointed out as contributors to both tragedies. However, they may serve as an explanation for the event, but not its historical process. They point to the immediate problem but do not reveal the intricacies of extractive activity in mining activities in Brazil and Latin America, its colonial epistemological foundations, and the ultra-liberalization that the sector has been undergoing in the last decades of the 20th and early decades of the 21st century.

The logically exploitatory activity of natural resources (not just in mining), turning everything into merchandise, engendered an unprecedented environmental crisis. Strictly speaking, it is not a crisis "of" nature, but the crisis of a rationality model. The environmental crisis is the expression of an unsustainable rationality model that supports and is based on a universalizing, objectifying, and economy-driven cosmovision of the being, of mankind, and nature.

Mineral extractivism is umbilically bound to the history of colonization and (under)development in Latin America, inserted in the context of European economic rationality of exploitation of natural resources that expanded throughout the world and spread the concept of denaturalization of nature. In the wake of this cosmovision, the history of the legal grounds concerning mining activities in Brazil was nowhere different.

With the use of the historical and dialectical materialist method and the decolonial proposal of transmodern overcoming, the scope of this work is precisely to reflect critically on the concrete relationships and deeper roots that imposed an *antinatura* rationality on the continent, permeating

the extractive mining activity and promoting the disjunction of the ancestral relationship between man and nature, resulting in successive human and environmental tragedies in the country and across the continent, from colonial until present times.

Therefore, at first, we investigate the foundations of decolonial thinking in Latin America and its critique of the continuous process of exclusion caused by the currently resignified colonial epistemological heritage as a means to compare them to the democratic-pluralist and anthropocentric overcoming project outlined by the new Latin American environmental constitutionalism, with an emphasis on the Constitutions of Bolivia and Ecuador.

Then, from the theoretical developments of political ecology in Latin America, in particular, the concept of neoextractivism, the exploitatory model of mining and natural resources in general, and the new role of the State and private companies in the global market model are discussed ("*Commodities* Consensus"). Finally, there's an examination of the epistemic foundations historically developed for mineral exploitation by the legal regimes in Brazil, highlighting the proposals for legislative change in Bill No. 5.807/2013, Provisional Measure No. 790/2017, and Bill No. 191/2020, which, despite being set forth by governments backing dissimilar ideologies, remained convergent towards the objective of "modernizing" the regulatory framework for mining. Here and throughout the text, the expression "[to] modernize" aligns with the perspective of keeping the legal order of mining subject to the imperatives of modern European rationality.

1 LATIN AMERICAN ENVIRONMENTAL DECOLONIALITY AND CONSTITUTIONALISM: PATHWAYS TO OVERCOME THE OBJECTIVE AND INSTRUMENTAL CHARACTER OF NATURE

Europe's very modernity has been guided by a rationalist view of existence, of an anthropocentric and universalizing nature. As mentioned by Dussel (2008), although Europe was not considered the center of world history until the end of the 18th century, the fact is that, in the wake of a self-referential colonial mentality (which justified the right to colonization and enslavement), there was the gradual imposition of a new paradigm of society, political organization, economy, religion, and culture.

In Latin America, modernity and colonization introduced a genuinely European sociability, institutions, and cosmovision which despised the ethical, political, and cultural references that gave a horizon of existential meaning to the peoples who already inhabited the continent, whether as individuals or communities. The obliteration of the "uncivilized" Latin American subjectivity was the preferred path of the colonizer, who now provided the "lesser" peoples with new standards to be – compulsorily – followed. According to Santos (2011), colonialism consists in the ignorance of reciprocity and the inability to perceive the other as anything more than an object.

As per Aráoz (2018, p. 64), if colonialism refers to the factual planning of concrete social, economic, political, military practices, and processes of differential appropriation of wealth and resources, exploitation, domination, and racial hierarchization of populations and territories, coloniality is expressed through social narratives under different registers (academic, scientific, ethical, philosophical, political, legal, and governmental, as well as journalistic and mass communication discourses) operating their naturalization and legitimization.

However, at its epistemological (of the being and knowledge – culture, religion, art) and political and economic levels (of power – means of production, social and political organization, including the Law), coloniality did not succeed in resolving conflicts and social contradictions. Although it managed to hide them, the fact is that they were only intensified during the process of colonial domination, favoring the emergence of a thought that would break with the mono-organizational and monocultural cosmovision imposed on Latin America.

The decolonizing thought, based on the critique of modernity and colonization (its most concrete aspect), confronted the effects borne by Latin American peoples within the epistemological, axiological, and anthropological dimensions. He understood that the European colonial strategy of modernity, which constitutes the basis of enslavement, dispossession, and exhaustion of natural resources, sought to eliminate subjectivities and millenary values in place on the continent.

As stated by Dussel (2012), overcoming modernity means taking all of the simplifying reductions produced since its origins into critical consideration, with the most important being, alongside a solipsistic subjectivity without community, the denial of the corporeality of said subjectivity – having human life itself as a last resort.

For the Argentine philosopher, this overcoming is the embodiment of transmodernity, that is, a proposal to recover whatever is recoverable from modernity, denying the domination and exclusion of the world system and, in this sense, freeing oppressed/excluded victims of the world's periphery from a cynical and managerial (administrative-worldly) reasoning of capitalism (as an economic system), liberalism (as a political system), Eurocentrism (as an ideology), the white supremacy (as in racism), sexism (in eroticism), the destruction of nature (in ecology) (DUSSEL, 2012).

In line with the Dusselian thought, what has been called the "decolonial turn" has more recently erupted in Latin America. As elucidated by Castro-Gomez and Grosfoguel (2007), the notion of decoloniality aims at overcoming the assumption of certain academic and political discourses according to which, as the end of colonial administrations and constitution of peripheral nation-states, we live in a decolonized and postcolonial world, realizing, that there was merely a transition from modern colonialism into global coloniality. Such idea is followed and deepened by the argument that, starting from such decolonial focus, contemporary global capitalism reframes the exclusions caused by the epistemic, spiritual, racial/ethnic, and gender/sexuality hierarchies introduced by modernity, that is, the long-duration structures formed during the 16th and 17th centuries continue to play a relevant role in the present (CASTRO-GOMEZ; GROSFOGUEL, 2007).

In this sense, Castro-Gomez and Grosfoguel (2007, p. 17) differentiate two types of decolonization:

> De ahí que una implicación fundamental de la noción de 'colonialidad del poder' es que el mundo no ha sido completamente descolonizado. La primera descolonialización (iniciada en el siglo XIX por las colonias españolas y seguida en el XX por las colonias inglesas y francesas) fue incompleta, ya que se limitó a la independencia jurídico-política de las periferias. En cambio, la segunda descolonialización —a la cual nosotros aludimos con la categoria decolonialidad— tendrá que dirigirse a la heterarquía de las múltiples relaciones raciales, étnicas, sexuales, epistémicas, económicas y de género que la primera descolonialización dejó intactas. Como resultado, el mundo de comienzos del siglo XXI necesita una decolonialidad que complemente la descolonización llevada a cabo en los siglos XIX y XX. Al contrario de esa descolonialización, la decolonialidad es un proceso de resignificación a largo plazo, que no se puede reducir a un acontecimiento jurídico-político.

The reflexes in the legal field were, of course, inevitable and are embedded in this perspective of coloniality of power. With modernity, the new political-social framework, the Nation-State, guided by

a liberal-individualist doctrine, demanded a legal structure with the characteristics of the scientism that thrives in Europe – objectivity, predictability, and neutrality. Influenced by bourgeois revolutions, the Constitution was elevated into a juridical monument for the elimination and stabilization of social conflicts and contradictions (that was the promise!) and constitutionalism became a (metaphysical) dogma of faith.

It also is in this sense that the Rule of Law must be understood, that is, while inserted in the tradition of liberalism as a political-legal doctrine that is not detached from its economic (capitalism) and moral (freedom) biases, as well as from its core subject – the selfish individual (MORAIS; MOREIRA, 2019).

As noted by Gargarella (2020) in a more recent look at the incipient constitutional process underway in the continent, most Latin American countries entered the 20th century with constitutions based on political agreements between the predominant forces in the region – liberals and conservatives. The former gained checks and balances, state neutrality between different religious groups, while the latter acquired concentrated authority and regulations on morals. These constitutions dealt with organization and the limits of power, not including clauses on benefits to the least favored. They did not provide ample rights of suffrage or association capable of promoting the participation of the masses in politics or the public sphere.

As a reaction to this unfulfilled promise and to a constitutionalism that did not precisely reflect the conflicts and contradictions that the modern legal worldview aimed to conceal, a "new Latin American constitutionalism" can be seen emerging at the end of the 20th century, with the fundamental purpose of overcoming the state's reproduction model of the predominantly European legal form and content, as well as engendering political mechanisms and institutions aligned and coherent with the social, cultural, and political reality of the peoples inhabiting this continent.

Influenced by the decolonial thinking, the "new Latin American constitutionalism" ("transforming constitutionalism") is expressed through struggles on the demand of a new model for the State and Law organizations (FREITAS; MORAES, 2013, p. 13) including new social actors, plural realities, and the respect for minority cultures (ASSIS; VIEIRA, 2020, p. 28). Therefore, Latin American democratic constitutionalism can be read in terms of the "rescue" dimension of what was neglected in the formulation of the first Constitutional Letters (MOTA, 2017, p. 91).

To Avritzer (2017, p. 28), this new Latin American constitutionalism has three main characteristics: the first is a strong expansion of rights, especially those of traditional communities; the second is the expansion of existing forms of participation alongside deliberation by the Executive and the Legislative, which switches the role of the exercise of sovereignty; and the third is a new role for the Judiciary, which affects the traditional balance of power in Latin America.

With genuine innovation to the classic model of separation of powers, art. 36 of the 1999 Constitution of Venezuela (VENEZUELA, 1999) proposed a quinary division of the National Public Power to include the Legislative, Executive, Judicial, Citizen, and Electoral Powers. Art. 257 of the Constitution of Ecuador (ECUADOR, 2008) also innovates in the political-administrative organization by allowing the coexistence of autonomous indigenous and Afro-Ecuadorian territorial constituencies, guided by the principles of interculturality and plurinationality. Art. 5.I of the 2009 Constitution of Bolivia (BOLIVIA, 2009) states that Castilian and all other languages of indigenous peoples and native peasants become official languages. It also determines that the Jurisdiction is Ordinary and Indigenous and both should enjoy the same hierarchy (BOLIVIA, 2009, art. 179 and art. 190.I).

Another innovative element perceived in this new Latin American constitutionalism is the proposal for a Plurinational State. As stated by Silva (2014), the refoundation of the State proposed by the Plurinational State has the recognition and emancipation of the pluriculturality existing in Latin America as a premise for its formation.

Specifically regarding Bolivia after the express announcement that the country is constituted as a Plurinational State (BOLIVIA, 2009, art. 1), it is inferred that the institutional design present in the Constitution was built precisely to guarantee respect for such plurinationality. Languages (the recognition of different languages and use in public affairs (BOLIVIA, 2009, art. 5.I and II), political, legal, and economic systems (BOLIVIA, 2009, art. 30. II. 14), indigenous people with participation in the composition of the Plurinational Legislative Assembly (BOLIVIA, 2009, art. 147. II), indigenous jurisdictions (BOLIVIA, 2009, art. 190.I), the Plurinational Constitutional Court and the Supreme Electoral Court, with the participation of representatives of indigenous peoples, are, therefore, protected (BOLIVIA, 2009, art. 196.I; art. 12. I; art. 205. I. 1).

In the environmental field, the break with an anthropocentric

normativity is admittedly present in the Constitutions of Ecuador and Bolivia, a phenomenon currently called the "ecocentric turn of the Andes". If modernity (and law, as an institutional arm) rationally and artificially produced the man-nature disjunction (Descartes, Bacon, and Newton), it was up to the Andean ancestral cosmovision, decolonically, to reintroduce and re-signify a fundamental aspect of culture and values of the Latin American peoples, the (*tinkunakuy*) interrelationship, in Law itself.

Fernandéz (2018) explains that the principle that governs life in the Andean world is *tinkunakuy* or interrelationship, that is, everything that exists in space-time (*Pacha*) is interlinked, interconnected. The interrelationship of the whole, the network of nexuses and bonds, is the vital force behind all that exists, which produces life, manifesting itself in every field of existence and at all levels (individual[3], family, community). In fact, the Amerindian existential sophistication of *tinkunakuy* does not fit into the civilized modernity of the Cartesian *cogito, ergo sum*!

Ecocentric constitutionalism emerges in the Andean region, elevating the notion of well-being to the legal-constitutional category (*Sumak Kawasy,* in Ecuador's 2008 Constitution; *Suma Qamaña*, in 2009 Constitution of Bolivia) and the recognition of rights to nature (*Derechos of Pachamama*, of Mother Earth, in the 2008 Constitution of Ecuador).

Buen-vivir demands a profound change in consciousness, in the way human beings perceive and understand and conduct themselves in life, which demands breaking with old structures and rebuilding a civilization oriented towards the value of life, rather than the market (FREITAS; MORAES, 2013, p. 16). *Sumak Kawsay* is constitutionalized in Ecuador in the form of well-being rights, while in Bolivia, well-being or *Suma Qamaña* became official as a moral-ethical principle of plural society (FREITAS; MORAES, 2013).

The well-being surpasses the individualistic philosophy of life typical of liberalism, presuming a holistic and integrative view of the human being while immersed in the great community of *Pachamama*. It is not about "living better" according to the developmental, consumerist sense, based on an ethics of unlimited progress, but rather being guided by an ethics of sufficiency for the whole community (ACOSTA, 2016).

From the legal-environmental perspective, the recognition of *Pachamama's* (Mother-Earth) rights, according to Freitas and Moraes (2013,

3 Individual, not in the modern-western sense, but in the Andean sense, which understands the human being as formed by three "bodies" – *aycha* (the physical body), *supay* (the spiritual body), and *sami* (the astral body), cf. Fernandéz (2018, p. 13).

p. 20), constitutes the most impactful novelty of the 2008 Constitution of Ecuador, since it confers nature the condition of subject of rights, and no longer of an object (ECUADOR, 2008, art. 71 and art. 72). Thus, nature holds the rights to life, reproduction of life, and maintenance and regeneration of its life cycles, structures, functions and evolutionary processes, integral restoration.

This biocentric/ecocentric view dialogues with Aldo Leopold's ("Think like a Mountain," 1949) reflections on environmental ethics, Arne Naess' ("The Shallow and the Deep, Long-Range Ecology Movement," 1973) "deep ecology," James Lovelock's "Gaia hypothesis" ("Gaia: A new look at life on Earth," 1979). Gradually, it also spreads across international organizations: United Nations Educational, Scientific and Cultural Organization's (UNESCO) Earth Charter, dating from 2000; the United Nations' (UN) *Harmony with Nature*, from 2009; the International Court of Nature's Rights, created by the Global Alliance for Nature's Rights, a non-jurisdictional instance; the International Union for the Conservation of Nature's World Declaration on the Rule of Environmental Law, which states the principle that nature is a subject of rights.

Despite the search for the epistemological overcoming of modernity, especially in light of the Dusselian thought and decolonial critique, the environmental dimension is contemporarily confronted, as discussed below, with an exploitation model perceived as neoextractivist, whose characteristics remain – and deepen – the instrumental and objectified perspective of natural resources.

2 NEOEXTRACIVISM AND MINING IN LATIN AMERICA: A CRITICISM FROM LATIN AMERICAN POLITICAL ECOLOGY

Extractivism reserved to Latin America the historical role of providing the inputs (raw materials, in the colonial regime; *commodities*, in the euphemistic vernacular of contemporary economy) necessary for the consolidation of an economic model guided by the overexploitation of natural resources and the logic of accumulation of predominantly North-Western matrix.

Following the thinking of Latin American political ecology, we can understand extractivism as a set of activities aimed at the removal of large volumes of natural resources, which are not (or are limited to) processed

with the main objective of exporting (GUDYNAS, 2009). To Acosta (2016), extractivism is a modality of accumulation in which certain regions specialized in the extraction and production of raw materials, that is, primary goods, while others took on the role of producers of manufactures – the first exports Nature, the second imports it.

In a similar direction, and particularly on mineral extraction, Aráoz (2011, p. 164-165)[4] analyzes the creation of expropriation processes of contemporary neocolonialism in mega-mining activities carried out in subordinated spaces, bringing them together in four dimensions (geographic, economic, ecological, and political).

Geographical expropriation operates fundamentally by destroying the local coherence of territories, dismantling endolocal socio-productive flows and re-articulating them as territorial fragments subordinated to productive processes of global reach (ARÁOZ, 2011, p. 166). As for the *economic dimension*, it relates to the amount transferred as financial resources involving the location of mining operations in the established geographical and political-institutional conditions, whether due to the remittance of financial assets to central companies or institutional reforms (taxes, socio-environmental and labor subsidies) that function as an indispensable component in the profitability equation of large businesses (ARÁOZ, 2011, p. 167). *Environmental expropriation* is the differential appropriation of environmental goods and services, the transfer of non-renewable resources, and their unequal consumption, as they are unequally used and consumed – the geography of mineral resource extraction is quite different from the geography of consumption of minerals themselves (ARÁOZ, 2011, 168-169). Finally, the *political dimension* can be understood as an eco-bio-political dimension (biopolitical domination), in which the expropriation of territories – as the expropriation of common goods and natural services (water, soil, air, energy) that make us bodies – is merely the expropriation of the bodies themselves, which will be increasingly expropriated from the socio-psycho-physical-biological conditions which cause such materialities to be taken and considered as human bodies, people (ARÁOZ, 2011, p. 172).

Aráoz (2018, p. 44-45) deepens his analysis by reasoning that mining is not just any form of extractivism, but an extreme one, given its foundational-constituent condition in the capitalist-colonial-patriarchal world

4 Please note that citations to the present work in the development of the text constitute a free translation by the authors of the original in Spanish.

system, as well as its long-lasting consequences, ecobiopolitical effects, which drastically altered (and still alter) the sociometabolism of the human species (the "mineralization" of the human being).

Although it maintains the premises of classical extractivism (appropriation of natural resources for export), neoextractivism, a phenomenon that took place especially from the beginning of the 21st century in Latin America, presents a new and more sophisticated role to be played by the State, which is not limited to the mere control of the economic activity and the analysis of actual or potential environmental risks (the dynamics of "command-control"). In this model, the State intervenes even more actively in the extractive sector, not simply from a regulatory standard of containment (limitation, control), but also to enable the increase of the countries' international insertion, the deepening of the world trade, and favor the flow of the capital that feeds back into the economic activity.

If the classic extractivism pointed to "exports" and the "world market," neoextractivism, re-elaborated from the State, is oriented towards "globalization" and "competitiveness," that is, it incorporates a broader set of ideas that include both classical economic aspects (exports, for example), and new rules on capital flows, the expansion of the concept of merchandise, and extension of property rights, all subordinated to a global commercial institutionality (World Trade Organization and international trade agreements) (GUDYNAS, 2009).

Wanderley, Gonçalves, and Milanez (2020) follow the same sense of understanding when alluding that neoextractivist countries, besides having little diversified economies focused on the appropriation of natural resources, also present a dependent insertion within the international geoeconomy. Brazil, with a large-scale economic matrix basically oriented towards agricultural activities and the extraction/processing of varied ores destined largely for export, which is therefore subject to fluctuations in the foreign market, has characteristics that fit it into this neoextractivist development model.

This situation illustrates what Svampa (2012) calls the "*Commodities* Consensus," that is, the entry into a new economic and political order supported by the *boom* in international prices for raw materials and consumer goods, which are increasingly in demand, by central countries and emerging powers, as well as the deepening of a dynamic dispossession or deprivation of land, resources, and territories, while generating new forms of dependence and domination.

However, with an even denser analysis of the capital-nature relationship, Pineda (2018) warns that extractive processes, hyper-urbanization, bio-commercialization, mega-infrastructure, and agroindustry are seemingly disconnected, yet, they are articulated as a systemic totality, a civilizing means of social reproduction which allows us to understand that the contradiction of capital and natural is inherent to the logic of the whole, as present within the form, scale, rationality, technique, and objectification towards and regarding nature.

Despite the new role taken by the State, neoextractivism does not give it the lead in the execution of the mining activity itself – which, incidentally, is no longer its objective. The idea of state ownership remains, but a new web of relationships and dynamics for access to mineral resources is created, involving public, private, and/or mixed entities. However, as highlighted by Gudynas (2009), state practices point to commercial success and, therefore, repeat business strategies based on competitiveness, cost reduction, and increased profitability based on classic efficiency criteria, including the externalization of social and environmental impacts.

Lander (2017, p. 80) explains that there is necessarily greater state control over the exploitation of raw materials, either through nationalizations or higher tax burdens, intending to guarantee a greater share in the income that transnational corporations previously had as the main beneficiaries.

The political ecology critique of neoextractivism focuses, therefore, on the paradoxical fact that the mining activity, despite its social and environmental impacts, is now accepted and widely defended by the State as a fundamental engine of economic growth and the fight against poverty. Before, the understanding was that extractivism contributed to generating poverty, but now, with neoextractivism erupting in Latin America, the discourse has switched into the argument that this model is precisely intended to combat poverty. Economic growth is, therefore, the path to social development and the financial maintenance of the State.

Thus, the inequality in the demands for commercial exchange and the subordination of Latin America as a supplier of raw materials are not questioned in this neoextractivist model, once the price of *commodities* in the international market cannot be neglected and exports of extractive origin are converted into a new privileged means of economic growth (GUDYNAS, 2009, p. 220), even though in continuity to a civilizational pattern of destruction of life guided by colonial historical forms of insertion into the global market for the export of nature (LANDER, 2017).

3 THE LEGAL REGIME ON MINING AND THE DENIAL OF THE WELL-BEING IN BRAZIL: NEOEXTRACIVIST, ULTRA-LIBERAL, AND *ANTINTURA* RATIONALITY

Mining activities are deeply and historically associated with the American processes of invasion, domination, and colonization were carried out for many centuries, and are present (with increasingly overwhelming force) to this day. From Potosí[5] to Brumadinho, the common thread binding different regions and historical times is an economic rationality guided by the disjunction between man and nature, the systematic exploitation of natural resources (the environment as a stock of goods), and the (fundamentalist) belief in the myth of infinite progress, the economic-philosophical dogma of European modernity applied with no constraint across the continent.

On the relevance of mining in the colonization period, historian Fernando Braudel, *apud* Aráoz (2018, p. 42), observed in a text from 1949:

> The role of precious metals has never seemed so relevant as in the 16th century. Without hesitation, its contemporaries give them the first place, and experts of the next century made them increasingly expensive. For some, they are 'the substance of the people'; while others believe we do not live only "from trading in commodities, but also gold and silver". This Venetian thinker goes so far as to say that the yellow or white metals are "the nerve of any government, that which gives it its pulse, movement, spirit, soul, its being and its very life (*l'esser et la vita*). They conquer all impossibilities, as they are the masters, the supreme commanders – dragging along the need for anything; without it, everything is weak and motionless".

Since then, continues Aráoz (2018, 43-44), the geophagic voracity of mineral greed has eaten away the arable soil not only of our continent but across the entire planet. The pace and volume (which did not stop growing) of mineral flows extracted, transported, and processed created the economic and political cartography of the colonial modernity in which we live.

As the developmental consensus (coloniality of knowledge) necessarily proposes the binding of mineral extractivism to economic progress/growth (both to and in the colony), the activity has always been considered strategic. Brazil, of course, experienced this process.

The mining rights in the Brazilian colonial period were exercised through the Regalian (domanial) regime, in which the deposits belonged to the Portuguese Crown. At the time, the mining activity was mainly focused on the search for gold and diamonds in the inner regions of the country.

5 A Bolivian city colonized by Spaniards and recognized as the richest in the world during the 16th century as a result of the intensive exploitation of silver; currently, one of the poorest in the continent.

Although lacking accurate records, gold shipments to Lisbon are estimated in "1699 […] 725 kg," and 334,000 kg" during the XVIII century" (PINTO, 2000, p. 28). From 1771 onwards, diamond extraction became the object of a contract with the Portuguese Crown and the Royal Extraction of Diamonds in Brazil was created, a monopoly that lasted until the Brazilian independence. During this time, the annual production averages during contracts with the Royal Extraction were (in carats): "26,814.2; 35,440.0; 38,644.8; 70,018.8; 54,169.9" (PINTO, 2000, p. 30). The decline in gold and diamond extraction in the period "had several causes […] mainly of an economic nature in the case of the two resources (loss of the value of gold and diamond in international markets) and, in the case of gold, of a technical nature (low grades and difficult geological conditions of the mines)" (PINTO, 2000, p. 35).

In the imperial period, a domination regime in which the deposits and mines belonged to the Nation was also adopted. During the First Empire, there were few attempts to discipline the Brazilian subsoil. In 1829, authorizations to undertake mining are issued. In the following year, there was a decree determining that mining authorizations on own land apply only to mining provinces where mining is free. With the predominance of the agrarian mentality, there were few legislative innovations and incentives for the activity during the Second Empire. The economic policy was oriented towards the coffee issue, which favored the rise of its production (RAMOS, 2000).

In the republican period, the accession regime was initially adopted with the Constitution of 1891, giving the owner of the land control over the subsoil (BRASIL, 1891). Subsequently, the other Constitutions re-established the ownership regime, in which mineral ownership (subsoil) is separated from surface ownership (soil), owned by the State. The difference in the subsequent constitutional regimes varied in terms of the impediment of foreigners in controlling the activity, as provided for in the 1937 Charter (BRASIL, 1937) and the current 1988 Constitution (BRASIL, 1988) or respective permissions, following the 1934 Constitution (BRASIL, 1934) and the 1946 Constitution (BRASIL 1988). Another difference referred to the creation of a preferential right to the owner for mineral exploitation which, authorized by the 1946 Constitution (BRASIL, 1946), was revoked by the 1967 Charter (BRASIL, 1967), then re-established by the 1988 Constitution (BRASIL, 1988).

At the infra-constitutional level, the mining activity in the country

was regulated by the 1934 Mining Act (BRASIL, 1934a), the 1970 Mining Act (BRASIL, 1940), and the 1967 Mining Act (BRASIL, 1967b). While analyzing the historical moment of publication of the aforementioned normative acts, the first circumstance that stands out is the fact that the legal regimes for mineral extraction in Brazil were instituted during periods of political tension and lack of democratic normality.

The 1934 Mining Act was conceived during the Provisional Government of 1930. Strictly speaking, the 1934 Mining Act was issued on July 10, 1934, but published in the Official Gazette on July 20, 1934. Although the Constitution was chronologically promulgated on July 17, 1934, these time frames do not invalidate the understanding of the exceptionality of such a political-democratic moment since the gestation of the norm took place during the regime instituted with the 1930 Coup. Similarly, the 1940 Mining Act was enacted during the Estado Novo, while the 1967 Mining Act (still in force) passed on the basis of Institutional Act No. 4, during the military regime.

It is understood, therefore, that the State (Crown, Empire, and Republic), in line with the flow of processes and dynamics underway in Latin America, played a preponderant role in mineral extraction, as it is them who define the cardinal discipline and structure activity (ore ownership, foreign participation, preemptive rights, research activity, etc.).

More recently, in 2013, Bill No. 5,807 (still pending) was sent to the National Congress to institute the new legal framework for the "management of Brazilian society's mineral heritage" (BRASIL, 2013). According to the Explanatory Memorandum, the scope of the project is none other than the modernization of the 1967 Mining Act "for the continuous, stable, and sustainable development of investments and production" (BRASIL, 2013). Despite mentioning the "sustainable […] development […] of production," the sepulchral silence throughout the text about how this would happen is eloquent. As, on the contrary, the established rules are restricted to the legal contours of the activity and the simplification of procedures; continuous, stable, and sustainable development seems to refer to investments!

As a result, the Bill is justified by the "absence of innovative and efficient instruments for public management of mineral resources" and the creation of the National Mining Agency (replacing the National Department of Mineral Production) as a regulatory agency "to strengthen the efficiency of the State's action in the development of the mining industry

through the institution of regulatory rules and norms to induce the best use of natural resources, in a sustainable manner, stimulate competitiveness between agents and promoting the greatest degree of added value to the mineral product" (BRASIL, 2013).

The improvement in the collection of the Financial Compensation for the Exploitation of Mineral Resources (CFEM), naturally, is one of the targets of the Bill, with goals to provide "greater transparency, objectivity, and efficiency to the collection process". In the end, there is the recognition that the New Regulatory Framework "expresses the concern towards the legal security of the rights granted – an essential condition for attracting investments –" and "should promote a new drive for the development of the mineral sector with relevant impact upon the generation of employment and income in the country" (BRASIL, 2013).

In turn, the Government that took over right after the 2016 impeachment process, using another legislative route, edited Provisional Measure No. 790 in July/2017, also aiming at updating the regulatory framework for the sector (BRASIL, 2017). The explanatory memorandum of the Provisional Measure itself indicates the direction taken by the "new" legal regime. It initially alludes that, for the improvement of the text, one could not fail to consider the new environmental demands; however, at no other time does it promote any deepening of the issue. In a laconic sentence, it further mentions the "novelty" of holding the miner responsible for the recovery of impacted areas, as if the National Environmental Policy (BRASIL, Law No. 6938, 1981, art. 14, § 1) and the 1988 Constitution of the Republic (BRASIL, 1988, art. 225, § 2) itself no longer imposed such an obligation on the entrepreneur.

Then, it points out the economic issue of the sector, which would be facing a critical moment due to the precipitous drop in both mineral production (from US$ 80.2 billion in 2014 to US$ 31.9 billion in 2015) and mineral transformation (from US$94.2 billion in 2014 to US$53.0 billion in 2015) (BRASIL, 2017). It further alleges that the scenario of the Brazilian industry was affected by the decrease in the price of mineral *commodities* and, expressly and without any shame, claims to welcome changes long-awaited by the "productive sector", offering them the "unrestricted support of the Public Administration," and that the norm is the result of a consensus between "mining companies" and the "Government" (BRASIL, 2017). The aforementioned Provisional Measure was only in force from 07.26.2017 to 11.28.2017, as after 120 days since its implementation the

Bill for conversion was not approved by the National Congress.

We must also mention Bill No. 191/2020, it too originated from the Executive Branch, which does not address a broad discipline of the legal regime for mining, but a specific point: the mining activity on indigenous lands. Under the claim of regulating art. 176, § 1, and art. 231, § 3, of the 1988 Constitution of the Republic, which would not have been done in the last 30 years, and in compliance with the determination of the Federal Court of Accounts, it points out that such a gap has harmful consequences for legal security, the lack of geological knowledge, non-generation of employment and income, illegal farming, and damage to customs and traditions of indigenous peoples (BRASIL, 2020).

In a cursory Exposition of Reasons, it states that "the Civil House coordinated the holding of technical meetings with the Ministries of Mines and Energy and Public Security… and other guest ministries […] for the production of the Bill of Law's draft" (BRASIL, 2020) . Despite affirming that indigenous communities are the target audience of the proposed regulation, there is no mention that they may have participated in the "technical meetings" or were enabled and encouraged to contribute to the Bill by any other means.

This incursion into the foundations of the legislative proposals (and that emerge from the respective justifications), norms that did not formally enter the legal system (or had been suppressed, as is the case with the Provisional Measure), seems relevant for the exposure, together with the one currently in force, of the understanding that the Brazilian State and the productive sector (inseparable consorts in the "modernizing" endeavor) aim to establish mining activities straightly aligned with a predominantly neoextractivist, economicist, and technocratic perspective, firmly opposed to a transmodern view (the Dusselian sense).

At first, the proposals always infer that they were the result of intense negotiations with the productive sector. However, no proof is presented to indicate such democratic conduction of similar deliberations with the remainder of the society, so that light can be shed on its perspective on the extractive development pattern proposed to the country, with traditional and urban populations directly impacted by the mining ventures.

This is because, despite the impacts involved, mining has been treated by the Brazilian State as an activity of public interest, given the economic return it provides. In 2014, the Brazilian mineral production was $ 40 billion. The National Mining Plan (PNM) 2030 foresees investments of

around R$ 350 billion over 20 years and estimates that mineral production will tend to increase up to five times, both to meet domestic and exports consumption (ARAÚJO; FERNANDES, 2016). Between 1990-1997, investments in the mining sector grew 90% around the world, while in Latin America the increase was 400%, as well as 12 of the 25 largest investments in mining projects in the world took place in the continent (BEBBINGTON, 2007).

About this oneiric view of the activity, Aráoz (2018, p. 50) affirms that this scenario presents a phenomenology that permanently alludes to novelty, transformation, and progress, encouraging and feeding the First World fantasy of ultra-mining rulers and defenders, perceiving it as the mother of all industries and development's driving force. On the other hand, Aráoz (2018, p. 53) continues, a phenomenology of horror looms on the horizon, leaving its indelible footprint upon bodies and territories marked by the productive violence of the colonial order amid a reconfiguration process; new forms of violence that bring back to life old ghosts of original and cyclical terror, images and experiences remounting to historical pain and immemorial injustice. Developmental fantasies on the one hand and horrific ghosts on the other account for the inevitable eco-biopolitical domination that projects itself upon bodies and territories of the new "mineralized" regions (ARÁOZ, 2018, p. 58).

Mining, therefore, becomes State policy. Still according to Aráoz (2018, p. 96-97), we are immersed in a new mining cycle in the 21st century which overcomes ideological differences, as different rulers undertake the task of promoting mining investments to boost development[6].

The decolonial environmental perspective collides with the neoextractivist model of the mining regime in Brazil, including the proposals for changes that, in addition to fundamentally keeping everything as before, deepen the perspective of an *antinatura* rationality and the environment as a stock of goods to be exploited (accumulation by spoil), devoid of any ethical, anthropological, and cultural sense.

As mentioned by Wanderley, Gonçalves, and Milanez (2020, p. 564), it is the consolidation of an ultraliberal neoextractivist model, nuanced by the decrease of state control over companies, replaced by a self-regulation system, and the flexibility of environmental legislation, including the

6 In Brazil, Bill No. 5,807/2013 (under president Dilma Roussef), Provisional Measure No. 790/2017 (under president Michel Temer), and Bill No. 191/2020 (under president Jair Bolsonaro) ratify the idea of overcoming ideologies when dealing with the mining activity (a sort of neoextractivist supra-ideology common to all political spectrums).

reduction of civil society participation in political decision-making and the reduction of dialogue and public debate ("more extractivism and less democracy").

Rooted in political-legal discourses, such developmental perspective cannot overcome the frontiers of the capitalist economic system and individualist liberal modern rationality – it rather reaffirms them – while imposing itself as one of the threatening instruments to planetary life and the rejection of means of production and reproduction of life (WOLKMER; FERRAZO, 2018).

As proposed by Svampa (2012), it is, therefore, necessary to carry out an eco-territorial turn, the emergence of a common language and the construction of common frameworks for collective action, working not only as alternative interpretation schemes, but as producers of subjectivities to intertwine issues such as common goods, environmental justice, and *buen-vivir*.

First, and contrary to the prevailing opinion, the notion of eco-territorial turn and common goods implies that natural goods should not be perceived as *commodities* nor as strategic natural resources. Natural resources must be redefined as common goods that guarantee and sustain ways of life in the territory. The eco-territorial turn and environmental justice movements presuppose the union between social justice and ecologism, with a focus on environmental inequalities, lack of social participation in decision-making processes, environmental racism. Finally, the eco-territorial turn and *buen vivir*, linked to the idea of the interrelationship between man and nature in the sense of cooperation and complementarity, and the recognition of nature's rights with the progressive departure from an anthropocentric view.

With ongoing neo-extractive perspectives, the legal regime for mining ends up putting the country and people in a situation of *mal vivir* that, as defined by Tortosa (2011, p. 46-48), is a lethal consequence of the *maldesarrollo*. The author starts from the idea of *buen vivir* as an insurance of the minimum for survival, security (as opposed to physical, structural [exploitation, marginalization] and symbolic violence), freedom (from and to; opposite to repression), and identity (capacity of responding for oneself; opposite to alienation). He then understands that the *maldesarrollo* is precisely the pattern of *mal vivir* where the structural dissatisfaction of the human needs verified in *periferias maldesarrolladas* is verified.

Buen vivir is characterized as a version that surpasses "alternative"

developments in an attempt to become an "alternative to development". It is a radically different option to all ideas of development – as it even dissolves the concept of progress in its productivist version. *Buen vivir* summarizes an opportunity to build another society, supported by the coexistence of mankind in diversity and harmony with Nature, based on the recognition of the different cultural values inherent to each country and the world. The intrinsic aspect of this proposal, with a possible global projection, is taking a great revolutionary step to inspire us to move from anthropocentric to sociobiocentric views, with the consequent political, economic, and social repercussions. (ACOSTA, 2016, p 84-85).

FINAL CONSIDERATIONS

Mineral extractivism in the Latin American continent was deeply determined by the cosmovision forged by Western-European modernity. From a philosophical point of view, the modern Cartesian-Baconian thought corroborated the construction of this disjunctive anthropocentric rationality of the relationship between nature and mankind. Artificially and metaphysically separated, the knowing subject (man) and the knowable object (nature) of modernity, nourished by the Eurocentrism that granted them the exclusive privilege of apprehending the cosmos, no longer managed to reach an agreement.

Anchored by an economic view of unlimited progress whose political economy constitutes an economic model in which everything becomes a commodity, the modern *homo economicus* (in this sense, loose and lonely in the cosmos) perceived nature as nothing but a stock of resources to be exploited, a way to build their also artificially, metaphysically, and narcissistically, idealized world. Such objectification allowed the modern subject to promote the commodification of nature, which substantively took effect in the period of colonial domination and remains relevant to this day.

Given its mineral megadiversity, Latin America was one of many stages for this intensive exploitation. However, the successive mining cycles (of gold, silver, diamond, hydrocarbons) have not resulted in the reduction of the social asymmetries historically present on the continent, but, on the contrary, intensified them. Based on the dogma of unlimited economic growth, extractivism – now converted into neoextractivism – operates in a way that gives new meaning to colonial practices. Colonial domination permeated with physical violence is replaced by biopolitical domination

(of symbolic, psychological, cultural, epistemic effects).

The normative discipline of mining in Brazil (1934, 1940, and 1967) – anthropocentric, utilitarian, and hyper-economized – faithfully fulfilled the role of guaranteeing the foundations of an extractive economy, which transformed the country's mineral diversity into a "strategic resource" to ensure the "public interest". The recent legislative proposals for change produced by governments with different ideological nuances aim at an even deeper horizon, in which the State plays the role of normative mediator and active stimulator of competitiveness by promoting (protecting) the adoption of business practices aligned with the global *commodities* market, albeit at the cost of permanent socio-environmental conflicts and a reprimarization of the economy.

With its Andean matrix, Latin American environmental constitutionalism seeks to guide itself towards the opposite direction. With the innovations of the Constitutions of Ecuador (2008) and Bolivia (2009) – in both the legalization of the *buen vivir* (*Sumak Kawsay* and *Suma Qamaña*) and, in that, the recognition of Nature's rights (*derechos de Pachamama*) – there is an ecocentric perspective of reestablishing links with the environment. The ancestral notion of observance of the principle of interrelationship (*tinkunakuy*), understood as a systemic view by contemporary ecosophies (deep ecology), brings the ecological issue to the forefront and, in this sense, to the very condition of mankind in the world.

The legal regime regarding the mineral extraction activity in the country conflicts with the foundations of the decolonial matrix of Latin American political ecology, the premises of ecocentric constitutionalism in the Andes, and the ethical-environmental concepts verified around the planet for a new understanding of the relationship between nature and mankind (such as the *Harmony with Nature project*). The Dusselian transmodern leap, the overcoming of coloniality structures of being/knowledge and power embedded in the reality of the continent did not reach the Minas Gerais issue in Brazil, still anchored in the commodification of nature and life. Same as in the past, the model literally digs into the ground to lay foundations for the modern cosmovision.

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