PROTECTION OF DIVERSITY AND LEGAL PLURALISM: A DECOLONIAL PERSPECTIVE

PROTEÇÃO DA DIVERSIDADE E PLURALISMO JURÍDICO: UM OLHAR DECOLONIAL

Igor Felipe Bergamaschi[1]
Gabriela Ganho[2]
Clayton Gomes de Medeiros[3]

RESUMO

A presente pesquisa utiliza o método dedutivo e a revisão bibliográfica para discutir o direito fundamental à diversidade, com base na teoria do pluralismo jurídico. A hipótese central é a de que os direitos fundamentais abrangem, em sua essência, os direitos frequentemente negados às minorias que vivem de forma distinta da maioria. O estudo propõe a ampliação e a aplicação das normas existentes para proteger esses direitos de diversidade, enfrentando o problema da diferenciação de tratamento jurídico-social que desfavorece as minorias. A pesquisa considera o pluralismo jurídico como via para concretizar os direitos fundamentais à diversidade. Além disso, adota uma perspectiva decolonial para avaliar o papel do Estado na proteção da diversidade e da dignidade humana, defendendo a inclusão de saberes e vozes marginalizadas.

Palavras-Chave: Direitos Fundamentais. Diversidade. Decolonial. Pluralismo Jurídico.

ABSTRACT

This research employs the deductive method and a bibliographic review to discuss the fundamental right to diversity, based on the theory of legal pluralism. The central hypothesis is that fundamental rights inherently encompass rights often denied to minorities who live differently from the majority. The study proposes the expansion and application of existing norms to protect these diversity rights, addressing the issue of differential legal and social treatment that disadvantages minorities. The research considers legal pluralism as a means to realize the fundamental rights to diversity. Furthermore, it adopts a decolonial perspective to assess the role of the State in protecting diversity and human dignity, advocating for the inclusion of marginalized knowledge and voices.

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[1]Mestre em Direitos Fundamentais e Democracia, pelo Centro Universitário Autônomo do Brasil (UniBrasil), 2018. Atualmente é professor do Curso de Administração da Universidade do Estado de Mato Grosso (Unemat), em Juara/MT. E-mail: igorfberga@gmail.com

[2]Doutoranda e Mestra em Direitos Fundamentais e Democracia, pelo Centro Universitário Autônomo do Brasil (UniBrasil). Bolsista Capes/Prosup. Especialista em Direito Civil e Empresarial, pela PUC/PR. Advogada e professora. E-mail: gabriela.ganho@gmail.com

[3]Doutor e Mestre em Direitos Fundamentais e Democracia. Foi bolsista Prosup/Capes. Especialista em Direito Público. Membro do Instituto Paranaense de Direito Administrativo (IPDA). Professor (IFPR e UFPR). Advogado. E-mail: claytoncgm@hotmail.com

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INTRODUCTION

Minority is a qualitative concept, not a quantitative one. Thus, minorities are social groups that are vulnerable in relation to other groups, whether due to sexual orientation, gender, race, social class, among other factors. This vulnerability often results in the marginalization and exclusion of these groups, hindering their access to the fundamental rights.

The importance of protecting minorities in order to guarantee social justice is analyzed, addressing legal pluralism as a basis for legally justifying and promoting diversity within society.

In the context of legal pluralism, a plural society must structure its institutions to guarantee and foster diversity, thus protecting the right of minorities to exist. This approach is essential to create an environment that respects differences and strengthens minority rights.

It seeks to understand the role of the State, especially considering the counter-majoritarian nature of the Fundamental Human Rights, which ensure protection for all, in particular for those who face weaknesses in the face of the majority.

The issue is approached from a decolonial perspective in order to analyze the protection of diversity and human dignity. This decolonial perspective proposes the inclusion of historically marginalized knowledge and voices, reinforcing the need for policies that materially protect minorities and promote a more inclusive and fair society.

1 FUNDAMENTAL RIGHTS AND THE PROTECTION OF DIVERSITY

One of the challenges in studying Fundamental Rights is to find a solid basis to support them, ensuring their proper fulfillment and serving as a means of pressure so that they are respected universally (Pfaffenseller, 2007).

It is important to understand, firstly, that these rights are not the result of a sudden revelation or discovery by a group or society. On the contrary, they are the fruit of history, built up over the years through processes of struggle against power (Siqueira, Piccirillo, 2012).

According to Ingo Wolfgang Sartlet (2007), the Protestant Reformation is of

great importance in the consolidation of the fundamental rights, since religious freedom gradually gained recognition around Europe.

According to Paulo Bonavides (2000), fundamental rights vary according to the ideology, the type of state and the type of values that each constitution enshrines. Fundamental rights are, in essence, the rights that man possesses facing the State.

Individual rights are rights of freedom and historically correspond to the first phase of the Western constitutionalism (Bonavides, 2000). They emerged with the transition from the Absolutist State to the Rule of Law, requiring rules to limit the power of the State in the face of the individual freedom of the citizen (Mendes, 2024).

Abuses occurred in a wide variety of ways, from the confiscation of property to arbitrary trials that imposed the faith and force of the State. It was therefore necessary to develop a legal apparatus that guaranteed respect for the individuality of each citizen. A list of rights that privileged the human person as the main entity in society, an individual whose dignity and integrity was above the force of the State.

For the first written constitutions, fundamental rights were the product of the 18th century bourgeois thinking, strongly marked by individualism, which emerged to reaffirm the rights of the individual facing the State. They are also called rights of defense, since they demarcate a zone of non-intervention by the State, as well as a sphere of individual autonomy before its power (Sarlet, 2007).

The consolidation of the individual rights, especially those of free enterprise and private property, helped consolidate the capitalist mode of production as an economic model. The advent of individual rights, according to Almeida, was extremely important for the reaffirmation of the market society, and these rights became a condition for the existence of the capitalist mode of production (Almeida, 2014).

The development of libertarian ideas and the emergence and consolidation of liberalism gave rise to the ideological scope that later gave rise to the Fundamental Rights, known for didactic purposes as the first dimension. Their scope is to guarantee freedom, assuring the individual that their intellectual, physical and psychological integrity will be protected.

The consolidation of the dimension of the individual rights has an impact on the way the State proceeds in the private sphere of the individual. These rights are called “rights of defense” because their main function is to protect individual freedom against abusive or illegitimate interventions by public authorities. The person affected can demand that the State respects their autonomy, and this right can manifest itself in

different ways: abstention, revocation and annulment (Mendes, 2010).

These rights therefore function as a way of guaranteeing that individual autonomy is respected and protected against the power of the State, establishing a clear boundary between the public and the private. This is a reflection of the principle of legality, which expresses the law as a supreme and irresistible normative act, against which no stronger right can be opposed, whatever its form or foundation. The primacy of the law marked a clear break with the absolutist traditions of the monarchy. The Rule of Law marks the reduction of all sources of law and power to the law (Zagrebelsky, 2007).

According to Tavares (2007), first-dimension rights were born in the Liberal State of the 18th century. These rights form the first category of human rights to emerge and include the so-called individual rights (those relating to physical integrity, freedom, property and free enterprise) and political rights. Emilio Peluso Nader Meyer (2014) points out that the fundamental rights are endowed with historicity.

When we think about social dynamics, we see a social body full of different and sometimes conflicting wills, forces and interests. In this dynamic, certain groups will have more prominence and weight in deliberations and, consequently, in the positions taken by the State.

In the context of the Rule of Law, fundamental rights are seen as a “trump card against the majority” exercised against the State. Considering that, in a political regime, the State will act according to the will of the majority, fundamental rights and human dignity must act as counterweights, limiting the force exercised by the majority (Novais, 2006). In the Rule of Law, democracy is adopted as a model and, consequently, the adoption of the will of the majority. On the other hand, human dignity, freedom and equality are also the guiding principles of the political and legal system arising from the Rule of Law (Novais, 2006).

In the scenario in which many States have come to be called “post-national” (overcoming the idea of a closed nation) and “post-secular” (recognizing a cultural and religious diversity), new challenges arise to address issues such as rights, justice and equality. In these discussions, inclusion is often seen as a solution, as it seeks to integrate groups and individuals who have historically been marginalized or excluded (Gabatz, 2019).

However, there is a contradiction in this idea of inclusion: it doesn't completely solve social dilemmas or the ideal of a truly cosmopolitan world (where everyone,

regardless of their origin, has equal recognition). This is because, in order to include someone, it is necessary for an agent (usually the State or an institution) to decide who should be included. By defining the rules of inclusion, this agent places itself in a position of power, deciding who is "inside" or "outside" the acceptance criteria. Thus, inclusion does not necessarily mean full equality, because whoever defines the conditions of inclusion remains in a position of superiority (Gabatz, 2019).

In this context, many minorities remain on the margins of decision-making and, as a result, are more vulnerable to rights violations. It should be noted that, according to Cabral (2005), the term "minority" takes on a qualitative rather than quantitative meaning. In other words, it is considered to be a group that does not have full access to the speech, that has little influence on decisions in their social context.

Minorities have the following characteristics: (a) legal-social vulnerability: the minority group is not a participant in, or represented by, the current legal-social order. They are therefore considered vulnerable before society and the State; (b) Identity in *statu nascendi*: this is the mark of minorities always being in a state of formation and construction. Although they are already old and numerous, they are always marked by this spirit of nascent states; (c) counter-hegemonic struggle: minorities are always seeking to reduce hegemonic power; (d) discursive strategies: marches, symbolic acts, manifestos, magazines and newspapers are their main weapons of combat (Gabatz, 2019).

Representative minorities are therefore excluded from the decision-making processes of their social contexts. In this way, fundamental rights have the role of not allowing the interests of these minority groups to succumb to the interests of majority groups. The important contribution of the emergence and subsequent legal protection of first-dimension rights can thus be seen.

2 LEGAL PLURALISM AND THE CONSTITUTIONALIZATION OF THE LAW.

Traditional conceptions of law and the State are not capable of meeting all the different demands, as they are often autopoietic [4]. Therefore, they develop apart from

[4] Quanto à autopoiesis pode-se ter que "em uma sociedade complexa são improváveis as hipóteses que permitem atingir o desenvolvimento homogêneo de um direito que possa levar em conta as relações entre regras sociais e normas jurídicas em todos os âmbitos da sociedade. As relações serão, no entanto, âmbitos nos quais o direito autopoiético apresenta confins dotados de porosidades, podendo registrar maiores aberturas às solicitações externas e ao mesmo tempo permitir uma atitude de maior fechamento nos confrontos das solicitações ou irritações voltadas aos sistemas individualizados. A referência ao modelo do direito autopoiético poderia servir para simplesmente individualizar um tipo ideal e útil para mensurar os desvios da práxis decisional." FEBBRAJO, Alberto, LIMA,

the will of the State. Or they are sometimes ignored by the State. In this even more serious case, these minority demands do not receive the necessary protection for the individuals who identify with them to subsist with dignity. This produces a mass of unassisted people who sit on the margins of society.

Contemporary social arrangements are more dynamic, diverse and interactive than ever before. They are made up of different groups of people, each with their own behaviors and concepts, but who are interconnected and interdependent. Thus, one of the biggest challenges for the Modern Law and the State is to meet the specific demands of each group while acting as an element of cohesion, providing a sense of belonging to the common context.

The law that used to be practiced based on liberal logic, in which the law prevailed as the primary will of the State, is undergoing certain changes.

Humberto Ávila (2008) teaches that the new constitutional doctrine has four foundations: the normative one, which demonstrates the preference of the principle over the rule; the methodological one, which proposes weighting instead of subsumption; the axiological one, which seeks to fulfill more and more private justice and less and less public justice; and the organizational one, which turns more and more to the Judiciary and less and less to the Legislative Branch.

With the advent of the Constitution of 1988, there was a significant change in the conception of the role of the Judiciary and judges in Brazil. Previously, the main function of the Judiciary was to resolve conflicts between private parties and to provide criminal justice. With the new constitutional text, the Judiciary began to play an important role in the public sphere. Among the factors driving this phenomenon are the crisis of representative democracy and the pressure from the doctrine to make the fundamental rights provided for in the Constitution effective (Sarmento, 2009).

The Constitution of 1988 is a milestone for the introduction of the neo-constitutionalism in Brazil. It includes a broad protection of the fundamental rights and numerous principles. It is characterized by being compromissory, that is, it makes commitments (the greatest commitment being compliance with fundamental rights) (Vieira Junior, 2015).

The phenomenon of the constitutionalization of law is directly related to what is

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Fernando Rister de Sousa. Autopoiese. **Enciclopédia jurídica da PUC-SP**. Celso Fernandes Campilongo, Alvaro de Azevedo Gonzaga e André Luiz Freire (coords.). Tomo: Teoria Geral e Filosofia do Direito. Celso Fernandes Campilongo, Alvaro de Azevedo Gonzaga, André Luiz Freire (coord. de tomo). 1. ed. São Paulo: Pontifícia Universidade Católica de São Paulo, 2017. Disponível em: https://enciclopediajuridica.pucsp.br/verbete/152/edicao-1/autopoiese. Acesso em: 2 nov. 2024.

known as neo-constitutionalism. Among its main characteristics is the normative capacity of constitutional principles (Schier and Ferreira, 2014). At this point, it should be known that every principle enshrined in the constitution can be demanded as a binding norm.

It is from this contextualization that we intend to trace the paths of the research. Political pluralism will serve as a backdrop for addressing the issue of sexual diversity. Sexual diversity must be understood as a fundamental condition for the construction of identity. On this basis, the fundamentality of the right to a free sexual orientation must be defended, given its importance for the formation of the individual.

Article 1, V of the Constitution of 1988 establishes the idea of pluralism as the foundation of the Brazilian State. It considers pluralism to be a necessity in view of the insufficiency demonstrated by attempts at ideological, philosophical and religious homogenization. Thus, there is a need for a duty of tolerance (Maliska, 2006).

It is necessary to better understand legal pluralism and its relationship with individual self-determination. This model arises from a vision of society that incorporates diverse behaviors and expressions, contrasting with the liberal-individualist model. New paradigms require a reassessment of social organization, and the idea of pluralism aims to democratize institutions and politicize individuals, promoting broad material justice. This perspective challenges the notion that the State has a monopoly on legality, questioning the supposed neutrality of the State (Maliska, 2006).

The lessons of Antônio Carlos Wolkmer (2001) on legal pluralism are worth highlighting at this point. For Wolkmer, the debate began with the centralization of law in the figure of the State, following the strengthening of political and economic liberalism. This phenomenon favored the reaction of pluralist doctrines in the 19th and 20th centuries. It should be noted that colonized countries were forced to give up their forms of social organization in order to assume the one imposed by their colonizers (Wolkmer, 2001).

Quijano (2005) criticizes Eurocentrism as a dominant type of thinking that profoundly influences the social sciences and the way knowledge is produced. According to him, Eurocentrism is a way of seeing the world that places Europe and the West as the center and standard of reference. This view interprets development, culture and progress from an exclusively European perspective, without fully considering the realities and contexts of other regions, such as Latin America.

For Quijano (2005), this Eurocentric perspective distorts the understanding of

social and historical dynamics outside the West, imposing a vision that often does not correspond to the experience and development of Latin American, African and Asian societies. In doing so, Eurocentrism reinforces inequalities and injustices, as it tends to marginalize local knowledge, histories and practices, presenting them as "backward" or "inferior." This critique points to the need to value different perspectives and rationalities that reflect the diversity of global experiences, rather than forcing a single European vision as the only valid or legitimate one.

The intercultural perspective proposes a respectful coexistence among different cultures, without unconditionally accepting all its aspects or treating any culture as inferior. This approach maintains a critical look, questioning cultural elements that may prevent emancipation and development. Interculturality recognizes that cultures can coexist in a plural and interconnected way, promoting a genuine and inclusive dialogue (Gabatz, 2019).

Intercultural dialogue is seen as a means of inclusion, encouraging the solidary and respectful encounter with others, seeing diversity as an opportunity for mutual enrichment and transformation. This vision is opposed to the dominant and exclusionary culture, defending an ethical, political and liberating project. The objective is to create a constructive and peaceful coexistence among individuals, peoples and nations that respects and values differences in search of a more just and integrated society (Gabatz, 2019).

The proposal of the Pluralism is to recognize and give rise to non-official and independent normative practices (Wolkmer, 2001). And it is at this moment that the argument is not only for the development of normative practices of unofficial groups, but also of lifestyles foreign to the traditional pattern.

Each individual brings with him marks of his own history and identity. And human relations should be built from the interaction of all members of the collectivity. Members of the LGBTI+ community are considered historically deviant, outside the convection of normality. They are faced with rejection, denial of the standard model of sexuality, the heterosexual. This causes them to live in a kind of identity vacuum, excluded from the social environment (Coelho, 2015).

The LGBTI+ identity initially emerges as an imposition of power and social discourses. This means that the ways of being, subjectivities, behavior and even desires of LGBTI+ people are largely shaped and controlled by external forces such as cultural norms, medical discourses, religion and legislation. These factors pass through the

bodies, that is, influence how these people see themselves and behave, seeking to normalize and discipline their desires and forms of expression (Quimalha, 2023).

However, each individual is invested with sufficient capacity to determine their own paths, as well as to develop and practice their customs, preferences and other cultural elements that may be part of their individual or social context. Human sexuality is expressed as an activity inherent to its own condition and it is a result of the biological, psychic and social development of each one (Coelho, 2015).

Guacira Lopes Louro (2009) draws attention to the phenomenon of heteronormativization that is carried out in the process of conformation of non-heterosexual individuals in the patterns of heteronormativeness. This process removes the right of self-determination from this layer of the population, constituting an act of violence and an attack on the dignity of these people.

The search for well-being is the right and duty of each individual (Coelho, 2015). And the means used to achieve this well-being cannot be removed from them, for such a guarantee is intimately linked to the fundamental principle of the dignity of the human person, exhaustively stated in the Constitution of 1988.

The human rights won in the last two hundred years are not exclusive to only one social class, although they have emerged initially to meet the demands of a particular class in a specific historical context.

Human rights are therefore appropriate for those who need to demand them, because of their universality. Thus, they constitute a tool that makes it possible to operate in the sense of building a new society project. All values born in the liberal-bourgeois context are applicable to any other context, since they assume the meaning of independence and autonomy from the context where they were born (Maliska, 2000).

3 PLURALISM, SEXUAL FREEDOM, HUMAN DIGNITY AND DECOLONIALITY

From the lessons about legal pluralism, it follows that the healthy development of sexuality, as well as expressing it freely is a fundamental right, indispensable to guarantee human dignity. This is a *sine qua non* for building a truly democratic society. All people have the inalienable right to define themselves and to live according to the assumed definition, directly related to a dignified and emancipated way of life.

Decolonial thinking, more than a theory, is an epistemological project that seeks to recognize the existence of a dominant knowledge and question it, highlighting its inconsistencies and considering stories and rationalities that have been invisibilized by the logic of the modern colonialism. This thought seeks to reveal the colonial logic that is hidden in modernity, exposing the power and exclusion structures that help understand the dynamics of law (Squeff; Damasceno e Taroco, 2022).

Decolonial thinking is not limited of being a theory, it is a project that seeks to rebuild the bases of knowledge. It starts from the recognition that modern knowledge is dominated by a hegemonic perspective, imposed by colonialism, which excludes and invisibilizes other forms of knowledge and cultural experiences. The objective is to expose how colonial logic is embedded in modern structures, including the way law works, revealing that this logic of power contributes to the exclusion of other knowledge and cultures. Decolonial thinking thus challenges and questions these bases, proposing a more inclusive and critical view of knowledge and social norms (Squeff; Damasceno e Taroco, 2022).

The LGBTI+ identity, initially imposed as a way to stigmatize, control and even shame people with different sexual orientations and gender identities, began to be re-signified and reinterpreted, being transformed through social movements and political actions. This process of resignification allowed this identity to cease being only a symbol of marginalization and become a source of strength and union (Segato, 2021).

Instead of passively accepting this negative label, LGBTI+ people have started to use this identity as a basis for claiming rights, equality and recognition. In this way, what was once an instrument of oppression has been appropriated and converted into something positive: an identity of pride, a symbol of struggle and political mobilization. This process has transformed LGBTI+ identity into a powerful tool for building a political movement that fights for dignity, visibility and social inclusion (Segato, 2021).

Jorge Raupp Rios (2006) proposes the idea of a "democratic right to sexuality" as an alternative to the widely used expression "sexual rights". The proposal of Rios (2006) suggests a broader and more inclusive view of rights related to sexuality, linking them to fundamental principles of human rights, such as freedom, privacy, equality, free development of personality and intimacy.

These rights aim to ensure that everyone, especially sexual minorities, can exercise their sexuality in a protected and respected way. Rios (2006) argues that these democratic rights of sexuality are not only issues of individual choice, but essential

aspects of human dignity that must be protected by the State and society. Thus, it emphasizes the need to recognize and protect sexuality as a central dimension of human rights, especially for groups that have historically faced discrimination and marginalization.

The dignity of the human person is fundamental to human rights and law as a whole, placing the human being at the center of legal and philosophical reflections. All constitutional principles are based on human dignity, which belongs to each individual simply by his human condition, guaranteeing him respect and essential rights in equality. This dignity is inherent and independent of the capacity for expression, creation, communication, sensitivity or relationship, being a universal attribute shared equally among all (Andrade, 2004).

Human dignity plays a central role in the way human relations develop, and among these, legal relations. The Law is thus reinventing itself, having as its starting point the dignity. Thus, from the understanding of the multiplicity of conceptions of the world, it can be understood that universal are not only human rights, but also the concept of human dignity. This, in turn, is placed at the centre of the range of human rights. It is in this that it lies the universal common core of human rights and that unites and enables dialogue among the different ways of conceiving the world, as well as conceiving human rights (Copelli, 2014).

Therefore, the denial of the right to self-assertion consists in the denial of the very rights of personality. In this understanding, it becomes clear that the State must not only recognize but also promote the realization of these rights, since there is no healthy community or individual without freedom and the guarantee of diversity.

CONCLUSION

The right to diversity is considered a fundamental right, since it guarantees all individuals the recognition of their particularities, whether they are behavioral, intellectual, emotional or worldview. This right reflects respect for differences and the acceptance of multiple forms of expression, positioning and interpretation of reality, recognizing the importance of diversity within society.

Legal pluralism serves as a structural basis for the right to diversity, proposing a society that embraces multiple realities and is inclusive for all, especially for minority groups. This plural model is essential for the construction of a true democracy, because

it ensures that diverse behaviors and identities have a place and voice both in society and before the State, promoting a less hostile and more egalitarian social environment.

Legal pluralism, analyzed from the point of view of decoloniality, allows us to build a more inclusive and fair system that not only tolerates but it also celebrates diversity, in order to offer a basis for challenging the hegemony of the Western law and promoting social justice.

Thus, it is clear that it is the role of the State to promote, protect and ensure the right to diversity, as well as other fundamental rights, in order to reduce prejudices and overcome discriminatory structures, Aligning itself to the commitment of the democratic state of law with the material realization of the fundamental rights.

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