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Epistemic indignation and decolonization of the concept of minorities

Indignação epistêmica e decolonização do conceito de minorias

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Abstract

This paper proposes the epistemic indignation as a logical and decolonizing way to reflect on the concept of minorities in contemporary Law. Using bibliographic research and analyzing the social history of the concept of minorities, we seek to demonstrate its ambiguity: while recognizing rights, it hides power relations which create, reinforce and update social, economic and epistemic injustices.

Keywords: Epistemic indignation; Decolonization; Minorities.

Resumo

Este trabalho traz a proposta da indignação epistêmica como caminho crítico e decolonizador para refletir sobre a construção do conceito de minorias no Direito moderno. A partir de pesquisa bibliográfica e de análise da construção histórico-social do conceito de minorias, buscamos demonstrar sua ambigüidade latente: ao mesmo tempo em que reconhece direitos, oculta relações de poder que criam, reforçam e atualizam injustiças sociais, econômicas e epistêmicas.

Palavras-chave: Indignação epistêmica; Decolonialidade; Minorias.

Introduction

This paper considers the epistemic indignation (FREITAS, 2020) as a logical and decolonizing[1]way to reflect on the concept of minorities in contemporary Law as well as the implications on its accuracy.

The arguments in this paper are based on theoretical guidelines from the Modernity/Coloniality group intellectuals, who understood coloniality as the violent face of modernity, which could only be reversed through epistemic disobedience (QUIJANO, 1992; MIGNOLO, 2010). Under these theories, we must distinguish the concepts of colonialism and coloniality, as defined by Aníbal Quijano (1992, 2005). According to Quijano, while colonialism refers to the political and economic relationship of colonial domination of one people or nation over another, coloniality is a pattern of power which remains in force in social and institutional relations even after the end of colonization. Therefore, hierarchy and subalternity positions marked by multiple factors, especially race, continue to shape epistemology, science understanding, aesthetics and intersubjective relationships within

[1]The debate around the decolonial and decolonial categories is not merely academic. According to Castro-Goméz and Grosfoguel (2007), the term decolonial best describes the specificity of the current historical moment in which the end of colonialism did not imply a liberation of the peripheries/former colonies from a relationship of subordination to the world centers. It is, therefore, a new stage of the capitalist process within a broader context of global coloniality. Therefore, according to the authors: "In this way, we prefer to speak of the 'capitalist/modern/colonial European/Euro-North American world-system" (Grosfoguel, 2005) and in the soil of the 'capitalist world-system', because it questions the myth of decolonialization and the thesis that postmodernity leads us to a world unlinked to coloniality. From the approach that we call 'decolonial', contemporary global capitalism re-signifies in a postmodern format the exclusions caused by the epistemic, spiritual, racial/ethnic and gender/sexuality hierarchy deployed by modernity. In this way, the long-term structures formed during the sixteenth and seventeenth centuries continue to play an important role in the present'' (CASTRO-GOMÉZ; GROSFOGUEL, 2007, p. 13-14, free translation). In this sense, the authors defend the need for a second decolonization named decoloniality in order to reverse processes of social hierarchy that the first decolonization (the formal end of colonial relations) left unaltered: "[…] The second decolonialization - to which we allude with the category of decoloniality—will tend to address the heterarchy of the multiple race, ethnic, sexual, epistemic, economic and gender relations that the first decolonialization left intact. As a result, the world of the early twenty-first century needed a decoloniality to complement the decolonization carried out in the nineteenth and twentieth centuries. On the contrary of this decolonialization, decoloniality is a process of re-signification on a broad scale which cannot be reduced to a legal-political event" (Idem, p. 17, free translation). On the other hand, SílviaCusicanqui considers that, many times, the decolonial debate is entangled in a profoundly depoliticizing alterity discourse, resulting from studies by Latin American researchers based in American Universities, but who have little of decolonial practices, being limited to logocentric and nominalist versions of decolonization: "Neologisms such as "de-colonial", "transmodernidad", "eco-si-mía'' proliferate and entangle language, leaving their objects of study convinced –indigenous and Afro-descendant people –with whom they believe they are in dialogue. In addition, it creates a new academic segment by using a world of references and counter-references that establishes hierarchy and adopts new gurus: Mignolo, Dussel, Walsh, Sanjinés". (CUSICANQUI, 2010, p. 64-65, free translation). Although we are aware of the terminological controversy, we will use the terms decoloniality and decolonization.

former colonies, now formally independent, or in the relationship between these and other countries. According to Quijano:

> [...] if you look at the main lines of exploitation and social domination on a global scale, the main lines of current world power, its distribution of resources and work among the global population, it is impossible not to see that the vast majority of the exploited, dominated and discriminated people are exactly the members of the "races", "ethnic groups" or "nations" under which the colonized populations were classified under the world power formation process, since the conquest of America[2] (QUIJANO, 1992, p. 61).

Coloniality is an extension of colonialism which updates it and creates collective identities in former colonies to reproduce hierarchies of power, knowledge and existence (MIGNOLO, 2003). The Eurocentric standard is thus presented, understood and incorporated as universal in the individual and collective imaginary of the subjects, being a reference and model which all knowledge and subjectivities must aim and seek to mirror.

However, disobeying this dominant episteme requires indignation (FREITAS, 2020; SANTOS, 2018) with its socio-legal and cognitive consequences, which impacts both the world power distribution and the intersubjective constructions that generate social discrimination.

In this sense, indignation is a sociopolitical feeling-thinking-acting against situations of social and cognitive injustice, resulting from the modern hegemonic political project regarding denial of rights to subordinate social groups. It expands the new theoretical and methodological possibilities of understanding these groups, known as 'minorities' in academic-legal literature due to economic conditions, gender, sexuality, age, ethnic-racial belonging, among other social markers.

While the current definition of 'minorities' is linked to the European project of epistemic, theoretical and political domination of the western world, the decolonial theory instigates the reinterpretation of these situations from territorial, temporal and political limits, allowing some social groups to have its history understood and considered through other social practices, political resistance and legal reorientation. For this reason, a reflection on the concept of 'minorities' becomes urgent, since it was originally defined under the

[2] Free translation of "[...] si se observan las líneas principales de la explotación e de la dominación social a escala global, las líneas matrices del poder mundial actual, su distribución de recursos e de trabajo, entre la población del mundo, es imposible no ver que la vasta mayoría de los explotados, de los dominados, de los discriminados, son exactamente los miembros de las "razas" de las "etnias" o de las "naciones" en que fueron categorizadas las poblaciones colonizadas, en el proceso de formación de ese poder mundial, desde la conquista de América adelante".

European hegemonic project which reproduced the binary logic of subalternization of different others, particularly related to “us superior and civilized versus them inferior and savage” (MAGALHÃES; ÁLVARES, 2017, p. 69).

The “us” preferably refers to male, owners and/or traders (including slave owners) white people for whom the law organized its political, civil, economic and cultural relations basis in order to expand and protect them. This reached contemporaneity properly regulated and implemented without further questioning. On the other hand, "them" were not necessarily defined in biological terms, but as a circumstance, a thing, a meaning, a concept, a theory that reinforces the idea of others as inferior, barbaric, uneducated, rude, incapable of developing their intellect and, therefore, to build a civilizing project. According to feminist sociologist María Lugones:

> The colonial civilizing mission was the euphemistic mask of brutal access to people's bodies by unimaginable exploitation, violent sexual rape, birth control and a systematic horror [...] turning colonized people into human beings was not the colonists' goal[3] (LUGONES, 2019, p. 360).

In modernity, this speech structures a way of thinking and arguing in the most diverse areas of knowledge, with emphasis on theology and philosophy of 16th and 17th centuries[4]. But only in the development of liberal political thought of the following centuries the ‘other’ differentiation becomes more evident and widespread with the aim of sustaining its political, legal and cognitive subalternization, such as in Hume’s, Voltaire’s, Kant’s, Hegel’s and other European thinkers’ work, which had great influence on Law. The philosophical and political basis of the Liberal State and its institutions' formation process after Liberal Revolutions is founded in this period, resulting in denial of rights to multiple social groups. As an example, we quote an excerpt from Kant which Mignolo (2006, p. 670) defined as a ‘blind arrogance’:

[3]Free Translation of “[a] missão civilizatória colonial foi a máscara eufemística do acesso brutal aos corpos das pessoas pela exploração inimaginável, violenta violação sexual, controle da reprodução e um horror sistemático [...] transformar os colonizados em seres humanos não era o objetivo dos colonizadores”.

[4]The Valladolid Controversy initiated the first moral debate about two indigenous peoples of America between Bartolomé de Las Casas and Juan Guiné de Sepúlveda, between 1550 and 1551, in which Las Casas condemned indigenous slavery for being all sons of the same God, while Sepúlveda defended based on the aristotelic doctrine of natural slavery; this theory expanded and justified slavery in all lands conquered by Europeans. In the defeated defense of Las Casas there is the following statement: “Also, we were not barbarians of the third class: we were not naturally slaves in an Aristotelian sense. They had their kingdoms and their kings, police, governed and ordered republics, houses, farms, homes, laws, courts etc. For this reason, being able to govern themselves, they do not need to be governed by others. Likewise, since they are capable of being instructed peacefully in the faith and in the sacraments, war should never be used against them, only by persuasion.” (LAS CASAS *apud* GUTIERREZ, 2014, p. 230).

> The Negroes of Africa by nature do not have any feelings that rise above the insignificant. Mr. Hume challenges anyone to cite a single example and a Negro who has shown talent and states that among the hundreds or thousands of Negroes who are transported from their countries to other places, even though many of them have become free, none has been found yet with anything great in art or science or any other quality worthy of appreciation, though among the whites there have always been some who have risen from the lowest classes and who have won the world's respect through superior gifts.[5]*(Kant, 1763, secção IV).*

In his book The Philosophy of History, Hegel (1837), in turn, supports the idea of Europe as the origin of universal history and America as an extension of the European spirit, having succumbed to the colonizer's project. For him, black Africans were considered savages, devoid of human character and therefore they did not bring any important contribution to the world's history. It is in this sense that slavery, associated with black skin color, is recognized by some historians as a cultural and "social death" (GOMES, 2019).

Since European colonization in America and Africa was structured in practices of violence, exploitation and slavery of blacks and indigenous people[6], the most natural consequence of this process is that the identity formation of these groups was devalued, barbarized or even made invisible in order to conform to a unique national identity, which would serve as the basis for the Nation-State model in formation (MAGALHÃES; ÁLVARES, 2017). While the ones who were similar to the dominant pattern had their identities uniformed under civil legal norms, the most different ones were marginalized in political relationships which involved ethnicity, race, gender, age etc. These differences symbolized inequality in terms of recognition and access to rights and power.

In its classical liberal standardizing purpose, the European Nation-State only recognized as different and qualified to distinct legal protection the quantitatively minority

[5]Freetranslationof "Os Negros de África não têm por natureza nenhum sentimento que se eleve acima do insignificante. O senhor Hume desafia qualquer um a citar um único exemplo e um Negro que tenha mostrado talentos, e afirma que entre as centenas ou milhares de negros que são transportados dos seus países para outros lugares, ainda que muitos deles tenham sido libertados, ainda não foi encontrado nenhum que tenha apresentado algo de grandiosos na arte ou na ciência ou qualquer outra qualidade digna de apreço, apesar de entre os brancos ter sempre havido alguns que se elevaram da mais baixa ralé e que, através de dotes superiores, ganharam o respeito do mundo".

[6]Las Casas denounces this state of violence against indigenous people in his book *Short Account of the Destruction of the Indies (1542)*: "This is a well-known and proven fact which even the tyrant Governors, themselves killers, know and admit. And never have the Indians in all the Indies committed any act against the Spanish Christians, until those Christians have first and many times committed countless cruel aggressions against them or against neighboring nations. For in the beginning the Indians regarded the Spaniards as angels from Heaven. Only after the Spaniards had used violence against them, killing, robbing, torturing, did the Indians ever rise up against them." Available at: https://www.coreknowledge.org/wp-content/uploads/2017/02/CKHG-G5-U3-about-spanish-explorers.pdf. Acesso em 09 de ago. 2021.

groups whose identities of nationality, ethnicity (white European) and religion were well defined and did not represent structural or counter-hegemonic threats to its political-institutional model[7]. Therefore, based on these categories of people with a nationality bond and isolated within the European Nation-State having their own cultural and ethnic characteristics, the concept of minorities was developed in Europe and started being generally used for other social groups, in other spaces and temporalities.

The importation of the concept of minorities from the local European reality, where it emerged, and from the North American reality, from where it took a transnational impulse (BOURDIEU; WACQUANT, 2002), raises the need to reinterpret this concept in different Latin America societies, arguing its normative efficacy, its political-theoretical ties and its usefulness under epistemic domination. This is because the struggles that social groups face in different places, with their own historical experiences and ways of life, present different meanings in the many ways they find to achieve the recognition of their existence and condition as subjects of rights that are part of a State.

For this reason, the application of the concept of minority to a different reality has been justified in socio-legal academic studies with many reservations and contradictions. Specifically, many authors who discuss the issue of minorities emphasize this is not a numerically defined category. For example, women and black people, which are majorities in the Brazilian population, are often considered as minorities in these studies.

This leads us to believe that it is a concept that does not conceptualize because it is disconnected from political-institutional conditions that can enable its construction along the lines of "common participation" and "inter-epistemic relations" (MIGNOLO, 2006, p. 691). Even when the use of 'minorities' conceptualizes, it limits the analysis of the social group associated with demands based on recognition, however, related to the principles of "tolerance" and "difference" and not of interculturality (FORNET-BETANCOURT, 2017), keeping unchanged the power relations of one group over another.

[7]Walter Mignolo, in his book *Local Histories/Global Projects*: *Coloniality, Subaltern Knowledge and Liminal Project*, analyzes the commercial circuit that linked the Mediterranean to the Atlantic, which is associated with a rearticulation of the racial and patriarchal thought, whose ideas of “blood purity" and "peoples’ right" became central. While "blood purity" was established as a punitive principle, which excluded black Africans from any resemblance to the human person, the "people's right" was the first attempt (of a theological nature), to write a canon of international law, which would go beyond the recognition of the Moors and Jews, since it also sought to recognize the Amerindians as vassals of the king(MIGNOLO, 2004, p. 56-57).

The right to difference, associated with many studies on minority rights in the Latin American context, tends to presuppose a pattern of comparison, subordination and control of particular groups within a greater universality, and not a notion of emancipation from new universalities that may exist within a particular context and transversal to many other societies. Therefore, it is worth asking: different to what? Different from who? How and why were these differences built? How can they be eliminated?

In this context, the concept of minorities develops without a concrete meaning, whose contents often not only reflect the liberal social spaces and epistemic domination in which knowledge is produced, but also reveal the effect that this knowledge causes on the social reality of these groups, which has been of low transformative impact (D'SOUSA, 2009). Therefore, the concept of minorities, when indistinctly used to define the reality of many Latin American social groups, who struggle for recognition of their existence based on the right to difference, suggests a load of universalized negative meanings whose passivity does not threaten power relations and implies more an idea of submission, political fragility, subordination, vulnerability, worthlessness etc. than the idea of a socially relevant group which challenges moral principles and dominant individual hierarchical and standardized values, and which has resisted the many threats suffered on its existence, autonomies and rights throughout history.

The idea of ahistorical minorities without a social and political context, when applied to Latin American societies, for example, raises numerous questions when interpreted through the lens of decolonial studies. In this sense, decolonization questions the reifying and reproducing place of inequalities and inequities that the concept embodies. When we speak of minorities, we are also suggesting, albeit unintentionally, an individual and collective condition of the subjects, something as if it were ingrained in people; minorities as something people are. While, in fact, we are facing an unequal power relationship that “minorizes” and undermines people. It is not women, black, indigenous people, children, teenagers etc. who are minorities; these groups are minorized and undermined in power relations which daily remind them how much they continue to be “the other” in a coloniality context of knowledge, power and being.

The lack of problematization of the concept of minorities, in this perspective, results in an apparent throughout history form in socio-legal research, with a language that transits between formal equality, which has an abstract meaning and thus can cover the most varied

social groups, even a language contextualized in reference to a superior, dominant hierarchical pattern, whose egalitarian project emphasizes inclusion proposals.

For this reason, the inclusion proposal alone does not solve the limitation of the concept in socio-legal research, since positive law tends to adopt concepts and history as elements already defined by other sciences. As a result, the political implications that may lie behind the concepts are unknown, except through the dominant social patterns of colonizers that give it a restrict meaning or through the pattern of the international humanitarian law and the constitution which absorb it as an abstract, uniform and generic ideal to be achieved (D'SOUSA, 2006). In this sense, the use of the concept of minorities, detached from the struggles that social groups daily experience, is only legitimate through its many justifications and reservations that try to give it some sense of adequacy.

Thus, this reflection is critical of the dominant episteme, both because it has expanded as the only possible conceptual basis, and also because it makes it impossible for other categories to emerge from specific sociopolitical contexts, which could expand the possibilities of thinking about existences and rights.

Hence, this paper initially resorts to post-colonial theories, which demonstrate the insufficiency of the contemporary concept of minorities and the need to break with the cultural imperialism that disseminates it. Later, based on decolonial theories, it produces a critique based on the sociopolitical and historical contexts in which the concept was produced and in the way the Social State was thought and rights became legal rules. For this purpose, this paper describes the historical-legal construction of the concept of minorities in international treaties and its correspondence to the right to difference in Human Rights conventions, incorporated into Brazilian laws, to question the application of the concept and its strength in contexts dominated by social and cognitive injustice based on epistemic indignation. In this way, the methodology applied to this paper is bibliographic review, the historical-social conceptual reinterpretation and the legal analysis of how social groups' rights were built based on absences (SANTOS, 2018), needs and mismatches with factual-social and political reality in contemporary times.

1. Postcolonial and Decolonial Critique

The critique of cultural imperialism (American or European), which rests "on the power to universalize the particularisms associated with a singular historical tradition, making them unrecognizable as such"[8] (BOURDIEU; WACQUANT, 2002, p.15), has a strong repercussion in post-colonial theories, such as Bourdieu's and Wacquant's[9]. According to the authors, the concept of minorities is one of those concepts with which it is argued, but about which little is discussed, as if it were a universal label, apt to be glued to any time and social reality, subsuming this reality to a supposedly ahistorical and timeless commonplace. This uprooting of concepts, such as that of minorities, when globalized by progressive intellectuals, tends to provoke the forgetfulness of their origins, establishing the complex and controversial realities of a local reality as a model and measure of all things. In this context, such progressive intellectuals:

> [...] project onto the whole humanity, with the good humanist conscience of a certain academic left, not only the American liberal common sense, but the idea of minority (it would be necessary to always keep the English word to remember this is a native concept imported by theory — and even then, created in Europe) that assumes that very thing whose real or possible existence should be demonstrated, namely: categories detached within a given nation-state from "cultural" or "ethnic" traits which have the desire and the right to demand civic and political recognition[10].(BOURDIEU; WACQUANT, 2002, p. 27).

The authors' critique is not limited to a difference in translation (minority, in English, for minoria, in Portuguese, for example), but encompasses "the difference between the social system in which these words were produced and the new social system in which they are being introduced" (BOURDIEU; WACQUANT, 2002, p. 30).

This same reflection is present in the decolonial critique of Walter Mignolo (2006) when he emphasizes that European modernity incorporates territorial thought and the "monoculture of the spirit", without dwelling on the fact that outside the European space

[8]Free translation of"no poder de universalizar os particularismos associados a uma tradição histórica singular, tornando-os irreconhecíveis como tais".

[9]Although Bourdieu does not describe himself as post-colonial, there are authors, such as Julian Go (2018), who argue the perspective of his analysis about Algeria was not limited to a critique of French imperialism but considered the Algerian people's point of view in a post-colonial perspective.

[10]Free translation of "[...] projetam sobre a humanidade inteira, com a boa consciência humanista característica de certa esquerda acadêmica, não só o senso comum liberal norte-americano, mas a noção de minority (seria necessário conservar sempre a palavra inglesa para lembrar que se trata de um conceito nativo importado na teoria — e ainda aí, originário da Europa) que pressupõe aquilo mesmo cuja existência real ou possível deveria ser demonstrada, a saber: categorias recortadas no seio de determinado Estado-nação a partir de traços "culturais" ou "étnicos" que têm, enquanto tais, o desejo e o direito de exigir um reconhecimento cívico e político".

there is a diversity of local knowledge, which also translates into local concepts without pretension of universalization. It is through European rationality that multiple concepts were created to explain experiences and forms of social organization, later assuming a universality projection, such as science, democracy, human rights and also the concept of minorities. For Mignolo (2006, p. 683), the problem of the universality of concepts created in certain regions lies in the difficulty on researchers' understanding (both from the right and from the left) that such concepts "are not even the arrival point, nor the correct name to designate a cognitive practice, a social reality or a universal ideal of social organization". These concepts should function as connectors of different experiences, perspectives and histories of knowledge and social organizations, and not as signs of denotation, which offer a name to designate the totality of a given practice or social reality (MIGNOLO, 2006).

Although postcolonial (Bourdieu and Wacquant) and decolonial (Mignolo) authors have the same critique regarding the origin of the concept of minorities, and the same goal of questioning the monoculture of valid knowledge in their theories(*i.e.*, the idea that only those concepts and knowledge built in the great European and North American academic centers are true), the difference between the critique of cultural imperialism by Bourdieu and Wacquant and the decolonial critique by Mignolo is fundamental for unfolding the reflection proposed in this paper. According to the first authors, the correction of cultural imperialism depends on a self-reflexive exercise by the European or North-centric researcher on the limits of his own knowledge (BOURDIEU; WACQUANT, 2002, p. 28), reinforcing that "only those who master the model of hegemonic science can be truly innovative" (SANTOS, 2018b, p. 60). This is an observation that leaves no room for other kinds of knowledge to contribute to textual and conceptual reconstruction and innovation. On the other hand, Mignolo's decolonial critique proposes the conjunction of this knowledge beyond the borders of the dominant knowledge, so that they can be reinterpreted and receive new meanings and senses – *i.e.*, a knowledge that will be thought from its context and with the subjects for whom knowledge is being produced.

Although Bourdieu and Wacquant recognize the cultural and political limits to the universalization of the concepts produced in the dominant episteme, they do not propose the criteria of colonial rupture that were evidenced and restored in Mignolo's theory. In this way, it remains in the reformulation of knowledge made within and from European thought itself. For Mignolo, on the contrary, one of these criteria refers to the cognitive injustice that

is constructed through this dominant epistemology, elaborated in processes of colonization, capitalism and patriarchy, which tries to leave in the knowledge that is produced the presence of epistemic domination. Through the dominant knowledge, the knowledge of these colonized groups is disqualified. Thus, they start to think from the perspective of the colonizer's knowledge and no longer from their existential, social and political context, which allowed them to understand the world and communicate it through other non-dominant practices, relationships and interactions (FANON, 1961; FREITAS, 2020). Therefore, it is from the colonized reality that new knowledge must be reconstructed and reinterpreted in view of the imposed conceptual basis.

Without this perception, research on 'minorities' may even present a progressive construction, as argued by Bourdieu and Wacquant, but they remain under the many degrees of epistemic dependence that Walter Mignolo points out, which compromises the understanding of these groups' local reality, their relationship with other political and social struggles and with the construction of rights. In case of Latin America, the dialogue between regional struggles and rules of International Law must consider the understanding of each country's historical contexts, with their political, economic and legal regimes, which leave societies with a functioning of subjectivity that needs to be discussed and reinterpreted (ROLNIK, 2018), before being reproduced in Law.

2. Why is a concept so important for understanding reality?

Radha D'Sousa quotes the philosopher Roy Bhaskar (1989) to remind us that the nature of human and social life depends on concepts: "these are historical heritage, and they are developed thanks to our concrete understanding in socio-spatial-temporal contexts'' (D'SOUSA, 2009, p. 128). According to the author (D'SOUSA, 2009), these are the concepts that include a concrete meaning in the political vocabulary, capable of explaining reality. When decontextualized, they become less important for reinterpretation and social transformation.

The generality and a-historicity of the concepts can bring a great harm in the construction of social and legal theories. In general, these theories can present a linear construction of rights that nullifies the many modalities of struggles of social groups and,

consequently, the relations of power and intersubjectivities that are inserted in these relations. On the other hand, as they are theories that normally agree with the construction of this concept from the European and North American local reality, to which the concept was initially related, they avoid exploring what is effectively at stake in the regional or local scope, creating many possibilities of meanings that prove to be contradictory and incompatible from a philosophical and theoretical point of view (D'SOUSA, 2009). Finally, by defining certain groups as 'minorities', they establish a relationship of contrast with the group considered standard, offering them an already exclusionary birth, whose central mode of struggle will be for inclusion in an exclusionary reality.

This starts having different meanings for many people in different contexts, being more frequently associated with the inclusion/exclusion language. For D'Sousa, the inclusion policy promotes the ideal of directing all people to supposedly neutral democratic spaces. When they reach them, this ideal brings the conformation of inclusive conquest, without questioning the joint existence of political processes of dependence and interrelation between inclusion/exclusion. In this sense, D'Sousa draws attention to the possibility of inclusion languages nullifying the political field where alliances could be built in the search for structural changes based on programmatic objectives (D'SOUSA, 2009).

In turn, GradaKilomba emphasizes that "language, as poetic as it may be, also has a political dimension of creating, fixing and perpetuating relations of power and violence, since each word we use defines the place of an identity" (2019, p. 14). Neither languages, nor concepts, nor science are neutral and devoid of political intentions. Therefore, it is not just a matter of reflecting on what we say when we talk about minorities, but mainly on what is not said and ends up being crystallized: the power relations that create and determine who is minority and who is majority.

These are aspects that reveal how a local knowledge, transformed into a dominant reason, can expand and articulate in other localities in order to lead the new knowledge built in them, to the same results expected in the pattern of liberal society where it was initially elaborated.

How, then, to work with the concept of minorities? Would a construction of other non-European or non-American concepts be necessary to explain the reality of subaltern social groups in Latin America? Does the functionality of the concept no longer mean what it wants to convey? Or as Santos (2018b; p. 64) questioned in his decolonial reflection: "Can

we build an extended common space based on the recognition of otherness?". When the concept of minorities is reinterpreted based on the struggles for rights carried out by social movements, this concept requires a new meaning, inserted in the existential basis of an epistemological, social, historical and cultural system. In this sense, the subjectivity that gives life to the system from which the concept is extracted becomes political (ROLNIK, 2019), whose starting point is often an institutionalized material power relationship that has repercussions on social intersubjective relations, built on from the invisibilities and/or political, economic and legal sub-representations of minorized social groups, which influence the way society interprets, accepts and/or rejects them.

However, it is important to remember that legal theories that use the concept of minorities are not usually driven by local social and legal practices aligned with social movements that fight for rights or their effectiveness, and even less, from a decolonial reflection based on otherness and diversity. In Diego López de Medina's theory (2016) regarding the impurities of law and the importation of legal concepts, which is aligned with Bourdieu and Wacquant's social theory, this transfer of concepts to Latin America, for example, is a consequence of the cultural history of Latin American legal theory, whose work is characterized by geopolitical, hierarchical and binary markers such as 'center and periphery', 'production and reception places', 'prestigious and non-prestigious jurisdictions', which help to preliminarily define the sense of the flow of ideas and theories through concepts such as "influence", "misreading", "transmutation", "imitation", "copying and plagiarism" (MEDINA, 2015, p. 36). As a place of reception of knowledge, Latin American institutions end up conforming local law to European and North-centric external theories, without recognizing that these theories have their bases in the material circumstances of the life of the societies in which they are generally elaborated. And they are part of a project that makes invisible and denies the local social groups themselves, even those protected in the international norm as minorities, as is the case of indigenous peoples, for example.

3. International Human Rights Law and the concept of minorities

The traditional concept of minorities has obtained several theoretical developments since the seventeenth century, aiming to accompany the demands of some social groups for protection and rights, guided by the idea of belonging and difference, such as the groups selected by "purity of blood" and nationality[11]. Under international law, which represents an important face of contemporary law, minority is a concept that needs to be problematized from the point of view of geopolitics, race and demands that formed legal rules, with limitations and potentialities. One of these limitations was the very idea of majority used in the functionality of American and European liberal democracy, associated with the concept of formal and universal equality, since these were contradictory models to encompass the demands of minority social groups.

According to Unger (1979), who understands equality from the modernity perspective, the generalized and uniform way of applying the rules considering the equality of all people before the law, had nothing to do with the rules of organization of the Nation-State. Since defining the content of these rules often means making choices for categories of people or things, the formality brought by liberal law became useless when it was challenged by its own assumptions of impersonality and neutrality of power. This is because the "hierarchies in society significantly affect the situation of an individual or a group, especially in patriarchal families, in market and work relations that influence governance"[12] (UNGER, 1979; p. 187). In this scenario, the rule of uniform and generalized equality only allows for the distribution of goods and rights that are already distributed in market and patriarchal relations and in government without facing options between conflicting values. As equality does not solve the problem of choices that guide social relations, "it ends up creating a sense of illegitimacy of the political-institutional order for the most unequal population with

[11]Another consequence pointed out by Mignolo on the principle of "blood purity", used to rearticulate the peoples of the three religions at the time (Jews, Moors and Christians), is that it transferred to the republican period and organized itself in a different way and opposed to another principle that emerged from Valladolid's debates, the "peoples'rights". Although it was at the colonial core, seeking to recognize the frontiers of power for the Moors and Jews, this principle brought the foundations of the modern thought that sought the universality of man as Europe conceived it already consolidated; which would be revealed after the Declaration of the Rights of Man and of the Citizen (MIGNOLO, 2003, p.56)

[12]Freetranslationof "hierarquias na sociedade afetam significativamente a situação de um indivíduo ou um grupo, sobretudo, em contextos familiares patriarcais, nas relações de mercado e de trabalho que influenciam a governabilidade".

different identities"[13] (UNGER, 1979, p. 204), since it is useless to deal with situations of inequality and discrimination.

Based on this egalitarian rationality of the Nation-State, the minorized social groups obtained a limited space for transformation through political-legal institutions in European societies, through liberal democratic means. In this way, they only had to assimilate the rules of formal organization of neutrality, equality and universality if they really wanted to belong to these societies as citizens (SANTOS, 2018a).

The first connotation of 'minorities' referred to the quantitative aspect of the social group in relation to the majority population, differentiated by cultural criteria, without compromising liberal equality, since all were nationals. These criteria only covered religious, ethnic and linguistic groups within European countries, in a smaller number than the majority of the national population. While formal and universal equality did not solve the problems of cultural differences between social groups, they were homogenized under the condition of citizens through the bond of nationality.

Over the last century, this concept was institutionalized by International Law, which was associated with classical liberalism for not demanding greater intervention in the States' economic policy to meet the basic needs of guardianship and preservation of these social groups in European territory. In this sense, the legal protection of minority groups associated with religion, white ethnicity and linguistic groups was guided by the liberal economic model of non-intervention, with the predominance of civil and political rights. In this aspect, the rights of these numerical minorities did not contradict the capitalist economic order that was installed in the countries, at the same time they did not interfere with the social organization resulting from the colonization processes, keeping them individualized and apart (FREITAS, 2017; SANTOS, 2018a).

This classic concept found limits within International Humanitarian Law when it did not allow refugees and immigrants, whether they were formal workers or not, to be protected by the same legal institutes, since they belonged to another category of people for whom States would have to promote more interventionist policies. For refugees and

[13]Freetranslationof "acaba criando um senso de ilegitimidade da ordem político-institucional para a população mais desigual e com identidades diferentes".

immigrants, the United Nations created specific legal instruments in favor of their protection, which were not confused with protection norms for minority groups[14].

The United Nations Charter of 1945 and the Universal Declaration of Human Rights of 1948 did not deal with the minorities issue. This issue was only addressedby article 27 of the UN International Covenant on Civil and Political Rights (1966), which became mandatory in 1976, three decades after the Charter of the United Nations, with the following statement:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

During this period, the Human Rights Commission began to prepare the Declaration on the Rights of Minorities and felt the need to create its own definition for minorities (DECHÊNES, 1985). The classic concept of minorities began to be reinterpreted in the post-war period, by the United Nations Subcommittee for the Prevention of Discrimination and Protection of Minorities, but only in 1979 the rapporteur Francesco Capotorti presented a strict definition, conditioned to the three criteria of above mentioned art. 27: I - non-dominant group which has ethnicity, religious or linguistic traditions and wishes to preserve it; II - must represent a sufficient number of people in the preservation of their traditions and characteristics; III - must be faithful to the State to which his nationality is bound:

> A minority is a group numerically smaller than the rest of the population of the State to which it belongs and possessing cultural, physical or historical characteristics, a religion or a language different from those of the rest of the population (CAPOTORTI, 1979, p.7).

An alternative proposal to the Subcommittee by Canadian Jules Deschênes (1985) tried to shift the scope of the concept to an approximation with the larger social body, in the exercise of citizenship, whose goal was to "achieve conditions of formal and material equality with the majority group":

> A group of citizens of a State, constituting a numerical minority and in a non-dominant. position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law (DESCHÊNES, 1985, p. 30).

[14] The United Nations Convention relating to the Statute for Refugees, also known as the 1951 Geneva Convention, defines who is a refugee or not and what are their rights and responsibilities of the nations that grant them asylum; without any reference to minority group status.

Therefore, the definition is expanded by Deschênes when related to the concept of citizenship, due to the possibility of bringing “minorities” closer to the struggles for material equality carried out at the liberal individual level, due to the absence of rights. Perhaps for this reason, as well as the previous ones, this concept did not obtain the approval of the United Nations Subcommittee on the Prevention of Discrimination and Protection of Minorities members, left open the need to be reinterpreted with the Commission on Human Rights of United Nations for the operationalization Human Rights legal instruments. This happened due to Capotorti's strict reinterpretation when defining minorities “as nationals” and Deschênes' proposal to associate with the majority social group and to interpret “minorities as egalitarian citizens' '. In addition, both definitions made implicit reference to other minorities that were not included in international rules, such as those groups that wish to remain with distinct characteristics or out of the society (DESCHÊNES, 1985).

The common point on the definitions of minorities in International Law, whether associated with nationality or egalitarian liberal citizenship, refers to the requirement of legally belonging to the State (*i.e.*, minorities belonged to a political community, to a State-Nation, and with that, they were formally assured the status of citizens, subjects of rights). Hence, the assurance of rights was conditioned on belonging to a political body and, as citizens, having other rights granted to nationals, such as economic, social and cultural rights. Although this was the goal pursued by the international rule, its liberal/individual connotation remained clear as it did not encompass the reality of colonized countries’ minorities. For this reason, this concept was dissociated from the struggle for rights within Latin American countries, where the concept of subjects of rights was still being formed.

In the Report on Education Rights and Minorities, prepared by the Minority Rights Group International, Patrick Thornberry (1991, p. 5) questioned this definition restricted to ethnicity and national belonging due to the deficit in political-institutional representation of other social groups with similar social demands, which were not directly protected by the existing rules, but only in a subsidiary way by the instruments of more traditional minority groups. Under these circumstances, the concept of minorities, by including only traditional ethnic and religious groups recognized by European countries, has a double effect of social inclusion and exclusion, where the demands of groups excluded from the concept intensified in the end of the last century began to require, among other needs, the recognition of other

identities, so that there would be a “distribution” of rights with a greater reach in the countries’ domestic scope.

Santos (2018a) highlights that the humanitarian rules of International Law disseminated the belief that the entire humanity could be emancipated through their common project of defense of universal individual rights, for which there were only two recognized legal subjects: the individual and the State. When humanitarian norms were written, many individuals were not protected because they were under collective domination and individual rights did not bring any protection (SANTOS, 2018a, p. 298). Hence, this project became inoperative because it does not disassociate itself from capitalism or colonialism, which were the hallmarks of many European countries in the last century. Considering that, it was not able to abdicate the concept of sub-human as part of humanity, which was represented in the reality of many peoples and colonized nations and in the identity differences of many social groups on which Humanitarian International Law projected the collective exclusions invisibility (SANTOS, 2018a). While the rules of International Law sought equality of all people’s rights due to their ontological condition as human beings from the European individual perception, many social groups affected by capitalism and colonialism resisted in the local struggle for their recognition as subjects of rights.

For this reason, it was necessary to intensify the dialogue of the international rules with the constitutional rules of each country and to verify, under the internal rules’ positive rights, the scope and limits of the intended international protection for minorities and other social groups. In the relationship between the international rules and the constitutional laws of Latin American countries, it became evident not only the Eurocentric character of the concept of minorities but also the need to recognize the particular belonging and diversity criteria which need to be protected by international law, which in turn should recognize human rights from the perspective of those who had these rights denied. Therefore, a more appropriate understanding of the concept of minorities in Latin America demanded an approximation with the principle of self-determination not only in the vertical relationship of the peoples who were subject to European colonization, which had consequences on the relationship of individuals or the community before the State; but also in horizontal relationships, within the scope of private and market relations, regarding the identity affirmation of multiple social groups which were subject to colonialism, including internally (CASANOVA, 2015), such as indigenous peoples, and which demand the international

institutionalization of the right to autonomy and belonging to promote an egalitarian and emancipatory inclusion.

In practice, this solution points to a disruption that Mignolo calls identity politics for groups considered minorities at the international and regional level, which assumes that "identities are essential aspects of individuals that can lead to intolerance"[15] and to the risk of fundamentalist positions (MIGNOLO, 2008, p.289). This means that, by being based on whether people are black or white, woman or man, indigenous, children and adolescents, homosexual or not, such identity politics hide the fact that they are not exempt from neutrality by naturalizing domination and power relations that are established over these human, social and economic conditions. In other words, the standard of identity politics is always the white, heterosexual and capitalist man, which denotes both similar and opposing identities as essentialist and fundamentalist (MIGNOLO, 2008, p.289) and therefore cannot be dissociated from the race/ethnicity/class, gender/class, work/class. As a decolonial alternative, Mignolo suggests identity in politics, which requires the understanding that the identities of the most traditional groups and the new groups that emerged at the end of the last century were artifacts constructed in modern European discourses based on a colonial and patriarchal racial basis. From this point of view, inserting them in the construction of a new political theory and experimentation of new social relations, including the struggles and resistances and even resilience produced in the tensions of colonial, patriarchal and economic western relations.

4. The concept of minorities in constitution: looking at the reality of Latin America

It is worth mentioning that the concept of minorities is not found in any of the most recent Constitutions in Latin America (Colombia, 1991/rev.2015; Ecuador, 2008; Bolivia, 2009) or even in the most recent International Human Rights Treaties and Conventions which are the consequence of much struggle by different social groups. In fact, there seems to have been a reinterpretation of 'minorities' for the rights of self-determination, recognition of difference and diversity of social groups in these international Treaties and Conventions and

[15]Freetranslationof"as identidades são aspectos essenciais dos indivíduos que podem levar à intolerância".

in the constitutions of Latin American States. The realization of these rights, however, depends a lot on the political-institutional space destined to groups with specific identities and characteristics. This means that the opening of political-institutional spaces must recognize in social struggles to defend identities and autonomies a transforming knowledge to be implemented in the elaboration of public policies, with a programmatic impact of transformation not only for the specific group, but for the entire social body. This transformation implies not only the occupation of public spaces, but also egalitarian political projects and the strengthening of individual and collective citizenship through an epistemic change, with an impact on legal, political, social and economic institutions which result in new concepts, perceptions and thoughts on social diversities and inequalities.

In Latin American societies, the political-institutional reformulation between public and private has varied from a progressive trend in some countries, that have adopted the right to diversity and autonomy, to an ecocentric turn in the Andean countries, where the different is no longer the subaltern social group in modernity, to be repositioned and strengthened as a subject of rights in contemporary racial and ethnic power relations (WOLKMER; LIXA, 2015; FREITAS; MORAES, 2017). This also implied a decolonial turn through the constitutions that established a plurinational State and adopted legal pluralism, with the recognition of the autonomies and communities of ethnic and racial groups, demonstrating they were a numerical majority in their countries, minorized by the colonization processes; they also inserted a model of community democracy, including the right to diversity in the pluriethnic sense (WOLKMER; FREITAS, 2017). Through the recognition and valorization of ethnic-racial groups in the Andean countries, the very concept of minority lost its traditional meaning, making its artificial character evident, resulting from the model of institutional choices in which it was created. It was not enough to criticize and not use the concept. Especially regardingEcuador and Bolivia's Constitutions, we observed a profound reformulation of regional and national legal institutions, following the example of the Bolivian Plurinational Constitutional Court.

Therefore, the liberal and universalist constitutional egalitarian rule in Latin America turned out to be one of the greatest impediments to the self-determination of social groups and needed to be reinterpreted in light of other political-institutional arrangements. Although material equality is still an ideal for Latin American societies, its realization through other political-institutional possibilities and public policies resulting from demands of social

movements can enable the reconstruction of identity and cultural differences and inequalities in order to break with hegemonic concepts and representations of monocultural and Eurocentric or North-centric tradition to promote a displacement in power relations that affect the subalternized social groups. In these struggles, there are records of a reality that conditions people to fit themselves into a forged concept which neutralizes all political efforts for change through autonomy, except through subordination and political dependence. Hence, the inadequacy of the concept of minorities with historical, territorial and temporal basis of struggles and resistance also began to require the reconstruction of political, economic, legal and, above all, epistemic social institutions and practices.

In Brazil, especially after the 1988 Constitution, it can be said that the national policy of protection for ethnic-racial groups, children and adolescents, women, people with disabilities, groups that bring sexual orientations and diverse gender identities, etc., even if they are not considered minorities in the traditional context of the term, presents approximate characteristics regarding the construction of their rights, for denouncing the bases of the denialist, exclusionary and violent model in which they were being positive in the historical and political context. First, with the absence and denial of rights, as in racial, children and adolescents, people with disabilities rights, and others. Second, through the preponderance of policies of dominant culture assimilation, which made the group to depend on the recognition of its identity and autonomy, which in case of indigenous rights were exercised in a protected way. Third, in the formal contemporary recognition that all members of these minority groups are subjects of rights, which is not aligned with the construction of dominant rights and consequently with the concrete reality.

The consequence of late and necessary formal recognition was the construction of rights in disagreement with the rights built for dominant groups, directing the struggle for a constant realization of rights. If everyone is a subject of rights and equal before the law, how can we justify the following data in Brazil:

- 78.9% of people killed by the police in 2020 were black, according to data from the 2021 Public Security Yearbook (Brazilian Public Security Forum, 2021).
- In 2018, despite an increase in women elected to the Chamber of Deputies, because of changes in the law on quotas and funds for female candidacies, there was still a proportion of 15% of women and 85% of men chosen for this legislative house. As for black women, who represent 27.8% of the Brazilian population according to the latest IBGE Census (2010), only 2.53% of the seats in the Chamber of Deputies are occupied by them (OXFAM, 2021).

- In 2019, according to a report annually published by the Pastoral Land Commission (CPT), there were 244 conflicts in indigenous territories, which involved murders, expulsion and attempts to expel indigenous families, gunshots and invasion of territories.
- For the 12th consecutive year, Brazil had the highest number of transgender people murders in the world, according to the Trans Murder Observatory (JUSTO, 2020).

Such data demonstrate that, in addition to the laws that ensure equal rights, there are social, cognitive and epistemic structures that maintain, institutionalize and, in some way, legitimize racism, sexism, patriarchy, coloniality, among other oppressions. Questioning these structures is the role of the decolonial critical researcher.

The consequences of the egalitarian value of assimilation and universalization of the right to equality fell not only on the subordination of people, cultures and knowledge to a dominant social model, but also on the dissemination of a pseudo belief that the non-subalternized were free to choose this social model. For this reason, it is essential to understand colonialism and coloniality in the formation of this legal rationality ingrained in the constitution and dissipated in the hierarchy of social relations. This reflection is relevant as it allows academic groups that do research on the rights and reality of minority social groups to identify conceptual blocks that reproduce limited and limiting external knowledge of local knowledge, with perspectives and thoughts devoid of critical reflection, or even without the recognition of its influence in the construction of local and legal rationality. Without this reflection, it isharder to recognize subjects as having rights; and even when they are recognized the implementation of these rights is questioned due to social non-acceptance.

This is a type of injustice that goes beyond social injustices because it also shows itself in a cognitive form. However, this injustice does not only occur on knowledge, but also and above all on bodies, daily updating the relations of colonial violence, disguised as epistemic and legal violence. It is a type of injustice, as Fanon observed, which can also cause action when the colonized reproduces oppressive practices against themselves and against other oppressed people (FANON, 2008).

Cognitive injustice is present in power relations that these groups face, especially in Brazil, when they involve racial, ethnic, gender and age issues. In addition to making these subjects inferior or invisible, it disqualifies their knowledge and social participation because

they are produced by inferior political and geopolitical bodies. Its greatest commitment lies in imposing the definition of the truth on these social groups under the dominant perspective as the only rational one, which ends up deciding what to be or not to be indignant about regarding the very existential condition of these subjects.

Final considerations

The decolonial critique, which guides the feeling-thinking-acting of epistemic indignation, leads us to the perception of the ambiguity of the concept of minorities: while it recognizes rights, it tends to make social groups vulnerable by hiding the power relations that they create, reinforce and update social, economic and epistemic injustices. The concept closes, frames and confines, but also brings possibilities. It becomes ambiguous because it can be used in a limiting or transforming way, allowing the coexistence of spaces of rights tolerated within the scope of the capitalist-patriarchal-racist-heteronormative-enabling system, which do not change the deep structures of domination.

The concept of minorities, as it has been generally applied, dehistoricizes, depoliticizes and assimilates different social collectivities under the same subalternized category. The complexity of reality is thus reduced, delimited, framed. Hence, it is up to these collectives to seek their framework in the concept of minority in order to have a certain supposedly rewarding political-legal status.

The lack of understanding of the processes of subordination, of historical absence of rights, of mismatch in the recognition of new subjects of rights, of political and economic underrepresentation (*i.e.*, of social and cognitive injustice), can lead the concept to a non-realization, as if it was part of a closed system, without gaps or ruptures, being a tautological concept. Concepts need to approach social movements to have legal density due to the constantly updated demands for rights. Social movements have a strong pedagogical role, as they bring other bodies-feelings-rationalities to the center of the debate and construction of legal knowledge, questioning the unique notion of subject, humanity and law.

In this way, socio-legal research based on the rights of different social groups should not start by classifying these groups as minorities or majorities, but, knowing their struggle

histories and their epistemes, should bring to law debate ontological conflicts of understanding the world in the search to promote the decolonization of Law.

Tradução

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