

## **A THEOLOGICAL THEORY OF LAW (AND POWER)**

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If we remember the headlines about the visit of Pope Francis to Bolivia we can read this: “Pope Francis focuses on poor in Bolivia” (BBC July 9, 2015); “What the Pope’s Left Hook in Bolivia Means” (Time July 10, 2015), and mainly this headline: “Vatican bewildered by Bolivia's 'communist crucifix' gift to Pope Francis” (The Guardian July 9, 2015). Pope Francis was surprised when he received from President Morales a crucifix attached to a hammer and sickle that was a replica of one designed by a Jesuit priest -Luís Espinal- who was tortured and killed by Bolivian paramilitary squads in 1980 (The Guardian, July 8, 2015). To some journalists and Latin American Catholics it was a revival of the Liberation Theology that once spread in Latin America in the 60’ and the 70’ and also it was a sign that shows Pope Francis is close to this theology. Is it true? In the next few lines I will try to give an answer.

Liberation Theology’s doctrine and praxis was once thought as a revolutionary doctrine far from the Catholic Church traditional teaching. Some of her adherents were sanctioned and some died because of her. Was it a Communist infiltration within the Catholic Church? Or was she a response to the social inequalities perceived in Latin American societies? These and many other questions can be done but all of them –in some way- are related to the emergence, in the last decades, of the so called New Latin American constitutionalism. In my opinion, this constitutionalism is a mixture of theology and constitutionalism, not a political theology. It is a response –whether correct or not- to the inequalities that arose like obstacles to the building-community process, and mainly, to the achievement of human dignity in Latin America.

To explain why theology and constitutional law are intertwined, in first place, I will focus on Liberation Theology and then I will examine the New Latin American constitutionalism.

I know that many scholars are reluctant to speak of this intertwining –whether real or not– because the traditional approach to study constitutional law considers that religion is not a modern source of law. Legal positivism stood as an obstacle to understand that religion – especially, Christian religion– is a common background in European legal thought. Second, as a response to them I suggest that the new constitutions of Bolivia and Ecuador can be understood as an outcome of the new cultural and political context that arose in the last decades in Latin America when constitutionalization of old and new rights played a relevant part as well as the winds of democracy and equality and social justice blew like a storm after the dictatorial regimes that govern Latin American societies. And third, in this context, Liberation Theology portrayed Latin American as a society with relevant and unsolved economic, social and cultural inequalities, an analysis that contributed to expose which were the main issues that governments, political parties and social movements had to face and solve: the quest for human dignity, especially for the poor.

In recent years, Alicia Bárcena Ibarra and Winnie Byanyima pointed out that “Although income inequality has fallen in recent years, Latin America remains the most unequal region in the world. In 2014 the richest 10% of people in Latin America had amassed 71% of the region’s wealth. If this trend continues, according to Oxfam’s calculations, in just six years’ time the richest 1% in the region will have accumulated more wealth than the remaining 99%”.<sup>1</sup>

In this setting, in the second half of the twentieth century, Liberation Theology emerged both as a theological doctrine and as social movement. Its intellectual roots were catholic theologians as Karl Rahner and members of the resistance to Hitler like Bonhoeffer. Their members focused in the social conditions of the poor and in their right to the essential goods. On discovering this reality they proposed a set of actions because this unjust situation was seen as a noteworthy contradiction with the Christian teachings and way of living. Its main issues were: 1) a preferential option for the poor; 2) the need of a radical change of the “structures of sin”; 3) a discourse against the capitalist system, and 4) an anti-

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<sup>1</sup> Bárcena Ibarra, Alicia & Byanyima, Winnie, “Latin America is the world's most unequal region. Here's how to fix it”, 2016, <https://www.weforum.org/agenda/2016/01/inequality-is-getting-worse-in-latin-america-here-s-how-to-fix-it/>

colonialist position.<sup>2</sup> To remark what Liberation Theology means “Gutiérrez explained that in the Bible he discerns a more or less consistent portrayal of poverty as a ‘scandalous condition inimical to human dignity and therefore contrary to the will of God’, an effect of the ‘injustice of oppressors’”.<sup>3</sup>

Two crucial debates emerged when some of the supporters started to propose a revolution in order to transform the entire societies. On one hand, the option for a violent way to alter the conditions of the poor and give them an access to the essential goods confronted with the Social Doctrine of the Church and with the magisterial teachings of the popes. And on the other hand, some of the Liberation Theology advocates found that Marxism could provide a useful methodology and interpretation of reality to Christian theology and social movements. These tendencies defied the Catholic hierarchy and gave the opportunity to bishops and ecclesiastical authorities to sanction some priests and nuns.

To understand these confrontations we must remember what Jon Sobrino wrote: during the 1970s, a new church and a new theology arose in Latin America. He told that in an interview what theologian Karl Rahner said to a Spanish review speaking about the situation of the Catholic Church, Rahner said that, besides laments or protests, “(…) there are some parts of the Church where there is a very animated, charismatic life, one that yields hope” referring to the creative new developments happening in churches like those of Latin America: their witness, their praxis, their theology and above all their martyrs.<sup>4</sup> Gustavo Gutiérrez –recognized one of founders of this theology- believed that “When we struggle for a just world in which there is not servitude, oppression, or slavery, we are signifying the coming of the messiah”. Thus, “So long and insofar as the Christian church is not committed to this struggle, it is unfaithful to the divine promise that constitutes it”.<sup>5</sup> If this statement implies a revolution is a matter of debate.

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<sup>2</sup> Irvine, Andrew B., “Liberation Theology as a Postcolonial Critique of Theological Reason: An Examination of Early Writings of Gustavo Gutiérrez”, *ARSR*, 25.2, (2012), pp. 139-162.

<sup>3</sup> Irvine, Andrew B., *op. cit.*

<sup>4</sup> Sobrino, Jon, “Karl Rahner And Liberation Theology”, *The Way*, 43/4 (October 2004), pp. 53-66.

<sup>5</sup> Irvine, Andrew B., *op. cit.*

But we must also notice that Latin American Bishops gathered in Medellín, Colombia, on September 6, 1968, wrote: “The Latin American bishops cannot remain indifferent in the face of the tremendous social injustices existent in Latin America, which keep the majority of our peoples in dismal poverty, which in many cases becomes inhuman wretchedness”. Then they recognized that the Church “(...) given the continent's conditions of poverty and underdevelopment, experiences the urgency of translating that spirit of poverty into actions, attitudes and norms that make it a more lucid and authentic sign of its Lord”.<sup>6</sup> They affirmed it again in Puebla (1979) and Aparecida (2007).

So what catholic members should do? At first there is a clear commitment: to be close to the poor. But is it enough? How long will it take to change the situation of the poor? For some theologians, like Rahner, it requires open-mindedness and radical attitudes. Accordingly Jon Sobrino states: “To put the point more graphically: liberation theology’s fundamental assertion and conviction is that the poor -and God in the poor- have broken into history (...) We are charged to liberate the poor and, in Ellacuría’s phrase, to take them down from their cross. Theology can no longer be the ideology that fosters oppression”.<sup>7</sup> This is the reality that has to be transformed. On behalf of this task Gutiérrez wrote: “the poor now comes front and center in Latin American church and society. The result is fear and hostility for oppressors, but high hopes for the disinherited of the earth. This is the true essence of the Latin American process”.<sup>8</sup>

Concurrent to this process within the Catholic Church, in the last decades, some Latin American legal systems began to be transformed. New constitutions emerged with some characteristics that conservative scholars criticized: a) a strong executive power, it means that presidency mostly based on leadership; b) new bills of rights, mainly the rights of the poor, because “rights do not exist in isolation” as Tushnet pointed out<sup>9</sup>, Bolivia and Ecuador in their constitutions included a new right: the right to a “good living” or *sumak kawsay* in Ecuador or *sumak qamaña* in Bolivia; c) an “elastic” interpretation of the

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<sup>6</sup> <http://theolibrary.shc.edu/resources/medpov.htm>

<sup>7</sup> Sobrino, Jon, “Karl Rahner And Liberation Theology”, *The Way*, 43/4 (October 2004), 53-66.

<sup>8</sup> Irvine, Andrew B., op. cit.

<sup>9</sup> Mark Tushnet, “An Essay on Rights”, *Tex. L. Rev.*, 62, (1983-1984), pp. 1363-1403.

constitution in order to protect the basic rights, and d) a weak separation of powers. It is thought that this new form of government can change the entire society and thus reduce the inequalities the poor has to bear.

This task requires not only an appropriate form of government but also a new social compact. Thus “To enjoy the status as legally binding higher law, constitutional foundation must be separated from the ordinary laws and conventions of ordinary politics”.<sup>10</sup> It means that “(...) state actors, whether legislators or adjudicators (...) should rely upon the experiences, ideals, and aspirations of the relatively *disempowered*, rather than the established traditions or customs of the socially empowered”.<sup>11</sup> The Cuban revolution, for many Liberation Theology advocates, could contribute with her experience to solve the problem of poverty.

Thus, the last constitutional processes in Ecuador and Bolivia shaped innovative constitutions with a new structure of power based upon a strong executive power, a power that conceives law as an instrument to change the present status quo, but because the ruling class will not peacefully agree to modify her status quo in order to give to the poor an extended access to the essential goods, some theologians argued that it was necessary to undertake a revolution, even a violent revolution. But, despite this argument, Liberation Theology found that through constitutional reform and democratic assemblies the main goal –to end with poverty- could be achieved.

Accordingly, New Latin American constitutionalism and Liberation Theology are “a challenge to the political systems in which they operate, but they are also a challenge to those (...) who believe in the normative defensibility of liberal constitutionalism” these words used by Kim Lane Scheppele to describe populism can be applied to the new constitutionalism.<sup>12</sup> Or the situation can be described as Pope Francis did in Bolivia: it is

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<sup>10</sup> Partlett, William, “The Dangers of Popular Constitution-Making”, *Brooklyn Journal of International Law*, 38, (2012), pp. 193-238.

<sup>11</sup> WesT, Robin, “Progressive And Conservative Constitutionalism”, *Mich. L. Rev.*, 88, (1989-1990), pp. 641-721.

<sup>12</sup> Scheppele, Kim Lane, “The opportunism of populists and the defense of constitutional liberalism”, *German Law Journal*, 20, (2019), pp. 314–331.

necessary to change “the mentality of profit at any price, with no concern for social exclusion or the destruction of nature”. For many people these words remind of the texts and social practices of the Liberation Theology that once flourished in Latin America. Nonetheless to some scholars this a kind of popular constitution-making “grounded on the belief that a successful process of constitution-making must be separated from ordinary politics”.<sup>13</sup>

In sum, it means that the kingdom of God will be achieved on earth through secular means; that the “gospel of wealth” will be replaced by the “gospel of the poor”; that the task of the theologians will be replaced by the hermeneutics of the people, and that the divinity in heaven is brought to earth through the action of the poor.

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<sup>13</sup> Partlett, William, *op. cit.*