

## Legal pluralism and community water rights from the theoretical perspective of water justice

### Pluralismo jurídico y derechos comunitarios de agua desde la perspectiva teórica de justicia hídrica

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**ABSTRACT:** The article contains a critical approach to legal pluralism and community water rights from the theoretical perspective of water justice. It documents that the unequal distribution of water is a source of struggles and conflicts that are associated with the accumulation mechanisms of dominant users and, from this, the disputes are articulated around problems regarding the quantity, quality and security of water supply. The studies consulted show that official management has been unfavorable to community-based organizations, above all, because legal uniformity and homogenization of management have been emphasized. In methodological terms, a specialized literature review was carried out and, based on this, relevant issues analyzed from the perspective of water justice are recorded. In broad terms, it is concluded that the state of the art shows persistent inequalities and processes of water dispossession.

**KEYWORDS:** Legal Pluralism; Water Rights; Water Justice; Water Policy; Water Uses.

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RESUMEN: El artículo contiene una aproximación crítica al pluralismo jurídico y los derechos comunitarios de agua desde la perspectiva teórica de justicia hídrica. Se documenta que la desigual distribución de agua es fuente de luchas y conflictos que se asocian a los mecanismos de acumulación de los usuarios dominantes y, a partir de ello, las disputas se articulan en torno a problemas sobre la cantidad, la calidad y la seguridad en el abastecimiento de agua. Los estudios consultados muestran que la gestión oficial ha sido poco favorable para las organizaciones de base comunitaria, sobre todo, porque se ha enfatizado la uniformidad legal y la homogenización de la gestión. En términos metodológicos, se realizó una revisión especializada de literatura y, con base en ello, se registran temas relevantes analizados desde la justicia hídrica. En líneas gruesas, se concluye que el estado de la cuestión evidencia las desigualdades persistentes y los procesos de despojo hídrico.

PALABRAS CLAVE: Pluralismo jurídico; Derechos de agua; Justicia hídrica; Política hídrica; Usos del agua.

## I. INTRODUCTION

The aim of this article is to attempt a critical approach to legal pluralism and community water rights from the theoretical perspective of water justice. This approach allows us to explain the context of community water use in the face of the parameters of neoliberal economics and the axioms imposed by the extractive model. In methodological terms, the essay consists of two parts: first, a specialized literature review and, second, a bibliographic selection that is discussed in order to illustrate the central argument of the work. The hypothesis formulated is that the studies carried out on water justice have focused, fundamentally, on persistent inequalities and on the processes of water dispossession, through a critical analysis of the capitalist production model.

The article is organized into six parts. The first is a brief preliminary discussion on water justice as a theoretical perspective, in terms of the bibliographic and documentary review to prepare this essay. The second section analyzes the political-territorial control of water, focusing on the concepts of *scarcity* and *containment* to refer to the transfer of water between different territories, uses and users, which is usually promoted through hydraulic projects modulated by dispossession. The third segment focuses on water policy associated with extractive processes, particularly the disputes that arise around problems regarding the quantity, quality and security of water supply. It is argued that official administration has been unfavorable to community-based organizations, above all because it has emphasized legal uniformity and homogenization of management, which has given way to the implementation of neoliberal policies that favor extractive projects. The fourth part refers to accumulation by dispossession, which has implied the snatching away of management and knowledge associated with collective social property, to then be led to regimes of exclusive rights through private appropriation. The fifth section studies community water rights as an expression of legal pluralism,

in particular, it considers that these rights are condensed in the participatory, plural and complex management that derives from collective work. The last section contains the conclusions.

## II. WATER JUSTICE AS A THEORETICAL PERSPECTIVE

Studies conducted from the perspective of water justice show that water is a disputed good that generates multiple conflicts. In other words, the way in which powerful actors control the liquid in order to promote the process of capitalist accumulation has been documented<sup>1</sup>. In this line of analysis, it is stated that water ‘flows in the direction of power’, accumulating in the hands of a few dominant users in favored sectors, who transmute it into an immediate benefit<sup>2</sup>. The accumulation of water is not only associated with the way in which someone appropriates the natural good transformed into a resource for production; said appropriation is selective and is directed to the best quality waters, which leads to many more people being left without the liquid, in quantity and quality, for daily activities<sup>3</sup>.

The image of a *blind justice* that guides an impartial legal system fails to hide the intervention of actors who position their interests and obtain prerogatives over natural goods; this situation fuels class differences and shows that justice and the systems that

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<sup>1</sup> BUDDS, Jessica, “Relaciones sociales de poder y la producción de paisajes hídricos”, in Rutgerd BOELEN, Leontien CREMERS and Margreet ZWARTEVEEN (eds.), *Justicia hídrica. Acumulación, conflicto y acción social*, Lima, PUCP, IEP, 2011, pp. 59-69.

<sup>2</sup> BOELEN, Rutgerd; CREMERS, Leontien; ZWARTEVEEN, Margreet, “Justicia hídrica: acumulación de agua, conflictos y acción de la sociedad civil”, in BOELEN, CREMERS and ZWARTEVEEN (eds.), *op. cit.*, 2011, pp. 13-25.

<sup>3</sup> ISCH, Edgar, “La contaminación del agua como proceso de acumulación”, in BOELEN, CREMERS and ZWARTEVEEN (eds.), *op. cit.*, 2011, pp. 97-109.

should guarantee it support social inequalities and, in general, strengthen them<sup>4</sup>.

John Rawls assumes that the primary object of justice is the way in which the most important social institutions –political constitution, economic ordinances and legal provisions– distribute rights and duties to determine the division of the advantages arising from social cooperation. According to this premise, the principles of justice are accepted by people in an original position of equality and, therefore, define the central terms of the social contract<sup>5</sup>. From another perspective, David Harvey points out that justice is a social construction of beliefs, discourses and institutionalizations that express social relations and contested figures of power, which have to do with the regulation and ordering of material practices in certain places during certain times<sup>6</sup>.

Although the principles of justice are constructed and accepted socially, they are subject to constant deconstruction and testing, so that the distribution of advantages and disadvantages is especially debated when it comes to natural goods. Due to the nature of the problems associated with water, a certain amount of work is required to ‘constructing the gaze’, which implies a dose of transgression of disciplinary boundaries and, consequently, of challenge. The fluidity of the element studied, liquid par excellence, implies a certain fluidity in the way of thinking<sup>7</sup>.

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<sup>4</sup> ISCH, Edgar, “Justicia hídrica: una sistematización conceptual introductoria”, in Edgar ISCH, Rutgerd BOELENS and Francisco PEÑA (eds.), *Agua, injusticia y conflictos*, Lima, PUCP, IEP, CBC, 2012, pp. 21-43.

<sup>5</sup> RAWLS, John, *A Theory of Justice*, Cambridge, Harvard University Press, 1971.

<sup>6</sup> HARVEY, David, *Justice, Nature and the Geography of Difference*, Oxford, Blackwell Publishers, 1996.

<sup>7</sup> MARIÉ, Michel, *Las huellas hidráulicas en el territorio. La experiencia francesa*, San Luis Potosí, El Colegio de San Luis, IMTA, Semarnat, 2004, p. 28.

In order to illustrate the arguments indicated, a literature review was carried out that also aims to constitute a theoretical approximation regarding water rights and their connection with water justice. To do so, the theme of the works, the perspective of their approach, the central hypothesis and the conclusions were identified. It is considered, in relation to the volume of the bibliography consulted, that most of the contributions study cases around conflict, dispossession, oligopolistic concentration and state discretion to distribute the benefits.

### III. POLITICAL-TERRITORIAL CONTROL OF WATER: SCARCITY AND CONTAINMENT

The transfer of water between different territories, uses and users is usually promoted through projects articulated from dispossession and accumulation, so that dams, aqueducts, canals and deep wells are presented as works supported by the State. The State drive is regularly accompanied by corporate-business incentives that seek to obtain immediate returns to the detriment of local collective rights and the capacity of ecosystems<sup>8</sup>. This is evident in the political processes of territorial planning, which make water flow towards economically privileged and socially polarized spaces, such as cities<sup>9</sup>.

This responds in part to the official consensus on water scarcity, through global statistics that assume the low availability of sources with effective access, that is, the aphorism that states: 'less than 1% of the total water on the planet is suitable for human consumption'. This idea, in trying to give scientific precision to the

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<sup>8</sup> SWYNGEDOUW, Erik, *Social Power and the Urbanization of Water. Flows of Power*, Oxford, Oxford University Press, 2004.

<sup>9</sup> SWYNGEDOUW, Erik, "The Political Economy and Political Ecology of the Hydro-Social Cycle", *Journal of Contemporary Water Research & Education*, vol. 142, num. 1, 2009, pp. 56-60.

discourse of scarcity, makes basic errors from the scientific point of view from which it seeks to obtain its legitimacy<sup>10</sup>.

This argument has been used to justify the lack of public investment, urban planning and infrastructure, so that the impoverished sectors are forced to naturalize the insufficient financial, technical and operational attention that, on the contrary, the privileged sectors do not suffer. The argument about scarcity hides the fact that it is a problem of inequality and not of quantity or availability of water. In other words, attributing the adjective *natural* to water scarcity is a persuasive strategy through which the management model that favors the provision of industrial zones, commercial sites and urban developments is excused<sup>11</sup>.

The depletion of underground water sources or the sudden decrease in their quality support water transfer projects based on the theory of overexploitation of aquifers. This notion *democratizes* the guilt among the users of underground water –industrial consortia, agricultural emporiums, local producers and urban inhabitants– and has the discursive aim of endorsing large-scale hydraulic projects that are materialized in the territory<sup>12</sup>. Remember, for example, the conflict arising from the construction of the Independencia Aqueduct, which formed a *transfer* to the detriment of the territorial rights and historical uses of the Yaqui Tribe<sup>13</sup>.

<sup>10</sup> PORTO-GONÇALVES, Carlos, “El agua no se niega a nadie (La necesidad de escuchar otras voces)”, *Polis. Revista Latinoamericana*, vol. 5, num. 14, 2006, pp. 1-24.

<sup>11</sup> JACOBO-MARÍN, Daniel, “Política hídrica, propiedad nacional y derechos de agua en México: una lectura histórico-jurídica crítica”, *Revista de la Facultad de Derecho de México*, vol. 70, núm. 278-2, 2020, pp. 937-964.

<sup>12</sup> MORENO VÁZQUEZ, José Luis, *Por abajo del agua: sobreexplotación y agotamiento del acuífero de la Costa de Hermosillo*, Hermosillo, El Colegio de Sonora, 2006.

<sup>13</sup> MORENO VÁZQUEZ, José Luis, *Despojo de agua en la cuenca del río Yaqui*, Hermosillo, El Colegio de Sonora, 2014.

Transfers are hydraulic constructions that include reservoirs, pumping stations, aqueducts and tanks, built with the purpose of transferring water from one basin to another. These projects are planned and executed in territories historically occupied by agrarian centers and indigenous peoples. Water transfers are used as political control mechanisms to subdue the ecological rationality of communities and to expropriate local management capacities, which compromises territorial rights associated with traditional uses of water<sup>14</sup>.

Rooted in speculation, water transfers constitute profitable businesses and, instead of responding to democratic policies of access to water, they are consolidated as devices of persistent water inequality<sup>15</sup>. In any case, water transfer works are technical-political devices that accentuate social inequality through concepts such as development, modernity and the paradigm of scarcity<sup>16</sup>. This argument is associated with the theoretical discussion regarding space, a key element of neoliberalism as a strategy for restoring class power and deepening inequalities<sup>17</sup>.

On the other hand, legal mechanisms for water protection – that is, *bans*– have been politically configured to build formal and informal water markets, which favors the individualized transmission of the benefits required for large-scale real estate, industrial, commercial, livestock and agricultural development. In this way, bans are used to guarantee productive processes that consume a lot of water. The dominant urban policy offers the best example

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<sup>14</sup> JACOBO-MARÍN, Daniel, “Régimen energético, usos del agua y antinomias jurídicas: El caso del fracking en México”, *Economía, Sociedad y Territorio*, vol. 22, núm. 70, 2022, pp. 921-949.

<sup>15</sup> PEÑA, Francisco; GRANADOS, Luis Enrique, “Archipiélagos urbanos. El trasvase como dispositivo de la desigualdad hídrica persistente en México”, *Región y Sociedad*, vol. 33, art. 1439, 2021, pp. 1-24.

<sup>16</sup> *Ibidem*, pp. 2-8.

<sup>17</sup> HARVEY, David, *Spaces of Global Capitalism: A Theory of Uneven Geographical Development*, London, Verso, 2006.

of the hypothesis under discussion: the *natural* scarcity of water is not an obstacle to industrial development and the speculative division of land<sup>18</sup>.

Precisely, under the assumption that the territory is one of its constituent elements, the State intervenes with *public* decisions because it claims it as the area for the exercise of its power and, at the same time, tolerates and encourages actions coming from *private* interests. In this context, the lands and territories of the agrarian centers and indigenous communities are defined under the notion of public utility and, as a consequence, have been constituted as spaces for dispossession<sup>19</sup>. Through state action, the defense of projects classified as being of social interest and public order has been militarized, while supporting companies that build dams, hydroelectric systems, industrial zones, energy generation or mining reserves<sup>20</sup>.

Empirical records show that during the negotiation and consultation of projects, asymmetrical power conditions prevail, which means that the affected communities must simultaneously confront territorial problems and socio-environmental conflicts. This is because through technocratic control of water flows, local populations are stripped of their territorial rights and forced to abandon their ways of life, causing a ‘deterritorialization’ of the social fabric<sup>21</sup>.

<sup>18</sup> JACOBO-MARÍN, *op. cit.*, 2020, pp. 937-964.

<sup>19</sup> *Ibidem*, pp. 937-964.

<sup>20</sup> SOLER, Juan Pablo; ROA, Tatiana, “Colombia: desarrollo, hidrocracias y estrategias de resistencia de las comunidades afectadas por Hidroituango”, in Cristina YACOB, Bibiana DUARTE and Rutgerd BOELENS (eds.), *Agua y ecología política. El extractivismo en la agroexportación, la minería y las hidroeléctricas en Latinoamérica*, Quito, Abya-Yala, 2015, pp. 239-252.

<sup>21</sup> ROA, Tatiana; DUARTE, Bibiana, “Desarrollo hidroeléctrico, despojo y transformación territorial: el caso de Hidrosogamoso, Santander, Colombia”, in Aline ARROYO and Rutgerd BOELENS (eds.), *Aguas robadas: despojo hídrico y movilización social*, Quito, Abya-Yala, IEP, 2013, pp. 313-338.

#### IV. EXTRACTIVE PROCESSES AND WATER JUSTICE

The unequal distribution of water is a source of struggles and conflicts associated with the processes of accumulation of dominant users and, as a result, disputes are interwoven around problems regarding the quantity, quality and security of water supply. The theoretical perspective of water justice reveals that the State exercises a monopoly in the development of norms, the application and the resolution of conflicts associated with water and, based on this monopoly, has subjugated the rationality of customary rights and local management systems, forcing territorial organization<sup>22</sup>.

Water justice is presented as an interdisciplinary field of study and, at the same time, as a terrain full of conflicts, interests and proposals with multiple scopes<sup>23</sup>. Other studies point out the intersections at which water justice has been theoretically developed, in particular those associated with political geography<sup>24</sup>, political ecology<sup>25</sup>, environmental justice<sup>26</sup>, social studies on water<sup>27</sup> and, in general, how water justice involves disputes over the formulation of rules and the obtaining of rights in the context of

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<sup>22</sup> ZWARTEVEEN, Margreet; BOELENS, Rutgerd, “La investigación interdisciplinaria referente a la temática de justicia hídrica: unas aproximaciones conceptuales”, in BOELENS, CREMERS and ZWARTEVEEN (eds.), *op. cit.*, 2011, pp. 29-58.

<sup>23</sup> ZWARTEVEEN and BOELENS, *op. cit.*, 2011.

<sup>24</sup> COLVEN, Emma, “Water Justice: At the intersection of political geography and political ecology”, *Political Geography*, vol. 86, art. 102278, 2021.

<sup>25</sup> HARRIS, Leila; MCKENZIE, Scott; RODINA, Lucy; SHAH, Sameer; WILSON, Nicole, “Water Justice: Key concepts, debates and research agendas”, in Ryan HOLLIFIELD, Jayajit CHAKRABORTY and Gordon WALKER (eds.), *The Routledge Handbook of Environmental Justice*, London, Routledge, 2017.

<sup>26</sup> FIORET, Cameron, “Water Justice as Socioenvironmental Justice”, *Ethics, Policy & Environment*, vol. 26, num. 3, 2023, pp. 406-421.

<sup>27</sup> SULTANA, Farhana, “Water justice: why it matters and how to achieve it”, *Water International*, vol. 43, num. 4, 2018, pp. 483-493.

asymmetric power relations that determine how certain water policies are legitimized<sup>28</sup>.

A critical analysis shows that official water management has been unfavorable for community-based organizations, above all, because legal uniformity and homogenization of management have been emphasized, which has led to the fact that, from the perspective of this model, local self-management and its actors are ‘atavisms of the past’ that must be eliminated<sup>29</sup>. In this context, neoliberal rules of water management have been embedded in the concepts of *decentralization*, *modernization* and *privatization*, which translate into extractivist public policies<sup>30</sup>.

In Latin America, from the 1990s onwards, a hydraulic policy was implemented under international auspices –often reduced to a form of *cooperation*– and a model of decentralization in decision-making, which very often caused local business elites to establish alliances with political authorities to defend *modernization*, which implied the gradual withdrawal of the State<sup>31</sup>. This situation was expressed in the reduction of state action to subsidies and support for real estate, agro-industrial and global production chain capital, while any government support for small producers,

<sup>28</sup> BOELENS, Rutgerd; VOS, Jeroen; PERREAULT, Tom, “Introduction: The Multiple Challenges and Layers of Water Justice Struggles”, in Rutgerd BOELENS, Tom PERREAULT and Jeroen VOS (eds.), *Water Justice*, Cambridge, Cambridge University Press, 2018, pp. 1-32.

<sup>29</sup> BOELENS, Rutgerd; ISCH, Edgar; PEÑA, Francisco, “Justicia hídrica: análisis y acción en contextos cambiantes”, in ISCH, BOELENS and PEÑA (eds.), *op. cit.*, 2012, pp. 9-20.

<sup>30</sup> BOELENS, Rutgerd, “Aguas diversas. Derechos de agua y pluralidad legal en las comunidades andinas”, *Anuario de Estudios Americanos*, vol. 66, num. 2, 2009, pp. 23-55.

<sup>31</sup> BUDDS, Jessica, “Water Rights, Mining and Indigenous Groups in Chile’s Atacama”, in Rutgerd BOELENS, David GETCHES and Armando GUEVARA (eds.), *Out of the Mainstream. Water Rights, Politics and Identity*, London, Routledge, 2010, pp. 197-212.

cooperatives, peasant associations and indigenous communities was rejected<sup>32</sup>.

In this context, metal mining is one of the most addressed issues from a water justice perspective. This is associated with the fact that this extractive activity is one of those that generates the greatest local opposition, a situation that has meant the emergence of socio-environmental conflicts of varying scale, duration and intensity<sup>33</sup>. As a result of state economic policies that encourage extraction, mining concessions have been granted in territories that reach large proportions, so that the risks of proximity to populations and waterways are a constant<sup>34</sup>.

In Peru, the way in which these projects were sponsored around the economic growth model that privileges extractive processes, modulated from the neoliberal prototype promoted by the Fujimori government under the tutelage of the World Bank has been recorded<sup>35</sup>. In this sense, conflicts over the use of water in mining have not only increased, but pre-existing conflicts in some regions have also worsened<sup>36</sup>.

Frequently, operators of open-pit mining accumulate prerogatives over water and land in order to expand their industrial

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<sup>32</sup> BOELENS, *op. cit.*, 2009.

<sup>33</sup> JACOBO-MARÍN, Daniel, “Despojo hídrico por acumulación: el caso de la minería metálica en México”, *Revista de la Facultad de Derecho de México*, vol. 74, num. 288, 2024, pp. 303-330.

<sup>34</sup> MORENO VÁZQUEZ, José Luis, *Acaparamiento y deterioro del agua en el noreste de Sonora. El caso de la mina de Cananea, 1899-2020*, Hermosillo, El Colegio de Sonora, 2021.

<sup>35</sup> SOSA, Milagros; ZWARTEVEEN, Margreet, “Acumulación a través del despojo: el caso de la gran minería en Cajamarca, Perú”, in BOELENS, CREMERS and ZWARTEVEEN (eds.), *op. cit.*, 2011, pp. 381-392.

<sup>36</sup> YACOB, Cristina, “Los guardianes del agua frente a las lógicas mineras en el Perú. El caso Conga”, in YACOB, DUARTE and BOELENS (eds.), *op. cit.*, 2015, pp. 157-174.

processes<sup>37</sup>, so that the accumulation of natural goods is used as a strategy to ensure the speculative nature of transnational capital, as has been documented for the cases of Peru<sup>38</sup> and Mexico<sup>39</sup>. However, the contribution of mining to the economies of the nations where it is based is a controversial issue; according to business and government discourse, the activity is essential for the generation of wealth and work, however, within the regions where it is developed, the perception is diverse<sup>40</sup>. It must be considered that large-scale mining drives the processes of commodification of natural goods, depriving communities of their means of livelihood<sup>41</sup>.

Finally, the responses of the populations are associated with the conceptions of justice and with the collective construction of the political, ecological, historical and geographical conditions of the environment<sup>42</sup>; so that the reactions of those affected or sub-

<sup>37</sup> PERREAULT, Tom (ed.), *Minería, agua y justicia social en los Andes. Experiencias comparativas de Perú y Bolivia*, Lima, CBC, 2014.

<sup>38</sup> SOSA, Milagros, “La influencia de la gran minería en Cajamarca y Apurímac, Perú: acumulación por despojo y conflictos por el agua”, in ISCH, BOELEN and PEÑA (eds.), *op. cit.*, 2012, pp. 63-79.

<sup>39</sup> AZAMAR ALONSO, Aleida, *Minería en América Latina y México. Problemas y consecuencias*, México, Universidad Autónoma Metropolitana, Unidad Xochimilco, 2018.

<sup>40</sup> SANTACRUZ DE LEÓN, Germán; JACOBO-MARÍN, Daniel; RODRÍGUEZ CÁRDENAS, Gabriela, “La minería metálica y sus efectos en el acceso al agua en comunidades rurales de Zacatecas, México. Una perspectiva centrada en la desigualdad”, *Población y Sociedad*, vol. 29, num. 1, 2022, pp. 199-226.

<sup>41</sup> JACOBO-MARÍN, Daniel, “Acumulación de derechos de agua en el sector energético-minero en México: una lectura de justicia hídrica”, *Revista de la Facultad de Derecho de México*, vol. 71, num. 281-1, 2021, pp. 261-294.

<sup>42</sup> HARVEY, David, *Justice, Nature and the Geography of Difference*, Oxford, Blackwell Publishers, 1996.

jected to water injustices cannot be studied using a homogeneous formula<sup>43</sup>.

## V. ACCUMULATION BY DISPOSSESSION: NOTES ON WATER RIGHTS

The theory of accumulation by dispossession suggests that the mechanisms of expropriation, appropriation or theft of water are part of a paradigm of reorganization of capital on a global scale<sup>44</sup>, which occurs through the contradictory process of *consolidation* and *fragmentation*, in order to generate the expansion of markets to place the surpluses<sup>45</sup>. The consolidation of capital is revealed in the disparity of income, the manipulation of global markets and the creation of transnational companies. On the one hand, fragmentation is manifested through the decentralization of production, the incorporation of workers with lax rights and the avoidance of corporate responsibilities regarding the externalities caused by accumulation<sup>46</sup>.

What Karl Marx<sup>47</sup> documented as an original process, for David Harvey<sup>48</sup> is a fundamental issue that capitalism develops continuously. In this sense, accumulation by dispossession has implied the privatization of collectively owned lands and their content,

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<sup>43</sup> ZWARTEVEEN, Margreet; BOELENS, Rutgerd, “La investigación interdisciplinaria referente a la temática de justicia hídrica: unas aproximaciones conceptuales”, in BOELENS, CREMERS and ZWARTEVEEN (eds.), *op. cit.*, 2011, pp. 29-58.

<sup>44</sup> HARVEY, *op. cit.*, 1996.

<sup>45</sup> HARVEY, David, *The New Imperialism*, Oxford, Oxford University Press, 2003.

<sup>46</sup> *Ibidem*, p. 26.

<sup>47</sup> MARX, Karl, *Capital. A Critique of Political Economy*, Washington, Regnery Publishing, 2012.

<sup>48</sup> HARVEY, *op. cit.*, 2003.

through a relentless search for profit. This is, essentially, a manifestation of neoliberal capitalism<sup>49</sup>. Neoliberalism is considered an expression of ‘the historically specific and geographically varied institutional provisions of late capitalism, which have caused the spatial and social restructuring of capitalist relations and, with it, a reconfiguration of the contradictions inherent to capital’<sup>50</sup>.

Accumulation by dispossession is characterized by promoting the capitalization of goods that were not previously considered part of the market<sup>51</sup>, so that it also implies the snatching away of management and knowledge associated with collective property that, once intervened by the political-economic mechanisms of capitalist order, lead to a regime of exclusive rights through private appropriation<sup>52</sup>.

In fact, what the literature on water justice shows is that most public investments that link water concentration and extractive projects are made for the benefit of politically privileged actors, with growing fortunes<sup>53</sup>. It also shows that the framework of action and regulation of state institutions and their public actions are not neutral<sup>54</sup>.

These arguments, with various nuances, are used to justify the transfer of community waters to the agricultural export in-

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<sup>49</sup> *Idem.*

<sup>50</sup> PERREAULT, Tom, “Las contradicciones estructurales y sus implicaciones para la justicia hídrica: pensamientos incompletos”, in BOELENS, CREMERS and ZWARTEVEEN (eds.), *op. cit.*, 2011, pp. 71-81.

<sup>51</sup> HARVEY, *op. cit.*, 2003.

<sup>52</sup> SWYNGEDOUW, Erik, “Dispossessing H2O: The Contested Terrain of Water Privatization”, *Capitalism Nature Socialism*, vol. 16, num. 1, 2005, pp. 81-98.

<sup>53</sup> SWYNGEDOUW, Erik, “Despojo y repolitización del agua: hacia una nueva política de los comunes”, in ARROYO and BOELENS (eds.), *op. cit.*, 2013, pp. 11-15.

<sup>54</sup> CASTRO, José Esteban, “Water Struggles, Citizenship and Governance in Latin America”, *Development*, vol. 51, num. 1, 2008, pp. 72-76.

dustry, which, by promoting the narrative about technical irrigation –*competitive* or very *efficient*– ensures the flow necessary for production. The issues associated with irrigation were addressed especially during the first half of the 20th century, as problems of a strictly technological nature and, therefore, were left in the hands of technicians and engineers<sup>55</sup>. The development of this approach not only affected irrigation systems and agricultural activities; one hypothesis suggests that the material modifications that involved engineers and builders also meant urban construction as hydraulic construction<sup>56</sup>.

The configuration of bureaucratic models has been analyzed as a process that has fostered state intervention in traditional irrigation systems, the control of water through its legal qualification as a public good, and corporatist intrusion into organizations of small owners and irrigators; precisely, the ‘novel’ state models imbued with the market end up ignoring customary rights to water and land, in order to standardize them and introduce them into the productivist paradigm inspired by capitalism<sup>57</sup>.

In Latin America, in the name of the common good and public interest, state policies have endorsed the concentration of large volumes of water for agricultural production, while small producers only manage to negotiate, defend or capture modest quantities for self-consumption and the subsistence of traditional

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<sup>55</sup> ABOITES, Luis, *La decadencia del agua de la nación. Estudio sobre desigualdad social y cambio político en México. Segunda mitad del siglo XX*, Mexico City, El Colegio de México, 2009.

<sup>56</sup> PEÑA, Francisco, “El misterio de la sed urbana. La ciudad como construcción hidráulica”, in Francisco PEÑA (ed.), *La sed urbana. La ciudad como construcción hidráulica*, San Luis Potosí, El Colegio de San Luis, 2013, pp. 9-20.

<sup>57</sup> ORÉ, María Teresa, *Agua: bien común y usos privados. Riego, Estado y conflictos en La Achirana del Inca*, Lima, PUCP, University of Wageningen, 2005.

irrigation systems<sup>58</sup>. Even in this unequal context, globalized industrial production has not constituted a forceful response to the so-called food crisis.

Although the problems associated with the expansion of agriculture have focused on land, access to water sources allows us to argue about the recurring struggles over their control. The role that the State has played in the processes of land and water accumulation is related to the construction of political networks, so that corporate consortia, in their desire to monopolize inputs for production, conspire with government institutions in the discourses that underlie agricultural development programs<sup>59</sup>.

Of course, the intensive use of groundwater is especially relevant, especially in regions where large-scale agro-exporting farms have achieved unusual success; likewise, cities are presented as spaces for the hoarding of groundwater, because industrial, food, brewing, chemical, textile and bottling centers are regularly established in them<sup>60</sup>. The fate of groundwater in cities is so diverse that, in keeping with the logic of economic polarization and segregation, some cities prioritize irrigation of golf courses while the popular sectors receive meager amounts, barely sufficient to meet basic needs.

In Mexico, the redefinition of national policy on water resources was driven by the direction of economic policy that responded to the signing of the North American Free Trade Agreement (NAFTA) in 1994. Thus, negotiations on the agricultural chapter found a voice in a small group of businessmen dedicated to the export of vegetables. It has been documented that this group was

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<sup>58</sup> GAYBOR, Antonio, "Giros, contradicciones y procesos de concentración del agua en la agricultura", in ARROYO and BOELENS (eds.), *op. cit.*, 2013, pp. 67-81.

<sup>59</sup> ORÉ, María Teresa, "Las luchas por el agua en el desierto iqueño: el agua subterránea y la reconcentración de tierras y aguas", in BOELENS, CREMERS and ZWARTEVEEN (eds.), *op. cit.*, 2011, pp. 423-434.

<sup>60</sup> JACOBO-MARÍN, *op. cit.*, 2020, pp. 937-964.

linked to the government structure and that some of its members even held public positions at the federal level<sup>61</sup>.

With the promulgation of the National Water Law –*Ley de Aguas Nacionales*– in 1992, Mexican water policy at the end of the 20th century sought the transfer of irrigation infrastructure, including areas where the most profitable commercial agriculture was concentrated. Despite the official discourse on the success of the transfer program, it has become evident that this policy strengthened local power structures, which are concentrated in the most capitalized strata of farmers who maintain control of water, under distorted processes of representation<sup>62</sup>. This situation has been manifested in the influence that the agro-business elite has exercised, with the endorsement of the State, to accumulate water rights in favor of agriculture that is in the hands of corporate groups, simultaneously politicians and farmers.

However, most of the research has focused on surface water, that is: the contamination of rivers by extractive activities<sup>63</sup>, wastewater flows from industry and cities, the construction of dams and the transfer of water between basins. This is partly due to the fact that surface water rights have a long history, are ‘more visible’, are –in some way– more defined and have been studied in depth<sup>64</sup>. In contrast, groundwater has received less academic attention, even though its use has transformed rural economies through di-

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<sup>61</sup> VARGAS, Sergio; PEÑA, Francisco, “Concentración de agua y agroempresarios en el Bajío, México”, in YACOB, DUARTE and BOELEN (eds.), *op. cit.*, 2015, pp. 45-51.

<sup>62</sup> *Ibidem*, pp. 47-48.

<sup>63</sup> JACOBO-MARÍN, Daniel, “Energy extractivism and water dispossession by contamination: an essay of fracking in mexican legal order”, *Brazilian Journal of Development*, vol. 10, num. 5, 2024, pp. 1-20.

<sup>64</sup> WESTER, Philippus; HOOGESTEGER, Jaime, “Uso intensivo y despojo del agua subterránea: hacia una conceptualización de los conflictos y la concentración del acceso al agua subterránea”, in BOELEN, CREMERS and ZWARTEVEEN (eds.), *op. cit.*, 2011, pp. 111-133.

versification in crop productivity, significant improvement in livelihoods and food security for farming and pastoral communities.

The intensive use of groundwater is also addressed from the perspective of water justice; it has been pointed out that since it is a natural good that cannot be seen with the naked eye, the forms of appropriation and concentration are often more difficult to document<sup>65</sup>. With the rise of the agrarian economy based on groundwater, the decreasing levels in aquifers have manifested themselves in various ways, such as the decrease in piezometric levels, the appearance of subsidence or saline intrusion<sup>66</sup>.

In this regard, several studies have confirmed the magnitude of water plundering, at least in two ways: the first, *formalized*, through the granting of concessions granted by the State and, the second, *informal*, through the hoarding of water rights outside the law. These long-standing processes, often simultaneous, continue to expand their dimensions through the creation of political-economic networks and the oligopolistic accumulation of water rights<sup>67</sup>. Irrigation water is not only used for basic consumer products; flower agribusiness increased in the 1980s with the rise of non-traditional agro-industrial exports<sup>68</sup>; for example, fresh cut flower crops acquired a relevant role in the economy of countries such as Ecuador, Colombia, Peru and Brazil<sup>69</sup>.

<sup>65</sup> *Ibidem*, pp. 128-132.

<sup>66</sup> MORENO VÁZQUEZ, José Luis, *Por abajo del agua: sobreexplotación y agotamiento del acuífero de la Costa de Hermosillo*, Hermosillo, El Colegio de Sonora, 2006.

<sup>67</sup> GAYBOR, Antonio, "Acumulación en el campo y despojo de agua en el Ecuador", in BOELENS, CREMERS and ZWARTEVEEN (eds.), *op. cit.*, 2011, pp. 195-207.

<sup>68</sup> HENDRIKS, Jan; BOELENS, Rutgerd, "Acumulación de derechos de agua en el Perú", *Anthropologica*, vol. 34, num. 37, 2026, pp. 13-32.

<sup>69</sup> ZAPATTA, Alex; MENA, Patricio, "Acumulación de agua y floricultura en un mosaico de territorios de riego: el caso Pisque, Ecuador", in ARROYO and BOELENS (eds.), *op. cit.*, 2013, pp. 167-184.

This production model is characterized by the displacement of irrigation associations and the formal and informal expropriation of the water rights necessary for production. Abrupt changes in land use, the degradation of farmland and the gradual loss of flora and fauna have been recorded as consequences of agribusiness, which seeks to homogenize fields for the sake of productivism labeled as protected agriculture<sup>70</sup>. This approach is responsible for the sedimentation of estuaries, the displacement of riverside communities and, with it, the sudden modification of the cultural landscape. In fact, the hoarding of water in a few hands is associated with the deeply inequitable concentration of land<sup>71</sup>.

## VI. COMMUNITY WATER RIGHTS AS AN EXPRESSION OF LEGAL PLURALISM

A current issue in the analysis of water rights and water justice is legal pluralism. Often, the water rights of indigenous peoples and historical irrigation communities are ignored by official regimes, due to the issuance of regulations that consider them illegal or because the registration mechanisms force them to move towards concessions formulated for the market. The application of these instruments usually favors the accumulation of water around the dominant users, whose uses are protected as priorities in the legislation.

Some studies analyze, from a cultural policy perspective, the different notions about the countryside and the asymmetrical power relations that are built between small farmers and multilateral agricultural companies for the use of water; thus, a symbolic language has been used that disregards traditional technology by

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<sup>70</sup> ROA, Tatiana, “A la orilla del río. La cultura anfibia del Bajo Sinú en Colombia: transformación, explotación y conflicto”, in ISCH, BOELENS and PEÑA (eds.), *op. cit.*, 2012, pp. 223-235.

<sup>71</sup> GAYBOR, *op. cit.*, 2011.

considering it *not very modern* and, therefore, responsible for the *inefficient* use of water<sup>72</sup>. On the other hand, irrigation systems managed by indigenous and peasant communities are usually formed based on the diversity of rules, rights and organizational forms. The development of this plural and complex normative repertoire is the result of local management, collective work and the construction of hydraulic infrastructure that responds to the socio-ecological requirements of its members<sup>73</sup>.

From another perspective, it is assumed that community water rights are often inconvenient for official regimes since they are incompatible with the water market model<sup>74</sup>. Therefore, their eventual inclusion raises problems with recognition policies and with the system of assigning concessions oriented towards economically profitable uses<sup>75</sup>. This panorama reveals that tensions around the recognition of community uses lead to socio-political conflicts of varying intensity. This analysis matrix has been used to document cases in the United States, Chile, Ecuador, Nepal, Indonesia, India and South Africa<sup>76</sup>.

Disputes associated with official water legislation are also a recurring theme in the topic of water justice since it involves authorities and water users. In this area, the application of positive law

<sup>72</sup> VERA, Juana, “La seguridad hídrica y los procesos de acumulación de los derechos de uso del agua en los Andes: una cuestión de política cultural”, in BOELENS, CREMERS and ZWARTEVEEN (eds.), *op. cit.*, 2011, pp. 435-452.

<sup>73</sup> BOELENS, *op. cit.*, 2009.

<sup>74</sup> MACPHERSON, Elizabeth, *Indigenous Water Rights in Law and Regulation. Lessons from Comparative Experience*, Cambridge, Cambridge University Press, 2019.

<sup>75</sup> ROTH, Dik; BOELENS, Rutgerd; ZWARTEVEEN, Margreet (eds.), *Liquid Relations: Contested Water Rights and Legal Complexity*, London, Rutgers University Press, 2005.

<sup>76</sup> BOELENS, Rutgerd; GETCHES, David; GUEVARA, Armando (eds.), *Agua y Derecho: Políticas hídricas, derechos consuetudinarios e identidades locales*, Lima, IEP, 2006.

processed by the bureaucratic apparatus regularly confronts community normative systems, composed of historically accumulated rules, agreed upon and constructed ‘from below’<sup>77</sup>. Under this hypothesis, studies have been developed in the Andean region that address the policies of recognition of water rights and the confrontation with the official legal regime<sup>78</sup>, which have resulted in peasant-indigenous mobilizations<sup>79</sup>.

The limitation of the historical uses of indigenous communities has been the subject of study in the south of the United States, essentially due to the colonizing expansion that relegated the inhabitants to reservations. Therefore, the people resented the application of the segregationist policy that modified the organization of irrigators that converted the collective production units into sections of individual irrigation<sup>80</sup>. On the other hand, the irrigation communities formed during the Viceroyalty of New Spain and the tensions between the operators of the agro-food market

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<sup>77</sup> JACOBO-MARÍN, *op. cit.*, 2021, pp. 261-294.

<sup>78</sup> GUEVARA, Armando, “Water Rights and Conflicts in an Inter-Andean Watershed: The Achamayo River Valley, Junín, Perú”, in Rutgerd BOELENS, David GETCHES and Armando GUEVARA (eds.), *Out of the Mainstream. Water Rights, Politics and Identity*, London, Routledge, 2011, pp. 183-196.

<sup>79</sup> BOELENS, Rutgerd; BUSTAMANTE, Rocio; Vos, Hugo, “Legal Pluralism and the Politics of Inclusion: Recognition and Contestation of Local Water Rights in the Andes”, in Barbara VAN KOPPEN, Mark GIORDANO and John BUTTERWORTH (eds.), *Community-Based Water Law and Water Resource Management Reform in Developing Countries*, Wallingford, CABI, 2007, pp. 96-113.

<sup>80</sup> GETCHES, David, “Defending Indigenous Water Rights with the Laws of a Dominant Culture: The Case of the United States”, in Dik ROTH, Rutgerd BOELENS and Margreet ZWARTEVEEN (eds.), *Liquid Relations: Contested Water Rights and Legal Complexity*, London, Rutgers University Press, 2005, pp. 44-65.

and the associations organized in irrigation systems<sup>81</sup>, fundamentally in Colorado<sup>82</sup> and New Mexico<sup>83</sup>, have been studied.

The tendency to commercialize natural goods for common use has also been tried, with the aim of reducing them to private property rights using mercantilist regulatory mechanisms. Of course, the Chilean water model offers an illustrative example, since the titles are granted through an administrative act that incorporates the use, enjoyment and disposal into the patrimony of its holder in accordance with the Water Code. The notion of *individual ownership* of water, separate from the land, allows the concessionaire to alienate, mortgage or lease his right, so that a market for water rights has developed<sup>84</sup>.

With the promulgation of the Political Constitution of 1980 and the publication of the Water Code in 1981, substantial modifications were introduced into Chilean water law. It is considered the most perfected neoliberal model for the allocation of concessions in Latin America. This scheme is identified through the aphorism: ‘the market is trusted as the final allocation mechanism’<sup>85</sup>. In any case, the water rights of indigenous peoples are regulated by Law 19253 –known as the *Ley Indígena*– this ordinance

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<sup>81</sup> HICKS, Gregory, “Acequias of the Southwestern United States in Tension with State Water Laws”, in BOELENS, GETCHES and GUEVARA (eds.), *op. cit.*, 2010, pp. 223-234.

<sup>82</sup> HICKS, Gregory; PEÑA, Devon, “Justicia hídrica: el caso de las acequias en la cuenca del río Culebra, Colorado, Estados Unidos”, in ISCH, BOELENS and PEÑA (eds.), *op. cit.*, 2012, pp. 107-134.

<sup>83</sup> HICKS, Gregory; PEÑA, Devon, “Normas conflictivas en la lucha por una gobernanza comunitaria en las acequias de la cuenca del Alto Río Grande, en Estados Unidos”, in BOELENS, CREMERS and ZWARTEVEEN (eds.), *op. cit.*, 2011, pp. 343-359.

<sup>84</sup> LARRAÍN, Sara, “El agua en Chile: entre los derechos humanos y las reglas del mercado”, *Polis. Revista Latinoamericana*, vol. 5, num. 14, 2006, pp. 1-20.

<sup>85</sup> JACOBO-MARÍN, *op. cit.*, 2021, pp. 261-294.

establishes that the uses on lands of indigenous peoples cannot be alienated for 25 years, counting from the day of their registration, which is considered the only exception to the principle of free transfer. However, the community rights of these populations remain marginal<sup>86</sup>. From a different perspective, arguments have been made about the benefits of the model of water rights assigned by the market, see, for example, the work of Olen Matthews<sup>87</sup>.

Other research has focused on large-scale mining and the concomitant impacts on indigenous peoples and peasant communities<sup>88</sup>. Also illustrative are the works that address local water rights, community risks in proximity, and the expansion of large-scale mining in the Andes, particularly in Bolivia and Peru<sup>89</sup>. Thus, the problems associated with the control of water resources become more challenging when legislators, public policy makers, and dominant power groups try to contain or manage them in multicultural societies, as has been analyzed in some studies on Latin America and the southern United States<sup>90</sup>.

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<sup>86</sup> CASTRO, Milka; QUIROZ, Loreto, “La crisis del agua en Chile: el futuro de Chile requiere una nueva política de agua”, in BOELENS, CREMERS and ZWARTEVEEN (eds.), *op. cit.*, 2011, pp. 225-240.

<sup>87</sup> MATTHEWS, Olen, “Fundamental questions about water rights and market reallocation”, *Water Resources Research*, num. 40, 2004, pp. 1-8.

<sup>88</sup> SANTACRUZ DE LEÓN, Germán, “Despojo y contaminación asociados con la minería en México. Explotaciones mineras en la Sierra Madre de Chiapas”, in YACOB, DUARTE and BOELENS (eds.), *op. cit.*, 2015, pp. 125-140.

<sup>89</sup> PERREAU, *op. cit.*, 2014.

<sup>90</sup> BOELENS, Rutgerd; GETCHES, David; GUEVARA, Armando (eds.), *Agua y Derecho: Políticas hídricas, derechos consuetudinarios e identidades locales*, Lima, IEP, 2006.

## VII. CONCLUSIONS

According to the hypothesis and central argument of this work, it is concluded that the studies carried out around the matrix of water justice have been fundamentally oriented towards persistent inequalities and processes of water dispossession, through the analysis of the capitalist production model. In fact, a critical approach to community water rights allows us to explain the context of collective water use in the face of the parameters of the neoliberal economy and the axioms imposed by the extractive model.

From the theoretical perspective analyzed, it is argued that water is a good disputed by powerful economic sectors, which manage to position their interests and obtain prerogatives to promote a certain type of urban planning, the development of industrial hubs or the creation of extractive projects. These mechanisms foster water injustices, but the empirical record shows that they are tolerated and encouraged by the State. As a consequence, the transfer of water between different territories, uses and users is usually promoted through projects articulated from dispossession, so that dams, aqueducts, canals and deep wells are shown as works endorsed by the state apparatus.

Finally, according to the literature review carried out, the studies focus, fundamentally, on four general categories: 1) those that address the transfer of water to cities through transfers, which has implied the concentration of water in these spaces by powerful users for the sake of hegemonic production of capitalist order; 2) those that document the water dispossession of indigenous communities and agrarian nuclei in favor of formal and informal, national and transnational water markets; 3) those that reflect on the economic expansion of water uses and the snatching away of the capacities and technologies to manage community irrigation and local supply systems; and, 4) those that analyze active or potential conflicts around mining, agribusiness, processing industries, bottling plants and water distribution companies in cities.

