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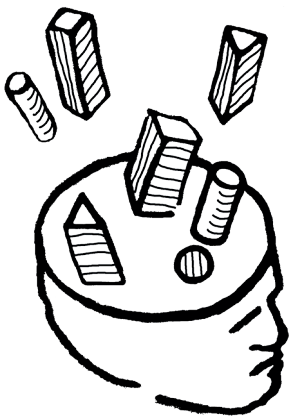

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Studi e ricerche

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Comparative Latin American Constitutionalism

edited by
Silvia Bagni
Serena Baldin

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Introduction

SILVIA BAGNI* AND SERENA BALDIN**

This book emerged out of a shared realisation. The editors, Silvia Bagni and Serena Baldin, found that while a vast legal literature on constitutionalism in Latin America exists in Europe, no single volume has provided an overview of the main institutional models of constitutional law in the region. Some institutions have received extensive consideration within comparative law (one thinks of the concept of *amparo* [protection] in constitutional justice studies, for example, or more recently the Andean notion of *sumak kawsay/ buen vivir* [good living]). There is also an extensive, if fragmented, literature on human and constitutional rights. In our view, however, no general synthesis of the region's legal models in terms of their origin, circulation and hybridisation previously existed. So, we have decided to present these models according to the traditional divisions of constitutional law[1]: legal systems

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1 The categories of constitutional law change in legal doctrine from country to country. A literal translation could present problems of functional correspondence. However, as an editorial choice was necessary, we have decided to use the English translation of the Italian categories, referring the reader, where needed, to the methodological premises of each chapter.

and forms of state; territorial organization; forms of government; constitutional justice. Despite the limited nature of the cases selected for each topic, this volume seeks to address the above gaps.

Because of the scientific rigour of its content and the methodological approach adopted, we hope this volume will be of interest both to fellow comparatists and, more in general, to all scholars who devote their studies to Latin American political and legal issues. On the other hand, we have adopted a streamlined format and chose to avoid cumbersome footnotes, including instead a final basic bibliography for each chapter. We hope this makes the volume a suitable complement to the traditional textbooks used by university students in courses on Comparative Public and Constitutional Law, but also on non-legal subjects.

This volume focuses on classic public law issues to gain insight into recent constitutional innovations. Moreover, it is the result of a basic and precise methodological choice. In fact, we decided to go beyond the limits of simply studying foreign law to fully embrace a comparative approach. An obvious result is that we observe Latin American legal facts – that is, forms and types of state, presidentialism and constitutional justice – not merely as national events. Rather, we see them as institutions that need to be contextualised in a broader way. That is, we need to consider the relationships between two or more systems in order to identify trends.

It is not by chance that the first chapter by Lucio Pegoraro, entitled "Comparisons with (and within) Latin America. A Critical Introduction", focuses on comparative methodology, highlighting what unites and divides countries in the region. One question Pegoraro seeks to answer is whether Latin America as a whole represents a model. He also asks if some of the institutional choices made there might be exportable elsewhere, for example, plurinationalism resulting from the integration of indigenous cultures at the constitutional level.

The contributions in the section entitled "Legal Systems and Forms of State" are in perfect continuity with the above. In "*Latinoamérica*: Law, System and Tradition of a *Patria Grande*", Sabrina Lanni traces how the Latin American legal system took shape, beginning with the Romanisation of indigenous peoples' law. In focusing on Latin America, the author asserts that we can, indeed, talk about the law of a "*Patria Grande*" ('Great Homeland'). That is, one can understand and interpret the social multiplicities and different identities the region represents as a homeland. Above all, there have been interesting innovations in recent decades in the region, especially at the constitutional level. Silvia Bagni illustrates this in

her chapter on "Forms of State in Latin America". Applying this analytical category to the legal systems in the region may entail using traditional classification schemes based on Eurocentric or North American criteria. However, by moving away from this approach, Bagni enriches the classification of forms of state with new models such as the "Caring state". She also specifies other categories such as the anti-communist autocracy or the "Cuban-style" socialist state.

Even in terms of the territorial organization of the state, the region's profile reflects new developments that call established doctrine into question. It also urges paying more attention to systematisation and in-depth diachronic studies which can be useful in revealing the historical roots of decentralisation as well as current developments. The authors of the two contributions included in the "Territorial Organization" section take up such challenges. In "Unitary State and Federal State in Latin America: Two Evolving Categories", Giorgia Pavani concretely highlights the interactive and sometimes chaotic phenomena shaping the relationships that exist among various levels of government. In this context, forms of decentralisation can set off centrifugal tendencies in unitary states while centripetal dynamics, vice versa, may occur in federal ones. In "Decentralisation, Pluralism, Indigenous Communities and Popular Power in Latin America between Unitary States and Federal States", Amilcare D'Andrea reflects on innovative forms of organisation linked to popular power, decentralisation and pluralism in local and/or indigenous communities' issues which are presenting legal scholars with more numerous and frequent contradictions.

The "Forms of Government" section provides readers interested in Latin American political issues with food for thought that may open up of new lines of research. In his chapter on "The Other Side of Latin American Presidentialism: Costa Rica and Uruguay", Edmondo Mostacci begins by considering the historical reasons which led to the spread of presidential forms of government in Latin America. He then focuses on the constitutional rules defining the relations between the legislative and executive branches. A close analysis of constitutional provisions helps clarify the reasons why Costa Rica and, albeit with some additional vicissitudes, Uruguay, represent counter examples when compared to other, generally less happy, presidential experiences in Latin America. In the chapter entitled "The Presidential Form of Government in Argentina and Chile", Francesco Duranti first analyses the established relationships between the President and Parliament in the two countries. He then highlights the unsuccessful attempts which have been made to mitigate the excessive dominance of their heads of state.

He also considers the management of states of emergency. The latter issue, while a topical subject given the current pandemic, has long been a common event in Latin America.

The concluding section looks at "Constitutional Justice". The first contribution by Serena Baldin and Enrico Buono considers "The Pantocratic Model of Constitutional Justice in Ecuador and Bolivia". This chapter highlights the main similarities and differences between the Constitutional Courts in each country in terms of their functions and guarantees of judicial independence. In a broader perspective, this research also brings into focus the characteristics of the so-called pantocratic model of constitutional justice in which public authority activity is comprehensively subject to some type of constitutional control. The last chapter by Anna Ciammariconi concerns "Constitutional Justice in Argentina and Brazil". Here, the author diachronically and synchronically analyses the main features of the two countries or systems in terms of how their Supreme Courts are configured. Despite drawing similar inspiration from the American model, and thus having widespread judicial review, the two countries have developed differently in relation to this original ideal.

In conclusion, the hope is that this volume will stimulate further research on Latin America, and also on other systems and institutions within this region. This will serve to enrich the scholars' knowledge of the legal specificities of the sub-continent, which needs to be understood as more than just a peripheral appendage of the Western world. As comparative scholars ourselves, we hope this volume will inspire our students to begin to cultivate freedom of thought alongside good reasoning and empathy. This will help them go beyond the pre-set boundaries and limited perceptions that are sometimes part of our cultural baggage and the environment that reinforces it. For this reason, the title of this book recalls a famous educational journey. It is the one that led *Comandante* Che Guevara to discover the soul of a continent and his own revolutionary one, as he aspired to achieve that sense of *fraternidad* that we should each cultivate towards all our fellow human beings.

The Methodological Approach

Chapter 1
Comparison with (and within) Latin America. A Critical Introduction

LUCIO PEGORARO*

Summary: 1. Comparisons. – 2. Comparing Latin America. – 3. A colonialist legal historiography versus "de-colonial" theories. – 4. The "unitary" comparative categories of Latin America. – 5. Comparisons in Latin America. – 6. Conclusions: Latin America as a family, a form of state and a model.

1. Comparisons

The existence of an element of *comparability* is a pre-condition to making comparisons. Given that, a comparison in a juridical context generally aims to observe similarities and differences between parts of or entire legal systems. This approach, then, can be applied in terms of law as well as in other sciences, such as political science.

Macro-comparisons are normally distinguished from micro-comparisons. Macro-comparisons aim at grouping homologous laws/systems into

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classes distinguished by similarities within groups and differences between them. On the other hand, micro-comparisons have the same aim, but focus on a particular segment of the systems being compared (for example, a particular source of law, a constitutional justice institution, a contract governed by private law, a state body and the like).

When making comparisons, micro-approaches normally evolve out of macro-comparative studies which have already clarified the most determinative elements, which then bind different systems together and allow them to be grouped into the same class. Macro-studies also consider the elements that divide systems in terms of their prevailing structural and functional differences (for example, with respect to ideology, economics, social factors and the like or perceptions of law and its various components). Macro-comparisons result in groupings of legal families or "legal systems" (prevalent among civil law scholars), forms of state (prevalent among public law scholars), or "legal traditions" (used by both). A micro-comparison is usually conditioned by the class to which the compared element belongs or within which it may make more sense (often) to place it.

Before doing a macro-comparison, one must precisely identify – as far as possible – the object to be comparatively studied. Another problem concerns the way to approach a study or choice of method. To consider Latin America as an object of study, it is necessary to consider a) what the term "Latin America" means and b) how we can expand our knowledge of it. The first question involves agreeing on the meaning of the term and stipulating it in a way that it can subsequently be used. The second question concerns how to approach a topic. An approach can be inductive or deductive, historical or strictly juridical. It can also centre on constitutional or civil institutions and the like. Above all, it may be based on a Western view of the law, or, on the contrary, turn things around and (try to) adopt the analytic perspective of indigenous peoples (or at least take their perspective into consideration).

2. Comparing Latin America

Many words imply membership and mask ideologies. We should state upfront that "Latin America" is a word linked to colonisation. As such, it effectively erases what existed before the colonial conquest from the historical lexicon. Like the term "New World", it implies the existence of an older and hitherto unique world, a true and important one, one which dominates the seas and lands as well as language.

However, it is also true that words should be used for what they mean according to current usage. After more than five centuries of colonisation, a term like "Latin America", although worthy of critical consideration, has been consolidated. It is a term everyone, more or less, similarly understands (barring the exceptions noted below). Its meaning is accepted despite the fact that many on the other side of the ocean are aware of alternative native formulations which have been almost erased over time. It is also true that the "Westernisation" of the Latin American continent has become consolidated as well over time. In the wake of the genocide of the region's indigenous peoples, colonial law became standardised and aligned with the conquerors' models. Only in recent decades has there been a palingenesis, or effort to rewrite history, adapting it (at least partly) to dormant indigenous traditions.

Still, there is no single criterion or universally accepted conventional way of defining the term "Latin America". Some authors consider it as that part of the Western Hemisphere that extends to the south of the United States, where the official languages are Spanish, French and Portuguese. Others consider Latin America a cultural and geographic region comprised of eighteen Spanish-speaking countries plus Brazil, or generally that part of the Americas colonised by Spain and Portugal. Many authors see the term "Latin America" as having the same meaning as the term "Iberoamerica". The prefix in the latter refers, of course, to the Iberian Peninsula, an area which includes Spain and Portugal (as well as Andorra and Gibraltar, a part of the UK where English is the official language) (see Lanni in this volume, chapter 2, § 5).

It is useful to ask whether the term "Latin America" is used the same way in a legal context as it is in Geography or whether other sciences offer distinct alternative contributions or options to this end. The extent to which geographic and juridical-cultural delimitations of the region vary are quite evident in some instances. For example, Latin America is sometimes identified as comprised of Central America (except Belize) and part of the Caribbean and South America (except Suriname). This definition overlooks the fact that Mexico geographically belongs to North America, along with Canada and the United States, and that the Caribbean is not only "Latin". In fact, the adjective "Latin" is borrowed from the cultural constructs of disciplines other than strictly Geography (Baldin 2019).

However, the rather large, semantic, sometimes very imprecise container we call "Latin America" at least allows us to differentiate the region from that part of America colonised by the British and the Dutch. However, there are some internal faults. The first and immediately evident one concerns the

distinction between Hispanic America and Lusophone America (Brazil). As just mentioned, the former French colonies are, moreover, commonly not integrated as well.

Some research emphasises the peculiarities of Central America and/or the Caribbean compared to the remaining countries in the "container". However, Lusophone America, part of Central America and the Caribbean presumably still share some common factors with the rest of Latin America. Alternatively, other features seem to suggest sub-partitions do exist. In the case of the Caribbean, in particular, some elements common only to the islands may prevail over other compelling factors, e.g., distinct periods of colonisation and the affirmation of different legal cultures in the countries conquered by England, France, Holland and Spain, respectively.

The terminology we have mentioned so far is that of Western legal (and other) historiography. To this end, definitional problems arise if one takes an "internal" perspective, as is pointed out by those who make indigenous claims and reject colonial connotations and the cancellation of the region's pre-Columbian cultural heritage. These perspectives are summed up in the Kuna expression *Abya Yala*, which means "land in bloom", "land in its full maturity" or "the mature land" as opposed to the term "New World" and "America" as used after the Spanish conquest. The Kuna notion of *Abya Yala* may mainly refer to their ancestral lands, located in present-day Panama and Colombia. However, some think that it also alludes to the entire southern area of the known continent. Clearly, use of the term *Abya Yala* has ideological connotations and implications which presuppose support for indigenous peoples' rights (López Hernández 2004).

3. A colonialist legal historiography versus "de-colonial" theories

Given the region's history of conquest and assimilation, the legal literature has yet to specifically elaborate or clarify a Latin American family, form of state or tradition linked to the laws developed in the region. None of the main proposed classifications of legal families, an area of study that falls under the much vaster topic of civil law, see Latin American as comprising a "family". Civil law scholars have sometimes noted the peculiar elements and original adaptations of the European codified model in the region and have undertaken extensive general classifications to this end (e.g., Losano 2000). Like Lanni (in this volume), some even come to think of Latin America as a "legal system". Other

classifications (Mattei 1997) have found that it is precisely the Latin American subcontinent which provides important explanatory elements regarding the family concept in political law (which combines law and politics).

In turn, constitutional doctrine considers only European history when writing about "constitutional cycles" rather than addressing the colonies as receptors (which existed in Latin America and much elsewhere in the world). A state form that specifically characterises, or has characterised, Latin America is hardly ever mentioned, not even in the context of specific time periods or partial geographic areas (barring the exception we will consider shortly below). Despite claims to the contrary, there has been an overall refusal to consider Latin American pluralism and the *mestizaje* (hybrid) nature of its traditions, which distinguish it from other geographic-cultural-juridical areas. Instead, there has been a preference for measuring its systems or orders in relation to Western values.

Above all, neo-constitutionalism has inflicted a *coup de grace* on any claims of identity and developing non-imperialistic historiographies of Latin America. This tendency imposes itself on most doctrine in Latin America. In turn, this has tended to block any element of originality for the sake of taking an uncritical, anti-historical view of rights and dignity, which are seen as being (unique) globally unifying elements. However, this official view has also been vigorously opposed, especially since the very end of the last century. A "de-colonial" interpretation of Latin America has been nurtured by claims of identity and the recovery of juridical and cultural traditions previously dormant for centuries. These traditions have been reawakened in recent decades at the social and political level and have translated into the development of "*nuevo constitucionalismo*" (new constitutionalism).

As written up by Garay Montañez (2020), for example, this perspective derives from taking a critical view of the power imposed by Western epistemology. It further notes the exclusion of indigenous peoples' philosophies and the views of the region's contemporary multi-ethnic populations, shaped by conquest and colonisation processes. From this perspective, one has to either abandon or, alternatively, integrate a constitutional theory based on categories such as sovereignty, constituent power, state, the individual, equality, freedom, democracy and constitutions. However, these concepts also all derive from European experiences marked by "an anthropocentrism based on an exclusionary protagonist: the European man or male, who is Christian, adult, white, heterosexual, educated and property-owing". His "humanity" is based on dominating and undervaluing others as well as expelling them from the social contract. This protag-

onist, as Garay Montañez further states, becomes consolidated in the colonial context with the elaboration of a constitutional theory based on the colonial settler. The settler, in turn, perceives himself as a superior human being and the owner of political, economic and epistemic power. He is the author and subject of this kind of constitutional theory.

"De-colonial" thought has generated critical debate aimed at (re)founding a type of constitutionalism which is properly Latin American and, above all, may integrate indigenous values. At the same time, it does not deny Western contributions which have proved capable of humanising modern society.

On this basis, both Latin American and European doctrines have become reflections and revisions of classic Eurocentric schemes. Interest has centred on seeing systems in dialogue with each other and which introduce, or at least try to introduce, a synthesis between Western and indigenous law by constitutional, legislative and/or jurisprudential means. The methodological obstacles posed by a rigorous legal method based on European law have been thus overcome. Even among comparative constitutional scholars, there is increased interest in how this synthesis of Western and indigenous law is shaping some specific systems which then turn it into new constitutions, constitutional revisions, legislation and jurisprudence. The comparative potential of interculturalism in overcoming multiculturalism is noteworthy. Indeed, new state forms are being identified as emerging from such experiences (for example, the Caring state discussed by Bagni in chapter 3 of this volume).

4. The "unitary" comparative categories of Latin America

Studying Latin America as a unitary object within legal-comparative research implies that something compelling and important binds the region's different systems together – above and beyond its common geographic setting. These are what Constantinesco (1996) would call determining elements.

Geography does contribute to having shared institutions, sources, rights and the like. These elements are all relevant when identifying the nature of legal systems and circulate more easily among geographically connected regions. However, this is not always a given. Should one study Israel along with Syria, Jordan or Iraq solely because they are in the same geographic region? Or should one consider Australia and New Zealand in legal studies focusing on the East because they are not part of the European continent and far from United States? Furthermore, research on America south of the US

traditionally leaves out Belize and Suriname since their respective political links to the UK and Holland have prevailed over their geographic location.

If you want to look for unifying or exclusive elements (presuming they exist at all), and estimate the important ones for distinguishing systems, it may be better to rely on traditions, culture(s), legal mentality, history, ideas about power and its legitimation and the like, as well as the way these factors translate into positive law institutions. Identifying such elements may serve two purposes. It can be used to a) deny a unitary class exists, or instead b) make micro-comparisons on differences within a unitary class.

The traditional narrative on Latin American law, barring the "de-colonial" contributions mentioned above, presents us with a varied picture. At the same time, it is also marked by some constants.

In terms of private law, codification has evolved from a single strain, with common characteristics emerging throughout the region. However, these common sources have been critically received and not simply duplicated in the region, often resulting in differences from state to state (especially between Brazil and Haiti and other countries). The region's peculiarities in terms of public law and constitutional doctrine have been marked by both the legacies of the constitution of Cádiz and Bolivarianism, with their particular ideas about political representation, and the widespread adoption of presidential forms of government. More recently, there have also been more or less marked movements towards parliamentarism. The same can be seen in the system of constitutional guarantees, with special reference to the ideas of *amparo*, *mandado de segurança* (writ of *mandamus*), popular action and other similar institutions. More in general, and from an historical point of view, the same approach concerns *caudillismo* (the excessive personalisation of leadership), the personalisation of politics, populism and the role of parties.

Factors common to public and private law include considering how sources are perceived and their relationship to political categories. Such factors may suggest placing Latin America within a macro-system framework in transition from "the rule of political law" to "the rule of professional law". Concurrently, other common factors to be accounted for include: the role of judges and the justice system, especially in terms of constitutional justice; marginalisation; the more recent partial recognition of customary and indigenous law (the return of the "rule of traditional law"); doctrine and its relationship with dynamic formants; and the harmonisation of law, with particular reference to the role of the Inter-American Court of Human Rights.

Beyond the law in a strict sense, Latin America presents an economic – as well as political – system that has been largely levelled by the Washington

consensus (apart from the case of Cuba) while there has been some limited emancipation in recent decades (e.g., the case of Venezuela). Still, all this does not tell us anything about Latin America as a family or form of state of itself or as distinct from a more comprehensive category. Depending upon the perspective, Latin America, like many other orders and systems, can be seen as belonging to the Western tradition and the families of civil or political law. As a form of state, no one currently doubts that Latin American countries belong to the category of liberal democracies (this was not so in the past when emergency powers were constantly and almost ubiquitously used on the continent).

Bernd Marquardt (2016) denies that Latin American is unique with regard to some of the elements mentioned above. For example, *caudillismo* may be found in Europe and other regions as well as in Latin America. Above all, he rejects the idea that Latin America represents something "less" than Europe or a mere (and bad) receiver of institutions forged on the old continent. He discounts this as a view stemming from the influence and preconceptions of European and North American doctrine. Moreover, he notes one can identify some characteristics in Latin America that might serve to further underline the "crypto-typical" elements commonly found there. With regard to the doctrinal formant, he particularly remarks that "in terms of social psychology, there is relatively low self-esteem, which could be called *victimhood*...".

Indeed, legal doctrine in the region shows a strong propensity to borrow from Europe and the United States, often uncritically imitating their schemes. This has meant renouncing any emphasis on the continent's important, original, historical peculiarities forged over time (for example, in terms of representation theories, social rights, the concept of *amparo* and the like). Given the region's immense culture, it is entirely capable of highlighting such aspects (and should continue to do so given the propositions of *nuevo constitucionalismo*). Doing this would have repercussions on the jurisprudential formant (and in part on the legislative one). These have rested on ideas and solutions imported from European courts (and from European and US doctrine), without bothering too much about the different contexts of insertion. The colonial soul has thus continued to survive over the centuries.

Certainly, however, "low self-esteem" cannot be a sufficient criterion to designate a class while, as a juridical-cultural category, Latin America is worthy of separate analysis. One factor to be possibly considered is the region's *mestizaje* nature, or the pluralism of its cultures, peoples, languages, different and distinct colonial influences, developments and even ethnicities. Bolivia

has put plurinationality at the centre of its constitution and it is precisely this idea which could represent the true *Grundnorm* (basic law) for the whole of Latin America. It might take the place of the notions of individual freedom, human rights and human dignity, which are capable of representing only a Western, European, colonial or post-colonial component.

It is true that other regions of the world, such as India or Southern Africa, also express similar *Grundnormen*. However, what makes Latin America different (apart from many other things) is its centuries-old mixture of distinct elements (which have continued up to the present despite the overwhelming predominance of Western-related culture). The region has had a history marked by expressing its own political and cultural strains and, fundamentally and above all, a "physical" mixture of diverse elements not found in the aforementioned parts of the world.

On a more strictly juridical level, and despite the exceptions routinely noted in the social sciences, Latin American law has its own characteristics. Of course, the Western archetype remains strongly at its base in terms of codified law, servile imitations of US public law and an adherence to the law of rights and globalisation. Yet, the region's diverse soul and sensitivity to pluralism has also managed to introduce adaptive and novel elements. These may not always occur simultaneously, but they do entail common structures and functions. In short, Latin America can be safely analysed as an entire class, or at least as a sub-class, of a legal family and, perhaps much more cautiously, a form of state.

5. Comparisons within Latin America

In the context of a "*tertium comparationis*" represented by a juridical-cultural area, useful comparison can be made only if a researcher already has a primordial knowledge of the system as a whole. They must also be aware of the differences and particularities which exist and characterise each order or institution in order to be able to choose what to diachronically and synchronically compare. As Alessandro Somma (2019) writes, "You finally end up almost naturally finding points of divergence, rather than reasons for convergence, when you combine studying a legal system with evaluating its place in time and space".

Each system in Latin America presents its own peculiarities, whether it is in terms of decentralisation, forms of government, constitutional justice, sources of law, state organisation, constitutional revision, transitional justice

or constitutional guarantees (especially individual constitutional complaint, a pillar of Latin American constitutionalism). This is the case despite the widespread imitation of European and US legal models which are perhaps only partly adaptable to the Latin American situation.

For example, in the area of federalism, the US system has been imitated in terms of the division of competencies, ways of resolving conflicts between centre and the periphery, the supremacy clause and even federal district autonomy (on which Mexico back-tracked a few years ago). However, regional factors, rather than normative differences relative to the ideal model, have prevented achieving results equal to the US. These regional factors include a series of pre- or meta-legal features linked to institutional culture, economic inequalities, forms for organising power which significantly deviate from the US model and the unifying role of political parties, which up until now have shown little turnover. However, this does not preclude studying the differences between Mexico, Argentina and Brazil, not to mention Venezuela, which has gradually abandoned a federal state type, retaining it in name only. There are also differences which are felt, for example, in terms of periphery dynamics, the role of municipalities (which is emphasised in Brazil), the presence or absence of indigenous communities and territories and so-called fiscal federalism and the like (see Pavani and D'Andrea in this volume, chapters 4 and 5).

Forms of government in the region are generally classified as presidential, with the sole exception of countries not affected by Iberian colonisation. But, even in this case, the imported US model has been correctively adjusted over a long initial phase in order to bolster executive power. More recently, elements of "parliamentarisation" have been introduced. In this context, the study of forms of government makes it possible to highlight the differences between various legal systems and outline some resulting sub-classifications. There have been sporadic departures from a presidential model (e.g., Uruguay has had a directorial model during some historical periods). In some instances, the "Government", as an institutional body, has been established as distinctly independent from the President. No-confidence issues linked to individual ministers or leaders and the strengthening of parliamentary versus presidentially controlled institutions have also arisen (e.g., as evident in the establishing of double mandates, legislation by decree or the use of emergency measures and the like as discussed by Mostacci and Duranti in this volume, chapters 6 and 7).

Another element regarding the distinct development of the region's peculiar model concerns constitutional justice. Here, similarities and differences can once again be appreciated both statically and dynamically. Their origins, in

terms of constitutional justice, are marked mainly by the widespread importing of systems from the US within which judges can prevent unconstitutional laws. More recently, and following a worldwide trend, there has been a move towards concentrating constitutional justice, even though profound differences between legal orders still exist (see Baldin and Buono, and Ciammariconi in this volume, chapters 8 and 9). There are further examples which might also be added in terms of the institutions noted above.

6. Conclusions: Latin America as a family, a form of state and a model

We have said so far that Latin America, although endowed with its own characteristics compared to other legal systems, is generally not considered a legal family in its own right. Only recently has the hypothesis been put forward that the region as a whole has reflected a "form of anti-communist state" during the post-WWII period. Since the new millennium, some Latin American countries have also reflected the form of a "Caring state" (in common with other regions of the world) (see, for example, Bagni in this volume, chapter 3, especially § 4 and 6). Is it therefore possible to think about a shared notion of the "Latin American model"? The term "model", as commonly used, evokes the idea of classifying and synthesising complexity using logical categories. In other words, it is a term that is ostensibly and closely linked to methodological research problems, including those which exist within comparative legal research. The use of the term "model" is to be understood in the sense of it being a synthetic representation of political-constitutional realities and phenomena. Additionally, a model is seen as a kind of "exemplary form" worthy of imitation.

Tusseau (2009) writes that, "[t]he use of models based on a constitutional justice example allows, on one hand, establishing coherence within each national legal system of constitutional justice. On the other, it also allows ordering different comparative elements in a rational way in order to facilitate the use of data. Rather than having to consider a set of concrete characteristics for each system (e.g., Spanish, Italian or Czech constitutional justice, etc.), it makes it possible to focus rather on the ideas implied by the models (e.g., the European model of constitutional justice). From this perspective, building models involves using simplifications for educational purposes that are linked to the various characteristics of the examined subjects. In doing

this, care should be taken not to underplay or exaggerate these characteristics, which would make the models unable to account for real configurations of positive law."

Tusseau continues on stating that, "Two major ways of conceiving models exist. In the first, models are induced based upon the empirical data they emulate. Alternatively, the second approach asserts that empirical data should not be considered on themselves, but in so far as they let us build preliminary models that bring order to the undifferentiated flow of phenomena. The closeness of a model's constituent elements has nothing automatic or natural about it. Rather, it is all elaborated by the author. Given the same finite set of legal institutions, there is an infinite number of ways to describe them in an equally exact way. This may result in models that vary greatly in their power or are even antagonistic." There are then, positive models – those that are normally referred to because they are considered worthy of importing – but also negative models, such as those offered by the Third *Reich* in Germany.

"Negative" factors, as identified by Marquardt (2016), seem to prevail overall in Latin America alongside others of a particularly cultural nature, and together these may hinder any affirmation of a global model. However, this does not preclude noting the important contributions the region has made to specific sectors of civil and constitutional law and the partial leadership it has offered with respect to different institutions. We only need to think of social rights, which were constitutionalised for the first time in the Mexican constitution of 1917. There are also the concepts of *amparo*, *habeas data* and, at the doctrinal level, the development of the science of *Derecho Procesal Constitucional* (Constitutional Procedural Law). The latter has been encouraged by the research of the great master, Héctor Fix-Zamudio (1993, 2002) in Mexico, and more recently by his disciples and many other scholars on the continent. Today, it is above all necessary to remember the constitutionalism of *buen vivir*. This notion has outlined important paths for harmonising Western values with those of other cultures that are being taken into consideration on the old continent (and North America) today, pushed by hunger and war.

Latin America has been considered for centuries as an example of economic and cultural homogenisation driven by the United States and Europe. Indeed, the region has been studied as such by constitutionalists and philosophers, believing their living room was the whole world. At the same time, Latin America has, on one hand, long been experimenting with original solutions while rediscovering and protecting its ancient roots. On the other, it has produced legal structures sometimes inconsistently aligned

with classic liberal-democratic models linked to conformist doctrines and inattentive to diversity. Because of this, Latin America may represent a model that encourages comparative legal scholars to pay close attention to their underlying theoretical assumptions. At the same time, the region also offers useful elements for considering the exportability of its constitutionalism to Western Europe and the North.

REFERENCES

Baldin S.
Il buen vivir *nel costituzionalismo andino*. *Profili comparativi*, Torino, 2019.

Constantinesco L.J.
Introduzione al diritto comparato, Torino, 1996.

Fix-Zamudio H.
Ensayos sobre el derecho de amparo, México, 1993.

Fix-Zamudio H
Introducción al derecho procesal constitucional, México, 2002.

Garay Montañez N.
Las concepciones no occidentales en el constitucionalismo latinoamericano: acerca de la categoría poder, in *Rev. gen. der. públ. comp.*, 2020.

López Hernández M.A.
Encuentros en los senderos de Abya Yala, Quito, 2004.

Losano M.
I grandi sistemi giuridici. Introduzione ai diritti europei ed extraeuropei, Roma-Bari, 2000.

Marquardt B.
Historia constitucional comparada de Iberoamérica. Las seis fases desde la revolución de 1810 hasta la transnacionalización del siglo XXI, Bogotá, 2016.

Mattei U.
Three Patterns of Law: Taxonomy and Change in the World's Legal Systems, in *Am. J. Comp. Law*, 5, 1997.

Somma A.
Introduzione al diritto comparato, II ed., Torino, 2019.

Tusseau G.
voce *Modelli*, in L. Pegoraro (a cura di), *Glossario di Diritto pubblico comparato*, Roma, 2009.

Legal Systems and Forms of State

Chapter 2
Latinoamérica: Law, System and Tradition of a *Patria Grande*

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Summary: 1. The Conquest and evangelising of the New World. – 2. Common legal foundations. – 3. The *ayllus* as a means of safeguarding indigenous tradition. – 4. Latin American law within the framework of contemporary legal systems. – 5. Latin America and the dream of a *Patria Grande*.

1. The conquest and evangelization of the New World

The ideological premise of evangelization of the New World was put in place through *Inter Caetera* papal bull of 1493. From the very beginning, a completely different legal situation from the mercantile imperialism of the 19th Century was promoted. In fact, the New World and Iberian territories were conceptually placed on the same level, giving rise to a single Kingdom rather than many colonies (Levene 1951; Barrientos Grandon 2004).

The idea of a single Kingdom finds its basis in the history of law. By the end of the 15th century, Roman law as *ars boni et equi* (i.e. the art of 'know-

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ing what is good and just' according to the famous and well-known definition of Celsus) had shaped the law of the Iberian territories. It was possible also thanks to the activity of rereading and refining the sources of Roman law made by medieval scholars and, last but not least, by those of the 'second scholastic' (like Domingo de Soto, Francisco de Vitoria and Francisco Suárez). Thus, according to the legal tradition in force in the Iberian area and transplanted in the New World territories, the development of the law in the dual sense of '*ius civile*' – '*ius gentium*' (in view of the distinction between 'positive law' and 'customary law thought to be held in common by all nations') was connatural to the political and ideological ideas of the Crown of Castile (Schipani 1999).

There is another factor that seems worthy of specific mention. Iberian law has been historically open to comparison with other people and to legal pluralism. It should not be forgotten that Iberian law has long been interwoven with legal system and religion of Muslims, Jews and Christians. It is how to say that legal pluralism was one of the endogenous consequences of the stratification of peoples and civilizations of the Iberian area. The legal system of the New World has benefited from this situation, at least from a formal point of view (Losano 2000).

The legal-historical bibliography lacks specific attention to the comparison between the legal experiences of the Old World and the New World. The reasons for this gap are both ethnological and anthropological. It is difficult to imagine a full legal pluralism where the natives of the New World were mostly considered "*servi natura*" (slaves by nature) or "*simpliciter*" (simple-minded) and "*tardi et hebetes*" (slow and dumb). The crucial point of the question should not be seen in the alleged inferiority, hidden in the word "*indio*". In the history of Latin-American law the mentioned word does not designate a dogmatic category based on inferiority (Lanni 2011).

To better understand the development of the Latin American legal system, it is helpful to consider that the Conquest of the New World took place through a bipolar model. Firstly, it led to the distinction between the legal order of Spanish people and the legal order of the natives, each with its own set of rules and authorities. Secondly, it determined a hierarchy that, under the aegis of the sacred religion ('*sagrada religión*'), placed the former above the latter, i.e. the Iberian Roman law above the law of the indigenous peoples.

The indigenous peoples of pre-Columbian America had their own legal traditions, which were surpassed by the Castilian and Portuguese conquerors. The latter had to invent special legislation to regulate the legal relations inside and outside the New World territories. The complex of "ordinances" on "new discoveries and populations", as issued several times and collected by the

Recopilación de las leyes de Indias (1580), goes beyond the simple objective of administering justice. More correctly, I believe it should be framed within the framework of the legitimacy of the justice done by the Iberian conquerors.

In this regard, one must keep in mind the historical and cultural context of the time, which was oriented by a deep religiosity and a universalistic legal vision. For these reasons, the legitimacy of possession and its regulation was founded not only on the success of the sword but also on that of the values. The otherness of one's rights and even before one's religion and society were the premise for cultural homologation (the so-called whitewashing of the New World). The analysis of historical sources of law confirms this. For example, we learn from the *Inter Caetera* papal bull that "the Spanish kings could occupy new lands provided that another Christian king did not already own them before the day of the birth of our Lord Jesus Christ recently passed, in which begins the present year 1493". It is like saying: the "Conquest" was legitimized against the indigenous peoples of the New World, in the same way that the "Reconquista" was previously legitimized against Muslims (Cassi 2014).

2. Common legal foundations

To fully understand the formation and character of the Latin American legal system, it is first necessary to reflect on the law applied to the New World territories after the Conquest.

Civil law in the New World was formed, on the one hand, on the revisiting of Castilian and Portuguese law, on the other hand, on a direct relationship with the Roman sources of law. The law of the territories of the Conquest can be said to originate from the "*Siete Partidas*", which are the Roman law rewritten and revised from 1256 onwards. It was joined by the "*Nueva Recopilación de las Leyes de Castilla*" of 1567, as another legal system that slowly became stronger (Schipani 1999).

Not least, the law of the territories of the Conquest also originates from the law conceived explicitly for that geographical area through the aforementioned *Recopilación de las leyes de Indias*. This legal source is very prominent because from it officially emerges the problem of the legal nature and legitimacy of the acquisition of the New World territories by the Crown of Castile and Aragon, as well as the problem of the legal nature of the "*indios*" (Lanni 2011).

With specific regard to the legal experiences of Lusitanian origin, in Brazil there were the collections of Portuguese royal acts were: firstly, the

Ordenações Alfonsinas (1446); then, the *Ordenações Manuelinas* (1513) that, while preserving the structure of the previous legal work, established that in the event of a dispute *communis opinio* should be followed; finally, the *Ordenações Filipinas* (1603 supplemented, at least until the Pombaline reform and the consequent reform of the *Lei da Boa Razão*, by the opinions of Accursius and Baldo).

To fully understand the importance of historical sources of law, it is important to remember that in Brazil, the Portuguese legal system remained in force with the Declaration of Independence (1823); in fact, it was only replaced by the entry into force of the *Código Beviláqua* (1916). Moreover, the reworking of the legal system previously proposed by Augusto Teixeira de Freitas, through its *Consolidação das Leis Civis* (1858), had aroused a certain optimism.

In 1810 the struggles for Independence began. From 1820 to 1830, the dissolution of Iberian control in the New World took force: this was a fundamental decade, in which the political and social geography of present-day Latin America took root. The crumbling of Iberian power and the autonomy of the new Latin-American Countries determined the statehood of the law.

The history of modern private law codifications has not preserved any trace of the different private-law rules that the native of the New World considered necessary. The constitutions and civil codes of the post-independence republican period represent the historical turning point in the monopoly of the legal-systematic model of Justinian matrix.

It was a peculiar situation: the universalistic imprint of roman law prevailed over the rights of those who embodied cultures different from those of the fathers of Latin-American Independence and their successors. According to their desire for political independence and legal unification, Simón Bolívar, Antonio José de Sucre, José San Martín unwittingly homogenized the different cultures in the area, eliminating all forms of cultural – and thus also – legal pluralism.

It is obvious that the recognition of the rights of indigenous people would have relativized the legal system of the new Republics, which instead wanted to be, through the promulgation of civil codes and constitutions, an expression of the law of 'all', that is to say the law of old and new inhabitants. It is evident that custom suffered a decrease directly proportional to the progress of the written law. This set of rules and traditions, which for about three centuries supported the idea of law in balance according to its dual meaning (*ius civile - ius gentium*), was deconstructed by the law of the new republics.

At the time of the civil codes drafting, the tradition that offered ample space to indigenous law and its rules was not taken into account in any of the Latin American countries. Indigenous law was mostly relegated to the idea of a 'special right'; in other words, post-independence law was thought of as a right for all people, without distinction. The universalistic idea of law was also spread through the prestige of Roman law.

The Chilean codifier's statement on the consideration of Roman law as the common basis of Latin American law is famous: Andrés Bello believed that all those who looked up Roman law as foreign legislation were themselves foreigners "in our America". The acceptance of this approach in the Argentine Civil Code (1869) is even more significant, whose *notas* opened with an explicit reference: "*la ley romana dice*...." (the Roman law affirms). It is a *dixit* that supports and provides foundation to a legal codification that only partially is considered 'new' (Schipani 1999).

Comparative lawyers are not surprised by the consideration of an Italian scholar who found acceptance in Brazil during the fascism period, thanks to some friends (e.g. *amici operosi* as in Losano 2013): Tullio Ascarelli, having fully experienced, during his ten-year stay, the Brazilian culture and university life, understood, with significant intellectual sensitivity, that the most typical feature of Brazilian private law was the uninterrupted validity, until the codification of 1916, of the old Roman law, supplemented at the legislative level by the *Ordenações Filipinas* of 1613.

3. The *Ayllus* as a means of safeguarding the indigenous tradition

As far as law after the Conquest is concerned, some elements of identity remained alive. The concept of *Tierra Nueva* has been one of the most invoked to justify in the New World territories the adoption of solutions different from the Castilian ones (Urquijo 1976). Legal doctrine underlines the presence of a specific "*derecho indiano*" because it refers specifically to the West Indies. However, it is difficult to place the latter as a unitary or stand-alone interlocutor: it was characterized in turn by a plurality of differentiations, for example concerning peninsular Indian law (expressed in the traditional forms of Castilian law: laws, pragmatics, *provisiones*, *reales cedulas*), or Creole Indian law (described in the provisions of the local authorities or, not infrequently, through the predominance of customs and unwritten sources). In other words, the law that followed the Conquest was composed of a myriad of sources of law.

The role of these sources and, more generally, the role of Indian law in the shaping of the Latin American legal system has only been fully recovered in the legal literature in the recent decades. The turning point of the indigenous component, in the encounter-clash between the two great models of civilization, represents a crucial part of the legal-anthropological literature. The latter has been accompanied by studies appropriately placed in the history of law, in order to rethink the reference to passivity with which the indigenous component of the New World has been historically characterized.

Indeed, although the laws of the Crown aimed at building a unified territory by the force of Christianity and by the rationality of the Old World, the indigenous peoples of the New World not infrequently asked and obtained, through *pleitos* addressed to the Spanish courts, the authorization to create *poblaciones* among them. The situation was different only for those indigenous communities that were 'located' in the border areas of the Viceroyalties of the time, due to a thinly veiled purpose of control and political-economic advantage for the Conquerors (Nuzzo 2014).

The core structure of these agglomerations of localized indigenous people (and more often re-located by the European invaders to ensure support to the evangelization) was the *ayllu.* The *ayllu* has characterized the Andean society since pre-Columbian times. It is a social and political structure that follows a precise pattern: the set of *ayllus* gave rise to *markas*, which formed large *suyus*, the sum of which gave rise to the *Tawantisuyu*, the largest empire existing at the time of the New World's discovery.

Ayllu is a Quechua term, that also finds correspondence in other indigenous languages (such as Jatha for the Aymaras). It indicates the family and social basis of the indigenous cultures of the Andean area. The notion of *ayllu* is still in use. From a macro-comparative point of view, it avoids reducing the complexity of the human-collectivity-environment relationship to the conceptual opposition between 'individual property' and 'collective property', which is spread in Western legal thought. The presence of the term *ayllu* as signifier is uninterrupted, but its meaning has been affected by the historical stratifications concerning it. Indeed, the policy of the so-called '*reduciones*' manifested interest in the *ayllus*. Still, it produced alteration to the original idea, leading to a hybrid figure that ranks between the '*ayllu*' and the '*comunidad*' (Míguez Núñez 2003).

The recognition of the *ayllus* allowed the Spaniards to acknowledge the social reality pre-existing the Conquest and, then, to provide the same experience with the status of a subject of law, at least to legitimize the use and possession of land, as well as the adverse possession. On the

one hand, the *ayllu* is the cornerstone of the resistance to the complete Romanization of the indigenous rules from the social and legal point of view. On the other hand, the *ayllu* represents the route to the westernization of indigenous property and the rights associated with it.

Through the *ayllus* the indigenous peoples have been able to maintain part of their customs and traditions in relation to the use of the land, especially regarding: the community of goods; the prevalence of Pacha Mama's rights over those of individuals; the common use of water; the rule of markets; the court proceedings; the service of guide and transport in the *Caminos* (the so-called *Tamemes*); and, to a lesser extent, the criminal regime and the law of marriage and succession.

In short, through the *ayllu*s, indigenous peoples have been able to pass on part of their customs and traditions in relation to the land, that is, the Gordian knot of that right which in the 20th century was placed at the centre of the new Latin American constitutionalism.

4. Latin American law within the framework of contemporary legal systems

In the last decades of the 20th century, meaningful attention has been paid to Latin-American law by scholars who looked at legal traditions from a comparative perspective.

In the field of the systemology studies, the uncertainties put forward by René David more than half a century ago – as to whether or not there are specific characteristics of Latin American law that can be opposed to those of European law – can now be considered to have multiple answers.

Concerning the characteristic elements of the civil law system, within which Latin American law is often considered to be absorbed, specific peculiarities have gradually emerged thanks to the intense research of comparative law scholars. For example, attention has been paid to: the civil codes' identities of Latin America, having in mind the model-code par excellence, represented by the *Code Napoléon* (Schipani 1999; Carbone 2020); the common Ibero-American roots, the similar historical evolutions and the undeniable homogeneity of the contents, linked to the fact that the languages in use in the sub-continent are essentially two (Castán Vazquez 1969); the common legal tradition of the Latin-American Countries that has forged an interesting specificity (Gambaro and Sacco 1996).

From the historical-diachronic point of view, the topic of legal tradition can be considered as the crucial element through which Latin American law

has oriented the research on contemporary legal systems. The crucial role played by certain factors in the identification of Latin American law system has been emphasized, namely: the systematic unity of civil codes, the reference to the general principles of law, the supremacy of the person in civil law, the role of the single formants of law and, even before, the role of lawyers in the development of the legal system (Schipani 1996; Esborraz 2006 e 2007). The researches of those scholars who have developed the topic of Latin American law for the first time in Italian textbooks should be placed in the mentioned perspective; they have emphasized the strong historical and ideological value (Losano 2000), or even some of the emerging identities of Latin American countries, such as the democratization of the economic circuit and the setting up of an alternative modernity (Somma 2014), and not least the chthonic component as the bearer of new claims, such as the right of commons and the right to protect the *Pacha Mama* (Lanni 2011).

A fundamental contribution has come from the comparative public law research, in which an important Italian school of thought gained strength. Thanks to this: Latin American models of justice have been reclassified based on new taxonomic elements (such as, for example, the protected good, the ways of the access to justice, the type of control exercised); the numerous points of reference set out in the constitution for the (substantive and procedural) protection of the individual have been examined in depth; the new ideas of democracy and participation in the management of peoples' interests have been emphasized (as it emerges from the constitutions themselves); the ability to combine new and old models of constitutions has been highlighted (Pegoraro 2015). Some of these points have also been illustrated by scholars who have contributed to this volume.

Private law also emphasises interesting perspective. Latin American civil codes, and the legal dialogue they promoted in that area of the continent, underline to the comparative scholars the presence of a 'private law' that goes beyond the logic of 'national law'. The analysis of the Latin American civil codes suggests a range of elements for the supranational harmonization and unification of Private law, especially as regards the protection of the individual and the family, as well as contracts law and torts law. It is interesting to underline how the peculiarity and unity of the Latin American system can be found not only in the peculiarity and unity of the systematic approach received by Private law through civil codes and special laws. but also, and above all, in the legal system as a whole.

Useful in this regard is Sacco's theory on legal formants, i.e. the basis on which the legal order of a society develops. While it is true that doctrine,

jurisprudence and the legislator contribute to the adaptation of the legal system to the different demands of justice, it is equally true that this triad has a different value in the Latin American legal system. The reason is twofold: both because the single elements that make up the aforementioned triad do not enjoy the same operative impact, and because the framework of reference is shaped by operating rules that derive from the Roman *jurisprudentia* and from the indigenous *costumbre* (which in turn generate other legal formants). For this reason, wishing to use the legal formants theory within the Latin American legal experiences, we should refer more precisely to the role they play in that system (Lanni 2017).

In this perspective, the legal doctrine, which in Latin American countries is of greater importance than jurisprudence and the legislature, comes to the fore. In Latin America, legal doctrine assumes a normative value or, at least, a wider legal space than that commonly recognized to scholars in the civil law systems. In other words, Latin American doctrine influences the production of principles and rules, both by legislative and judicial means. In order to have an overall vision of the Latin American legal system, it is fundamental to refer to the positions taken by the Latin American doctrine on the study and developments of the several issues relating to private law.

In other legal experiences, e.g. those of Argentina and Brazil, legal thought not only shaped the model relating to the discipline itself, but also led the other legal formants towards the positions developed. This was the case for consumer liability in Argentina and for ultra-individual protection of consumer rights in Brazil (Lanni 2005).

In Latin America, the substantial cohesion of the legal culture, as well as, of course, the legal tradition, appears as the core of a legal system characterized by the supremacy of the doctoral opinion, which is at meantime science and source with respect to any expression of legality. Significant in this regard is the reference to what are considered the three great civil codes of Latin America (as products of the legal doctrine): Dalmacio Veléz Sarsfield, Augusto Teixeira de Freitas and Andrés Bello, who were responsible for the construction of the Civil Code of Argentina, Brazil, and Chile respectively. This approach has allowed the civil codes (and therefore the legal system) of the new Latin American Republics to remain far from the rationalist dogma of supremacy and all-inclusiveness civil code as an authoritative source (Schipani 1996).

Emblematic in this regard was the example offered by the Argentine Civil Code (1869-2015), which was composed, as already pointed out above, not only of rules expressed in articles, but also of doctrine and normative references referred to in footnotes. This approach has placed the Argentine civil code's

experience in close relationship with the Justinian compilation, and with the different codification experiences based on the Roman-Iberian tradition. Still today the new Argentine civil and commercial code of 2015, which has removed the logic and tradition of the *notas* from its text, cannot be considered detached from the comparison with the great Latin American codes. In fact, the same Commission in charge of drafting the code currently in force (Aida Kemelmajer de Carlucci, Ricardo Lorenzetti and Elena Highton de Nolasco) has stressed how the code itself is the result of constant comparison of the Argentine legal doctrine with that of other countries and, in particular, that of Italy.

The new 2015 Argentine Civil and Commercial Code addresses and incorporates several issues linked to the 1994 Constitution. Indeed, the recodification of Argentine civil law has not infrequently included the social demands already enshrined in the Constitution, as well as those developed in the analysis of legal science and full grown in the courts. Nevertheless, the recodification itself kept the code at the center of the legal system. In the context of the characteristics of the Latin American system, the analysis of the new Argentine code (but the discourse is also common to the new Brazilian civil code of 2013) emphasizes a constitutionalisation of civil law, but moreover the use of constitutional principles as selection criteria to determine which interests deserve specific protection by the legal system. The dialogue between constitutional law and civil law (and then the dialogue between new civil codes and new constitutions) is a feature element of Latin American system.

Last but not least, the topic of the indigenous peoples' rights has a specific role for the taxonomies of legal systems. It is an essential issue in order to rethink the legal dogma related to the resistance of the rights of the peoples themselves. The issue itself has been brought to the fore by the anthropological acquisitions as well as by the incorporation of these rights in the new constitutions. Through these features it is possible to overcome the Eurocentric thesis that led to deny (at least until the 1970s) the unity and specificity of the Latin American legal system (Lanni 2011).

From the study of the rights of the indigenous people of Latin America, and from the analysis of their recognition through the constitutions, emerges not only a set of rights for a limited part of the country, but also rights for a new epistemology of Latin American law as a whole, which goes beyond the trinomial People-Nation-State. The encounter with the indigenous component, particularly with holism as its typical trait, far from contextualizing the law in a lousy imitation of Western models, emphasizes a different way of conceiving it (Somma 2020).

A reflection on Latin American law can mean talking about the law of a '*Patria Grande*' or a '*Grande Patria*', capable of understanding and interpreting the multiplicity of the social and the different identities that represent it. This can be found in all those researches, not only exclusively legal, which focused on the principles and values that unite the community of people living between the Caribbean islands and the Patagonian area.

5. Latin America and the dream of a *Patria Grande*

At first, the legal area considered here has been identified as "*Mundus Novus*" for the obvious reasons related to the scientific knowledge in the 16th century. The idea of exploring the possible existence of a proper name, already in use in that part of the World, did not receive significant attention by the Conquerors because, in part, they were not yet aware of the area of reference and, in part, they did not want to leave room for earlier forms of identity and, therefore, synonymous of languages of peoples unaware of Christ.

Two definitions have been used to indicate the whole of that part of the World that was the object of the Castilian conquest at the hands of '*sagrada religión*': that of "*Indias Occidentales*" and that of "*Mundus Novus*". Today, these definitions have a historically dated value as an expression of a geographical-identifying matrix linked to the era of the related discoveries. On the other hand, two indigenous definitions, handed down from the indigenous tradition and, therefore, necessarily combined with the cultural baggage transmitted orally by the indigenous peoples, have returned to the fore today: *Abya Yala* and *Pacha Mama*.

"*Abya Yala*" is the name by which some indigenous peoples (particularly the *Tule-Kuna*, i.e. a Chibcha-speaking people living in Panama and western Colombia) designated the American continent. It means 'living land'. This name has become widespread in recent decades, in conjunction with political movements in favour of the recognition and autonomy of Latin America's indigenous peoples. Its election is due to the Aymara leader Takir Mamani, who urged the use and disclosure in all documents and declarations concerning indigenous peoples.

The definition of "Pacha Mama" is the most successful in the ethno-anthropological identification of the fragment of the universe in which indigenous peoples live. The expression *Pacha Mama* recurs in Latin American indigenous literature in tune with the tendencies of the current constitutions in which the emphasis is placed on the 'right to nature' and its 'right to reparation', as responses of 'environmental ethics' towards the needs of Nature. In this green meaning, the expression *Pacha Mama* denotes a value without territorial boundaries and,

therefore, more linked to Nature as a subject of law. In this regard, the references to the 2009 Preamble to the Bolivian constitution are particularly expressive, although in a context of strictly normative reflection: "[...] We inhabit this sacred Mother Earth [...] with the strength of our Pachamama, and thanks be to God" (Lanni 2011; Bagni 2013; Baldin 2014).

"*Abya Yala*" and "*Pacha Mama*" can be understood, beyond their possible or real toponyms, as expressions of reaction against the homologation of Latin American society to a lazy and careless lifestyle, indifferent to the knowledge of the other, impotent to the preservation of ecological balances and, last but not least, insensitive to the fulfillment of intergenerational obligations and the prevalence of the common good over the individual good. Certainly, the diffusion of these expressions has emphasized a form of brotherhood and closeness of interests between peoples who are detached from the logic of borders and the state. However, they have limited recognition in the panorama of legal systems' classifications.

In the legal bibliography, the countries of the New World are usually known by the name "America", which is variously followed or preceded, depending on the linguistic rules, by a plurality of adjectives (i.e. Ibero, South, Latin). Indeed, the name "America", which as geographical connotation dates back to a 1507 pamphlet (i.e. '*Cosmographiae introductio*') by which the German cosmographer Waldseemüller proposed a tribute to Amerigo Vespucci, so that it was extended to the entire continent from 1570 onwards. Subsequently, it stimulated the need for clarification in order to maintain its ability to identify a territory.

Referring to the use of the adjectives previously invoked to describe America as the object of Spanish Conquest, it has been (and still is) mainly spoken of "*Ispanoamérica*", "*Lusoamérica*", "*Iberoamérica*" and "*Sudamérica*". These definitions are ideologically oriented and semantically limited, if compared to the one currently most in use, namely "*Latinoamérica*" or "*Latin America*". The latter expressions, in fact, well describe a historically determined geographical and cultural area. At the same time, they evoke the idea of a set of common identities, a body of shared values and a hard core of common legal principles generally opposed to those of the other America, the Anglo-Saxon one, founded on common law and today more than ever on the idea of walls, where belonging to the narrow circle of the white Anglo-Saxon Protestant, as happens with many US families for generations, still has a social value.

Conversely, expressions referring to the linguistic and colonial matrix lack foundation. In fact, to speak of "*Ispanoamérica*" means to exclude Brazil, French Guiana, Surinam (former Dutch territory), Guyana (former

English colony), and many islands in the Caribbean, where no one spoke and speaks Spanish, nor was there the presence of that European colonial power. The same goes for the word "Lusoamérica", which describes the former Portuguese colonies in America, namely Brazil, a country that is 90 times larger than its former motherland and in which this name has not been very successful, for obvious reasons. Also the expression "*Iberoamérica*" maintains a colonial connotation, and is not appreciated, especially on that side of the Atlantic. However, it is broader, since the reference is addressed to the former possessions of the kingdoms of the Iberian Peninsula, and thus also includes Brazil, which was part of the Portuguese Empire until 1822.

The term "*Sudamérica*" is widespread, partly because it does not have the limitations associated to the above-mentioned expressions. Apart from the difficulties linked to correctly identifying the geographical area that divides the north from the south (the equator? or the Isthmus of Panama?), this expression has an erroneous ideological value, namely the north/south opposition (developed countries/underdeveloped countries). However, from the point of view of legal systems' classifications, it does not seem suitable to geographically capture the countries of Central America, such as Costa Rica or Panama, which are, like the former, part of the Latin American system.

"*América Latina*" or "*Latinoamérica*" seems the most suitable name. From a toponymic point of view, the semantic compromise also allows the Spanish Viceroyalty of the area, the former French colony of Haiti, as well as the area that in the past was Portuguese and the current French overseas territories (i.e. the Caribbean islands of Guadeloupe and Martinique and French Guiana). Only the non-Latin Caribbean islands (Jamaica and the Virgin Islands, Surinam, Guyana, and the Falkland Islands) are excluded from this perspective.

Furthermore, in line with an etymological point of view, the name "*América Latina*" should be considered as bearing a precise identity. It was coined by the Latin Americans and can be ascribed to the Dominican friar Francisco Muñoz del Monte, the Chileans Santiago Arcos and Francisco Bilbao and the Colombian José María Torres Caicedo, who used it from 1850 with a specific ideological content. The Latin character was no longer seen as a reflection of the interests associated to the colonial powers, but rather as a name coined by the inhabitants of the region themselves to emphasize a process of cultural and political qualification linked to 'being Latin'. According to a historical reflection, it has been pointed out that the term 'Latin' identifies not an ethno-linguistic datum and, therefore, a segment of the population, but a legal qualification, i.e. the status of 'Latin'. In addition, Latin Americans refer to "*América Latina*" with

the capital L, thus emphasizing the meaning not of an adjective but of a middle name (Schipani 2004).

It is also a name with a well-established historical tradition. The expression "*América Latina*" appeared in 1860, when general Walker wanted to build some military bases in the southernmost countries of the United States. For these reasons, the peoples of that area conceived, according to Simón Bolivar's thought, a Union of Republics to defend themselves, and gave themselves a name that would help delimit this unitary and political-legal identity (Ardao 1980). It should be stressed that the statement of Latinity and its difference with respect to Anglo-Saxon America, together with the idea of a culture based on common belonging, as well as the values of shared citizenship of the whole of peoples located south of the Rio Bravo (from Mexico to Argentina, including Brazil and the Caribbean Islands), have been the cornerstones of the historiographic and academic philosophical debate on Latin American identity.

Nor should it be forgotten that the universalist proposal of the *Libertadores*, the well-known Venezuelan Simón Bolivar, and the Cuban José Martí, was founded on the basis of Latin brotherhood; that is to say: the creation of a single Great Homeland, starting with the Republics that emerged after the wars of Independence against Spain. The proposal of the Colombian José Maria Torres Caicedo to build a "*Liga Latino-Américana"* was also based on it.

Concluding, the word "Latin" is unrelated to ethno-cultural elements. The people who have inhabited the New World since its discovery were not Latin, they were native or Iberian, and they were joined by many other peoples with the great migrations. The designation "Latin" has a political and legal meaning, as intentionally emphasized by the establishment of a Latin-American College in Rome (1858) in order to train the clergy, that would operate in that area, reinforcing the history and the spread of Latinity (Schipani 2004).

The union of Republics, known as "*Latinoamérica*" or "*América Latina*", today presents itself as a multifaceted and polysemic concept, bringing together legal, political, social and, last but not least, religious issues. Indeed, Latin America has been referred as *Patria Grande* (the concept has been taken up several times by John Paul II and now by Pope Francis) to evoke that political vision of integration that has been advocated by the *Libertadores* in the framework of a unification of the countries of that area, which could cope with the interference of the great political and economic powers, brought to the fore today by globalization, and thus avoid the "steamroller of injustice" that is linked to the prevalence of 'logic of market' over the 'logic of person'.

REFERENCES

Ardao A.
Génesis de la idea y el nombre de América Latina, Caracas, 1980.

Bagni S.
Dal Welfare State *al* Caring State*?*, in S. Bagni (ed.), *Dallo Stato del* bienestar *allo Stato del* buen vivir. *Innovazione e tradizione nel costituzionalismo latino-americano*, Bologna, 2013.

Baldin S.
*I diritti della natura: i risvolti giuridici dell'*etica ambiental exigente *in America Latina*, in S. Baldin, M. Zago (eds), *Le sfide della sostenibilità. Il* buen vivir *andino dalla prospettiva europea*, Bologna, 2014.

Barrientos Grandon J.
El gobierno de las Indias, Barcelona, 2004.

Carbone P.
La rotta dei codici: orizzonte e terzo millennio, Napoli, 2019.

Cassi A.A.
Ius commune *tra Vecchio e Nuovo Mondo. Mari, terre, oro nel diritto della Conquista (1492-1680)*, Milano, 2004.

Castán Vazquez M.
El sistema de derecho privado iberoamericano, in AA.VV., *Estudios de derecho civil en honor de J. Castán Tobeñas*, VI, Pamplona, 1969.

Esborraz D.F.
La individualización del subsistema jurídico latinoamericano como desarollo propio del sistema jurídico romanista (I) e (II), in *Roma e America. Diritto romano comune*, 21, 2006 and 24, 2007.

Gambaro A.
Sacco R., *Sistemi giuridici comparati*, Torino, 1996.

Lanni S.
America Latina e tutela del consumatore. Le prospettive del Mercosur tra problemi e tecniche di unificazione del diritto, Napoli, 2005.

Lanni S. (ed.)
I diritti dei popoli indigeni in America Latina, Napoli, 2011.

Lanni S.
Il diritto nell'America Latina, Napoli, 2017.

Levene R.
Las Indias no eran colonias, Buenos Aires, 1951.

Losano M.
I grandi sistemi giuridici. Introduzione ai diritti europei ed extraeuropei, Roma-Bari, 2000.

Losano M.
L'impronta scientifica lasciata dai giuristi italiani in Sudamerica: l'archivio dell'uruguaiano Eduardo J. Couture, in S. Lanni, P. Sirena (eds), *Il modello giuridico –scientifico e legislativo – italiano fuori dell'Europa*, Napoli, 2013.

Nuzzo M.
Il linguaggio giuridico della Conquista. Strategie di controllo delle Indie spagnole, Napoli, 2004.

Pegoraro L.
Giustizia costituzionale comparata. Dai modelli ai sistemi, Torino, 2015.

Schipani S.
Il diritto romano nel Nuovo Mondo, in G. Visintini (ed.), *Il diritto dei Nuovi Mondi*, Padova, 1994.

Schipani S.
La codificazione del diritto romano comune, Torino, 1999.

Schipani S.
Latinità e Sistema giuridico romanistico, in AA.VV., *La Latinité en question*, Paris, 2004.

Somma A.
Sull'identità del diritto latinoamericano, in L. Loredo Alix, A. Somma (eds), *Scritti in Onore di Mario Losano*, Torino, 2020.

Urquijo J.M.
El concepto de tierra nueva en la fundamentación de la peculiaridad indiana, in AA.VV., *Memoria del IV Congreso internacional de historia del derecho indiano*, México, 1976.

Chapter 3
Forms of State in Latin America

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Summary: 1. Latin America's contribution to the classification of forms of state. – 2. Between empires and colonies. – 3. The legacies of colonialism after independence: the indigenous issue and *caudillismo*. – 4. Anti-communist dictatorships as an expression of an autocratic form of state. – 5. The socialist form of state under Cuban law. – 6. The construction of the *Caring state*.

1. Latin America's contribution to the classification of forms of state

Italian comparative constitutional doctrine defines "form of state" as "the set of fundamental principles and rules which work within the state system to regulate relationships between the state-apparatus (the system of public bodies and entities assigned to legitimately exercise the power of coercion by law) and the community of citizens" (Pegoraro, Rinella 2020, p. 34 s.).

Political science also examines this same subject. However, lawyers are interested in manifestations of the form of state at constitutional level, namely

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in analysing the principles and values encompassed in the constitution. This is the only way in which the classification becomes prescriptive, representing the values shared by the political community, as the will of the constituent power imposes itself through rules and guarantees of the legal system.

The category "form of state" presents some methodological problems for the comparatist. Firstly, the expression is not always literally the same in other countries, with the researcher thus having to seek its functional equivalent. Secondly, forms of state are reconstructed by looking back over European and North American constitutional history, based on Hegelian thought, considering history an evolutionary path towards an optimal form of societal organisation. It begins with the absence of the state, in the ancient and mediaeval period, moves on to absolute monarchies and the liberal state only to arrive, finally, at the *Welfare state* (or democratic-social state), considered to be the culmination of the West's civilising mission. Alongside this narrative, "heretical" models come to light, such as the Nazi totalitarian state or the socialist form of state; beyond the history of the West, the theocratic form of state is indicated as a current threat.

The Eurocentric approach, often adopted in Latin America, tends to simplify everything in terms of the contrast between democracy (in its current hegemonic form of the *Welfare state*) and autocracy (in any of its versions).

From a comparative perspective, the theory of forms of state incorporates constitutionalism. However, the category includes more than a state that does not recognise the division of powers and guarantees the fundamental rights of citizens. Instead, it also incorporates forms of "constitution without constitutionalism".

The classification has no longer changed after the terrible Nazi and Fascist experiences. The Short Century ended with the collapse of the Soviet Union and the near extinction of the socialist state (Hobsbawm 2010). At the same time, the decolonisation processes in Latin America, Asia and Africa demonstrated a tendency to reproduce, at least on paper, the Western form of welfare state.

A comparative analysis more attentive to the cultural context of each country blurs the proposed traditional classification, considering as new categories Arab socialist nationalism and the Chinese socialist-liberal form of state, characterised by the recognition of private property and free economic initiative as elements of socialism in Chinese colours (Pegoraro, Rinella 2020, p. 60 ss.).

The study of Latin American systems offers an interesting test for the theory of forms of state. In his *Historia constitucional comparada de Iberoamérica*,

Bernd Marquardt denounces the excess of Eurocentrism in the theories of constitutionalism and the state referring to the subcontinent, emphasising that a synchronic analysis including the South demonstrates a development that sometimes diverges between the two hemispheres. For example, nineteenth-century liberal doctrines were incorporated on a broader scale in the republican constitutionalism of Latin America than in the European Restoration (Marquardt 2016, p. 47).

Finally, the field of study has to be delimited geographically. "Latin America" is actually a vague and clearly ethnocentric expression. The original peoples used different expressions to refer to their land (see Pegoraro and Lanni, in this volume, chapters 1 and 2). The choice of one expression over the others would be as arbitrary as giving a new name to the continent; thus, by convention, the name "Latin America" will continue to be used, specifying that this will refer to the whole continent except for the United States, Canada and the former "non-Latin" colonies (namely, the English-speaking islands of the Caribbean, Suriname and Guyana).

2. Between empires and colonies

The theory of forms of state applies by definition to organisational forms that present characteristics of statehood, namely an institutional and legal system of powers, holding legitimate use of force over a territory and a population. In Europe, these conditions manifested for the first time with the absolute monarchies in the fourteenth-century (Volpi 2016, p. 25); in Latin America, on the other hand, the issue became relevant after independence was gained from the colonial empires. However, even pre-Colombian history presents sophisticated forms of organisation of power. When Cortés and Pizarro arrived on the continent, they found not only small social groups organised into tribes, but also large empires, such as the Mayans, Aztecs and Incas.

According to the Brazilian anthropologist Ribeiro, these were theocracies based on worship of the Sun, having a complex social, economic and cultural structure (Ribeiro 1975, p. 115). The social stratification into three large groups (the dominant aristocracy of priests, bureaucrats and the military; the intermediate class of craftsmen and merchants; and the peasants), with the king or Inca at the top, was the result of advanced irrigation techniques, which facilitated the production of an agricultural surplus able to sustain the non-productive classes. Worship of the Sun represented the common element between the Meso- and South American peoples.

At the time of the conquest, in present day Mexico, the Aztec confederation was at the peak of its development. Tenochtitlán dominated the other confederate areas, Texcoco and Tlacopan. The Aztecs believed that they were the people of the Sun, which they worshipped in various forms – peaceful and violent – including with propitiatory human sacrifices. The territorial organisation of each federate entity involved the subdivision into further decentralised bodies, each having its own bureaucracy.

In the territory of present-day Guatemala, the Mayan civilisation was already in the descending phase, such that it was easy for the Spanish conquistadors to replace the local ruling class.

In the Andes, the Inca Empire was probably one of the largest and most flourishing empires in the world, destined to unify the entire American subcontinent. It was a theocracy dominated by the sacred figure of the Inca, son of the Sun. Below that, the hereditary aristocracy ruled and controlled the lower classes, occupied by priests, officials and military leaders. The Inca was formally the "owner" of the entire empire, although the concept of private property was unknown to that culture. Peasants were organised into *ayllus* (see Lanni, in this volume, chap. 2, § 3), supportive communities that worked the land and paid taxes to the upper non-productive classes, in the form of an agricultural surplus and labour power for performing public works. There was communal labour (*minga*), but not slavery. This was an absolutist, collectivist and decentralised form of state. The internal divisions of the noble class (in particular, the rivalry between the two Inca brothers of Cuzco and Quito) were the cause of the fall of the empire when faced with the handful of Spanish conquistadors led by Pizarro (Portal Cabellos 2011).

Colonisation inevitably affected the social and economic structure of the original populations in the subsequent period. This was primarily due to the genocide perpetrated by the Europeans. Most recent estimates of the continent's population prior to the conquest, excluding North America, stand at approximately 70-88 million people, which, in less than a century, fell to just 3.5 million (Ribeiro 1975, p. 116; Dussel 2014, p. 19 ss.), due to epidemics, mistreatment, slavery and expulsion from their territories. The genocide was not only physical but also cultural. The assimilation process carried out against the population who survived extermination forced them to abandon their traditions, practices, beliefs and rituals, which sometimes survived, mixed with Western Catholic culture (Yrigoyen Fajardo 2011, p. 140). Finally, the exporting of the concept of private property and, in some cases, slavery (unknown to Inca society), replaced a system based upon community management of the land with a mercantilist-capitalist model of colonial exploitation, transforming

those populations into an external proletariat of the metropolitan (European) economy. The development of one civilisation (European) was the cause of the permanent under-development of the others (indigenous).

The colony not only determined the history of the indigenous peoples and their denied rights (see below, § 3) but also indelibly influenced the relationships between Latin America, Europe and North America after independence, creating a chronic tie of subordination, which left a mark even in the history of the state, along with its economic model and the manipulation of liberal values during the Cold War (see below, § 4).

In the economic field, the globalising trend of capitalism assigned to Latin America, since the conquest, a peripheral role with respect to the European-North American centre, which the continent still maintains. Its economy is based on the production and export of unprocessed raw materials, which the North returns in the form of finished products at much higher prices (Galeano 2018). Attempts to overcome the social and economic factors that impede the transition towards the next stage of development have been hindered by political and financial control exercised by the centre and by the very structure of the market economy, which presupposes the existence of unequal relationships between forms of production and trade (Amin 2011).

In spite of all this, there are small signs of a countertrend against neo-colonialism. On one side, even after the collapse of the Soviet Union and the evolution *sui generis* of the Chinese form of state, the Caribbean is home to one of the last socialist states, which has recently experienced significant changes, also as a result of a constituent process that led to the adoption of the new Cuban constitution of 2019 (see below, § 5). On the other, based upon some peculiar characteristics of more recent Andean constitutionalism, a new category of form of state is being proposed, the *Caring state* or state of *buen vivir*, which, despite not fully materialising in any political system, represents an innovation in the legal field and an emancipating form of institutionalism from below, valuing the contributions of indigenous, Afro and Mestizo cultures (see below, § 6).

3. The legacies of colonialism after independence: the indigenous issue and *caudillismo*

From a non-ethnocentric perspective of the history of constitutionalism, it is important to note that one of the main revolutions that paved the way for its global emergence occurred in the Caribbean. The Haitian revolution,

which began in 1791, led – in 1804 – to the declaration of independence of the French-speaking part of the island, with a document in which the French revolution's principles of liberty, equality and fraternity were concretely implemented for the first time, overcoming the gender and race discrimination that had, on the other hand, characterised European and North American constitutionalism in their first century of life (Garay Montañez 2014). Commander-in-Chief Jean-Jacques Dessalines, a former slave who led the revolt and was then appointed the first Governor General, addressed the Haiti population, inviting "indigenous citizens, men, women, boys and girls" always to defend the liberty conquered against the "barbarians" who had reduced them to slavery.

Although, as noted, constitutionalism grew in Latin America as a result of independence processes, it would be wrong to think of revolts inspired by nationalism, as "*en América se sublevaron europeos contra europeos*" ("In America, Europeans rose up against Europeans") (Marquardt 2016, p. 162). The majority of citizens and indigenous peoples did not play an active part in this phase of the process, led, instead, by the local Creole *élite*, who, with regard to the form of power, merely replaced the monarchical principle with the republican one.

Caudillismo, key to understanding the form of presidential government on the continent, resulted from this historical context. In fact, despite the new liberal constitutions, the weakness of the institutions and the extraneousness of the peasant class to liberation movements contributed to the fact that feudal or "mafia" forms of power remained in place; in this context, the *caudillo* exercised control over the local area both by force and due to the unconditional loyalty of other local *caudillos* or the population, who received protection or favours in exchange (Zanatta 2017, p. 50 s.). *Caudillismo* is a system of power relations that is substantially pre-state or para-state, like the mafia in Italy, although in Latin America – on some occasions – it went so far as to coincide with an autocratic form of state. The democratic crisis subsequently experienced by the continent was therefore not so much due to "flaws resulting from the technical construction of the respective supreme norms but, rather, primordially to the implementation and feedback within societies" (Marquardt 2016, p. 429).

When analysing *caudillismo* through legal categories, it can perhaps be considered midway between the concept of form of state and that of form of government. In fact, on one side, its origins lie in some specific principles and values, albeit beyond a liberal vision (the exaltation of public safety; pro-

tection of the family, the clan; localism); on the other, it avoids representative and intermediate bodies, preferring a direct relationship between the holder of power and citizens.

The reception of liberal constitutionalism in the Latin American post-colonial context left open the issue of the role of indigenous communities in the new institutions. The "indigenous issue" defines the type of relationship established between the state and the part of society descending from ancient populations that inhabited the continent prior to the conquest. It influences the form of state, as it questions the concept of nation-state, on which political doctrines of the state and constitution theory in Europe have always been based, starting from the seventeenth century.

When the Spanish and Portuguese Crowns imposed their supremacy over the American territories, the problem of their legitimacy arose, namely how to justify the appropriation and exploitation of goods and people, in light of a cultural and legal tradition that claimed to be humanist and Catholic.

The different positions can be summarised in the theories of Juan Ginés de Sepulveda and Bartolomé de Las Casas in the Council of the Indies of Valladolid (1550-1551), as well as in those of Francisco de Vitoria. The first saw the *indios* as inferior human beings, pagans and barbarians in their customs, such that both their submission and their extermination could be fully justified. The second, conversely, denounced the mistreatment of indigenous peoples as completely illegitimate, both according to Christian doctrine and based upon Aristotelian reasoning on the meaning of the term "barbarian". Finally, Vitoria held an intermediate view, which, on one side, considered the *indio* a person and, as a result, attributed to him the status of "King's subject", with the respective privileges of protection; on the other, he justified Spanish imperialism in the name of freedom of movement and trade, and supported the need to evangelise the indigenous peoples to save their souls.

The prevalence of this latter position explains why, in the Indian laws – being the laws applicable in the colonies – initially, indigenous peoples maintained the possibility of applying their own habits and customs in their internal relationships, if they were not contrary to natural and Christian law, as definitively ratified in the *Recopilación de Leyes de los reinos de las Indias* of 1680 (Giraudo 2012, p. 19 f.). Even the 1812 constitution of Cadiz proclaimed equality between all Spaniards, including indigenous peoples. This explains why, unlike in the United States, in the constitutions of independence, indigenous people were considered citizens, in application of the principle of equality; thus, in the name of equal treatment, a policy of cultural homogenisation was applied to them, through education according to Western canons,

the imposition of Spanish, the redistribution of land without considering the model of collective ownership typical of their communities, and the non-recognition of their own law (Marquardt 2016, p. 201 f.). An integration process occurred by way of assimilation, known as "whitening" of the *indio*, as a form of rejection of his "otherness".

The indigenous issue arose in the political and constitutional scenario only in the twentieth century, with the decolonisation process supported by the United Nations with resolution 1514 of 1960, which invited imperialist Sates to permit the self-determination of local populations who still lived under colonial domination. However, America was formally excluded from this process, as it had been independent for more than a century, irrespective of the fact that the indigenous peoples of the continent had never been able to express themselves in this sense. Furthermore, making matters worse, the serious economic and institutional crisis in many countries brought about the establishment of military dictatorships or authoritarian regimes, which certainly cared little for the indigenous issue. The international agenda, however, remained interested in this matter, until the adoption, in 1989, of ILO Convention no. 169 on the rights of indigenous people. The influence of this treaty was felt in the cycle of Latin American *nuevo constitucionalismo* in the nineties, when, for the first time, constitutions recognised broad catalogues of collective rights for indigenous peoples.

Other fundamental stages at international level were the creation of the United Nations Permanent Forum on Indigenous Issues in 2000 and the signature of the 2007 UN Declaration on the Rights of Indigenous Peoples, despite its non-binding nature, which, over time, has been accepted also by Australia, New Zealand, Canada and the United States.

International successes drove those of the new constituent season of 2008 and 2009 in Ecuador, Bolivia and Venezuela. Finally, the most recent result was the approval of the American Declaration on the Rights of Indigenous Peoples in 2016, by the member states of the Organization of American States (OAS).

Although it is tricky to demonstrate a cause-effect relationship between international law and constitutional reforms, it cannot be denied that the favourable international climate supported internal reform processes. However, there are various critical opinions on the truly inclusive nature of these treaties. In Peru, for example, the 1993 constitution does not recognise indigenous populations as "people", to avoid endangering territorial unity in the name of the right to self-determination recognised by the

Declarations and by the ILO Convention, albeit its *soft* interpretation is "self-government within a sovereign State".

Ecuador and Bolivia have introduced into their constitutions the concept of plurinational state. This does not question state sovereignty but implies a form of decolonisation of legal thought, breaking away from the idea of nation-state (Merino, Valencia 2018, p. 15 and p. 326). The subjective element of the state is no longer characterised by a population with uniform ethnicity, language, culture, traditions and religion; conversely, it is a melting pot of peoples, with their respective languages, cultures and customs, who all participate equally in constructing the national state identity.

Scientifically, the plurinational state represents a subversive category even from a comparative perspective, as it stands at the crossroads between form of state, type of state (decentralised or unitary), and legal monism or pluralism.

With respect to the form of state, the plurinational state adopts the values and principles of indigenous worldviews, such as *sumak kawsay* or *suma qamaña* (*buen vivir*), which are recognised as objectives of public policies, legal statutes or interpretative principles. In fact, the form of state is defined in the constitution as "*plurinacional, intercultural*", as plurination implies the egalitarian recognition of all communities living in the state territory, with their respective traditions and cultures. This reciprocal recognition facilitates a dialogue between peoples and nationalities, which is a crucial element of its distinction from the multicultural state (and constitutionalism).

Another fundamental principle, which necessarily derives from the two just mentioned, is that of participation. Dialogue must be transformed into a permanent characteristic of the plurinational state and into a mental habit for solving problems and social conflicts. As a consequence, forms of participation must be seen not only as extraordinary and exceptional means, as in constituent processes, but as daily management of basic community services. For this reason, representation (of indigenous peoples in the constitutional bodies) and participation (of citizens in the process of forming public policies, in planning budgets, in reporting processes) are two keywords of the plurinational state.

In terms of the territorial organisation of the state, the old categories of "federal state" and "regional state" seem insufficient to describe the phenomenon. Formally, it involves the establishment of entities whose jurisdiction is based on both territorial (residence in a location) and personal conditions (membership of an indigenous people or community). Despite this, both in Bolivia and in Ecuador, the territorial criterion continues to be crucial to the creation of indigenous municipalities, territories and dis-

tricts, to the detriment of a more fluid model of local organisation, which the new form of state could legitimise. Andean doctrine notes that the plurination as an institutional organisation model is intrinsically weak, as it fails to offer a solution to situations in which different peoples and communities cohabit in the same area (Valarezo 2009, p. 125).

Finally, the state recognises the existence of a competitive legal system legitimised outside the constitution, in the chthonic tradition. The plurinational state thus rejects legal monism in favour of pluralism. Legal pluralism undermines the very category of the state, in which the unity of the legal system is one of the constitutive elements. The constitutionalism of international law and, in Latin America, the "conventionalization" of the constitution had already brought up the issue of the legitimacy of legal sources produced outside the sovereignty of the state. However, legal pluralism introduces problems of a different nature. This is firstly due to the fact that the state, directly or indirectly, participates pro-quota in producing international or conventional law. Conversely, it is completely excluded from the production of indigenous law. Secondly, the constitution continues to maintain the *competenz-competenz*, namely the power to recognise or not recognise indigenous law, as well as to limit it and to decide on its compatibility with the state legal system through its interpretative body (Constitutional or Supreme Court). However, indigenous law nevertheless continues to be reproduced and invoked, irrespective of those rulings, generating sanctioning reactions from the state institutions that, in some more serious situations, have even led to the imprisonment of members of the communities, for the sole fact of having applied chthonic law to a case within their jurisdiction.

4. Anti-communist dictatorships as an expression of an autocratic form of state

The totalitarian state model created in Europe by the Nazis never reached the Latin-American continent, except in the form of small hateful *enclaves*, where Nazi criminals who had fled international trials were welcomed by the military dictatorships and authorised to organise communities of Aryan life, isolated from the rest of society, and used as detention and torture centres, as in the case of the *Colonia Dignidad* in Chile. On the other hand, it is important to reflect on the form of state implemented in different countries, both of the Southern Cone and of Central America, in the decades of the

seventies and eighties, thanks to the military and financial support offered to dictators, on many occasions even as a result of orchestrated state coups, by US foreign policy, which considered Latin America to be a geopolitical area of strategic influence at the height of the Cold War.

The concept of dictatorship does not define a form of state but merely describes an undemocratic way of exercising power (Schmitt 1975). The origin of the institution is well-known: the Roman *dictator* was created in the Republic, as an exceptional instrument to be used in times of crisis, a figure to whom all powers were temporarily delegated to deal with calamities or wars, for the time strictly necessary to resolve the emergency situation. In the theory on forms of state, these situations are generally included in the category of autocracies. However, just as democracy today is seen in the substantial – and not just formal – sense, namely with the set of values that qualify it, similarly, autocracies can be classified differently, depending on the political objectives pursued by the power. An autocratic government, to legitimise itself in power, may refer to specific ideologies, which contribute to creating external pseudo-justifications, both in relation to other sovereign states and in relation to citizens who cannot, or do not wish, to oppose openly to the regime, or who even support it, in the name of those principles.

In the last century, Latin America experienced lengthy periods of dictatorships. In Guatemala, a dictatorial regime was established from 1954 to 1984, in the middle of which there was a bloody civil war, between 1978 and 1984, while from 1985 to 1996, it was classified as a low intensity conflict; in Nicaragua, from 1981 to 1989; in El Salvador, from 1980 to 1992; in Panama, from 1968 to 1989; in Colombia, there was a civil war from 1960 to 2016.

In the Southern Cone, military dictatorships were established in Chile from 1973 to 1990; in Argentina, from 1966 to 1970 and from 1976 to 1983; in Brazil, from 1964 to 1985; in Paraguay, from 1954 to 1989; in Peru, from 1968 to 1975 and from 1975 to 1980; in Uruguay, from 1973 to 1985; in Bolivia, from 1971 to 1978 (Zanatta 2017, p. 169).

There are several possible ways of explaining this phenomenon. From an economic perspective, one reason is the failure of the development policies applied to countries with the balance of payments always in deficit, because they produce raw materials but import processed finished products at far higher costs. From a political point of view, the presence of a ruling class committed to defending its high salaries and the interests of the anti-socialist bourgeois *élite*, liberal towards the market, illiberal towards recognising the rights of minorities and economic, social and cultural rights. Finally, from the perspective

of international politics, the Truman doctrine of 1946 on national security, which considered Latin America a territorial extension of the United States.

"La guerra fría suministró el contexto global de un anticomunismo patológico" ("The Cold War provided the context for pathological anti-communism") (Calloni 1999, p. 17), particularly after the success of the Cuban revolution, which represented a model for many marginalised groups; the latter, organising themselves into guerrilla groups, according to the Guevarist doctrine, opposed the *status quo*, aiming to gain recognition, equity and economic-social reform in all Latin American countries. The US policy of strategic and material support to any type of regime that opposed the Red threat continued until the USA realised that it was far easier and less expensive to achieve the same results using economic leverage through the International Monetary Fund and the World Bank. The collapse of the Soviet Union led to the definitive abandonment of the policy supporting dictatorial regimes and their consequent immediate fall. Throughout this whole period, however, the armies, faithful to the doctrine of national security, converted into gendarmes of the "ideological frontier".

This piece of Latin American history was not considered from the angle of the form of state, despite the authoritarian regimes of the second-half of the twentieth century, albeit with different nuances within the continent, presenting some peculiar characteristics. In fact, power was not merely concentrated in the military but, rather, a theory of state was applied which aimed to pursue precise goals with careful planning of the means to achieve them.

Firstly, they acted according to a common vision: "[...] the Doctrine of National Security. This variant maintained the idea that the security of society was maintained on the basis of the security of the state. However, one of its main innovations was to consider that, in order to achieve this objective, military control of the state was required. The other important change was to replace the external enemy with the internal enemy" (Leal Buitrago 2003, p. 74 s.). The external enemy was international communism, which internally transformed into any person or group that did not agree with the principles of defence of the homeland, its Christian values and nationalism.

Secondly, this objective of defending the pseudo-democratic nature of the state was pursued through any means and at any cost. The military, with state coups or in supporting civilian governments, proclaimed itself to be the defenders of this social order, threatened by insurgent left-wing groups, legitimising state terrorism as an instrument of deterrence against

the rebels in the name of democracy. Sovereign dictatorships did not impose themselves to supplant the previous regimes and to create a new order but, rather, to defend the order already in place, in what they considered to be its essence, seen as the highest expression of democracy. Pinochet, after the coup that brought him to power, supported the adoption of a new constitution which, in its dogmatic part, was not significantly different from the previous Chilean liberal constitutions.

Finally, this vision of the role of the state and the military does not represent an isolated case but turned into a strategic plan of international policy, established with secret agreements between the various countries of the continent. The clearest manifestation of conscious adherence to an ideological vision of the state and of society inspired by anti-communism was the *Plan Cóndor*, whose historical and judicial truth was confirmed in the case decided by the Inter-American Court of Human Rights *Goiburú y Otros versus Paraguay* (judgment of 22 September 2006).

In his *voto razonado*, the judge Cançado Trindade notes that "the historic Final Reports of both the National Commission for Truth and Reconciliation (Chile, 1991, the so-called *Rettig Report*) and the National Commission on the Disappearance of Persons (Argentina, 1984) confirm the existence of the coordinated repression carried out by the secret services of the countries of the Southern Cone that became known as '*Operation Condor*'". The judge questions how such a distortion of the purposes of state should be considered in the context of the legal category of the form of state. He calls it "a State extermination policy, characterised by the concealment of trans-border 'counterinsurgency' operations by death squadrons (illegal and arbitrary detentions, abductions, torture, murders or extrajudicial executions, and the forced disappearance of persons). The participating States endowed it with a para-State structure – to further a State criminal policy – which enabled those who held power to hide the atrocities and avoid the application of international law and human rights guarantees, with total irresponsibility and impunity" (par. 51). This therefore constitutes conscious corruption of the rule of law in favour of support to state terrorism.

The anti-communist form of state assumed by various Latin American countries of the Southern Cone between the Seventies and Eighties of the last century (and subsequently in Central America, in the Eighties-early Nineties) is not recognised in any constitutional law handbook, but it is perhaps the only form of autocratic state, in addition to the Nazi totalitarian one, to have been judicially recognised.

Constitutional and comparative doctrine usually classifies Cuba among the latest examples of a socialist form of state. The central core of the claim certainly cannot be disregarded. However, from a historical-comparative perspective, some nuances and adjustments are worthy of being considered.

When reviewing the first stages of what became the victorious Cuban Revolution of 1959, no initial choice of communism can be found. The revolution was mainly nationalist and reformist, while it was only in 1961 that Fidel Castro announced the change towards the socialist bloc (Portillo Valdés 2016, p. 176; Villabella Armengol 2008, p. 34). Formally, it was only in 1975 that the long process of building new Cuban stability came to an end, with the celebration of the First Congress of the Communist Party of Cuba, where Marxism-Leninism was chosen as the informing ideology of the state and of society.

As to Guevara's vision, it is well-known that the Commander's thought represented a third way compared to the Soviet version and the Maoist one, based upon the idea that the communist revolution could only be achieved by stimulating a moral transformation of each individual into a "new man", and not through economic incentives. "There can be no socialism if there is no change in the conscience that causes a new fraternal attitude towards humanity, both at individual level, within the society that is being constructed, or where socialism has already been constructed, and at global level, towards all peoples suffering imperialist oppression" (Guevara, 1965). The ideological conflict between Che and Fidel was one of the reasons why Guevara decided to leave the Caribbean island to pursue his internationalist and third world project of liberating oppressed people.

Having overcome this initial adjustment phase, the Cuban form of state stabilised within the context of the socialist family according to the Soviet model. The revolutionary constitution of 1959 then gave way to that of 1976, which included typical elements of the socialist state (Guzmán Hernández 2015, p. 254). In the preamble, the constitution retraces the historical stages that led to independence and to the affirmation of the socialist state, proclaiming as its objective the building of a communist society; the heroes of these battles are mentioned, Martí and Fidel Castro (but not Guevara), and the support received from the Soviet Union is acknowledged.

Art. 1 proclaims that "*La República de Cuba es un Estado socialista de obreros y campesinos y demás trabajadores manuales e intelectuales*" ("The Republic of Cuba is a socialist state of workers and peasants and oth-

er manual and intellectual workers"). It attributes to the population of workers the ownership of power, but, at the same time, it identifies the Communist Party of Cuba as its ruling force, subjecting the activity of all officials and public leaders to the principle of socialist legality. It proclaims the adhesion to the principles of planned economy (art. 14: "In the Republic of Cuba, the economic system based on socialist ownership of the means of production by all the people prevails, and the suppression of exploitation of man by man") and state ownership, except for small farmers' ownership of their land and their instruments of production, personal ownership of salaries and savings obtained from work, the home that is legitimately owned and other goods and objects that are used to satisfy the material and cultural needs of the individual. Similarly, the ownership of personal and family means and tools of work is guaranteed, provided that they are not used to exploit the work of others (art. 20 ff.).

Civil liberties (such as freedom of speech and of the press), as well as the other rights recognised in the Charter, must be exercised in respect of the purposes of the socialist society (art. 61: "None of the freedoms which are recognised for citizens can be exercised contrary to what is established in the Constitution and the law, or contrary to the existence and objectives of the socialist state, or contrary to the decision of the Cuban people to build socialism and communism. Violations of this principle can be punished by law"). In the organisation of the state, the principles of socialist democracy, unity of power and democratic centralism are applied (art. 66).

The constitution underwent some reforms in 1978, 1992 and 2002, the last two necessary to address the altered international geopolitical situation, due to the collapse of the Soviet Union, which had made Cuba an orphan of its strongest ally in the fight against capitalism and US imperialism (Guzmán Hernández 2015, p. 258; Noguera Fernández 2019, p. 364 and p. 394). However, it was following the constituent process of 2019 that possible transformations towards a "Cuban-style" form of socialist state were identified.

Some commentators have positively highlighted the role of popular participation in the constituent process (Sciannella 2020, p. 572 ss.); others, conversely, have opted in favour of a façade-like participatory model, in view of the initiative from above, the short time reserved for popular consultation and its minimal impact on the final text (Mastromarino 2020, p. 476). Besides, comparative constitutional doctrine has long noted that some forms of popular participation in constituent processes or constitutional reforms (public debates or consultations; confirmatory referenda, in some cas-

es) constitute an element of the constitutional tradition of socialist matrix and the doctrine of the Leninist state, even though popular participation in the context of socialism can never aspire to replace the leading role of the communist party (Lenin 2003, p. 130; Biscaretti di Ruffía, Crespi Reghizzi 1979, p. 85; Bagni 2017, p. 266 ss.). Therefore, from this perspective, Cuba does not innovate the principle; rather, perhaps, it increases the quality of the participation, also thanks to the use of ICT.

On 2 June 2018 a commission of 33 deputies was created within the National Assembly of People's Power, with the task of preparing a draft of the new constitution, which was presented to the Assembly on 21 and 22 July 2018. From that time, the text was published on the internet and a phase of popular consultation began, between August and November 2018, in which 133,000 meetings were held, with approximately 9 million participants, 1,700,000 interventions, 738,000 proposals of revision received (the data reported correspond to those disseminated by the official body of the central committee of the Communist Party of Cuba, Granma.cu). It was calculated that approximately 60% of the original text was modified (with more or less substantial changes): "The topics and criteria discussed in numerous consultation spaces, from the micro-community and neighbourhood, to centres of work and student centres, led to the modification of 134 articles, representing 60% of the text, 3 articles were removed and 87 remained intact: after the drafting commission made 760 changes (from just a single word or sentence to complete paragraphs or articles), the constitutional Project remained with 11 titles, 24 chapters, 18 Sections (two extra), 229 articles (five extra) and the preamble with eight modified paragraphs" (Fabelo 2019).

The final text was approved by the Assembly in December 2018 and submitted to a referendum on 24 February 2019, with 90% participation of those entitled to vote and 86.85% in favour.

As has already happened in China, socialist constitutionalism is incorporating some typical traits extraneous to its history, due, on the economic level, to the energy and production crisis, as well as to the isolation of the socialist economic model with respect to globalised capitalism; on the political level, due to international pressure, particularly in implementing forms of human rights protection.

The preamble of the new constitution is, if possible, even more in line with the socialist tradition than the previous one, with more explicit references to communist ideology, as redeveloped by the Cuban leader himself, Castro. On the other hand, there are various innovations in the text which,

on paper, offer the potential of transforming the socialist form of state, which is not by chance now defined a "socialist state of law and social justice".

With regard to the state of law, primarily the constitution is proclaimed "the supreme norm of the State" which everybody is required to respect (art. 7). Secondly, every person is expressly recognised the enjoyment and exercise of "human rights", which must be guaranteed by the state and respected by all (art. 41). This provision is completed with the incorporation of international treaties into the state legal system, in a subordinate position to the constitution (art. 8). Furthermore, the subordination of rights to the purposes of the socialist state, or their suppression, if contrary to communism, no longer appears. Now, the only limits envisaged are "the rights of others, collective security, general well-being, respect for public order, the Constitution, and the law" (art. 45). Finally, the constitution includes procedural guarantees previously only envisaged by law, such as *habeas corpus*; a form of *amparo* is introduced (art. 99), although the list of protectable rights is deferred to a subsequent law; the right to effective legal protection (art. 92) as well as due process (art. 94) is recognised.

Even though the control of constitutionality remains formally attributed to the Assembly (art. 108, letter e), the recognition of the legal superiority of the constitution and the obligation to respect it for all public powers could theoretically open the door to widespread forms of control of constitutionality by the courts (Prieto Valdés 2019, p. 59), considering that, in the broader context of Latin American constitutionalism, that solution is applied and incentivised by the inter-American system of human rights.

As to the economic constitution, the innovations are important but they are not entirely new, as they confirm or ratify what was already applied by law, or other sources, or de facto, following the reforms of 1992 (Noguera Fernández 2019, p. 376): the recognition of private property and free economic initiative (including foreign investment) as forms of additional property, stands now together with the socialist property of the whole population, personal property and state planning (Moreno Cruz 2020, p. 45 and p. 61).

Finally, as to the form of government, some state powers have been modified, without, however, substantially undermining the unitary political direction of the Party. The figures of President of the Republic and Prime Minister have been introduced, although the direct derivation of both from the ANPP, and thus, ultimately, from the party establishment, means this is not exactly a form of division of powers but, rather, at most, a re-distribution of functions (Prieto Valdés 2020, p. 8). The same can be said for the territorial decentralisation into Provinces

and Municipalities (see D'Andrea, in this volume, chap. 5). On the other hand, the main axis of the reform of the state administration seems to be the trend towards greater "transparency" (the word did not appear in the previous constitutional text), to strengthen the right of citizens to information and control of power.

The concrete development of the "Cuban-style" socialist form of state will depend, as always, on the degree of implementation of the reform in future, both in relation to the implementing laws envisaged in the text, and in relation to the interpretation of the constitutional dictate that will be upheld. In any case, the new Cuban constitution represents an original contribution to the study of the socialist form of state.

6. The construction of the *Caring state*

The latest constituent cycle in Latin America corresponds to the Ecuadorian and Bolivian processes of 2008-2009. Various constitutional reforms were implemented later in other countries, but never complete revisions of the Constitution. In 2021, Chile started a constituent process, characterised by a very high degree of popular participation, inclusiveness and interculturality, that, however, culminated with the rejection of the Constitution draft in a popular consultation in September 2022.

In paragraph 3, I have already described some innovative characteristics introduced with the Andean *nuevo constitucionalismo* in the theory of forms of state, due to the leading role performed by indigenous communities in the political debate, resulting in the recognition of their subjectivity thanks to the concept of plurinational state, interweaved with the principle of interculturality and legal pluralism.

The worldviews of ancestral peoples have become a subject of study in the legal field, not only as individual legal cases, or as justification of the application of personal legal regimes but, rather, as a set of values included in constitutions and in the "constitutionality block". Those worldviews are characterised by a different foundation of the relationships between human beings and between the latter and Nature. Life is considered in its community dimension – harmonious and holistic – which can be defined as ecological in the broad sense (Mesa Cuadros 2018, p. 33): the human being is not at the centre of creation, but part of a Whole that includes his species and on which his survival depends. As well as the recognition of the collective rights of indigenous peoples, the incorporation of these worldviews

in the constitutional system has encouraged an ecocentric shift in law, with the proclamation of Nature as a subject of rights (art. 71 Ecuador const.), even justifying the creation of a specific United Nations programme, which studies the cultural and scientific paradigm shift from anthropocentric to ecocentric (see http://www.harmonywithnatureun.org).

In addition to the ecological dimension, the recognition of ancestral thought and knowledge leads to a rediscovery of the values of sharing a community life, based upon traditional institutions such as *minga* and *ayllu*, namely collective use of the land, communal labour and popular participation in managing community life.

A normative perception of the form of state means identifying which values and principles guide the public action in relation to citizens. The *Caring state* is built upon two necessary and interdependent pillars for the creation of the common good, resulting in the assumption of specific duties and obligations of environmental and social justice towards the members of the community. These two pillars are based upon both an anthropological and an ecological justification.

Caring is an intrinsic feature of human nature. The legend of Care, of Roman origin, recovered and cited by Heidegger, reminds us that the dualism of the human being, split between Heaven (the spirit) and Earth (the body), is composed through Care. At the same time, the myth awakens us to our vulnerability (Marcos 2016), as our existence is linked to the environment in which we live, populated by other beings, human and non-human, governed by its own rules. Our survival depends on the ability to recognise this inter-dependence (Viafora, Zanotti, Furlan 2007, p. 21) and to nurture the delicate balance with the other components of the ecosystem, where there is no "I" without a "you".

The theoretical foundation of the *Caring state* does not express a criterion of unique choice to determine the path towards "good care", namely what should be the guiding principles of the public action, both in legal policy decisions and in the organisation of the state. It is precisely in the transposition of the ethical foundation to legal principles that the contribution of the indigenous worldview becomes important. In the environmental dimension, the state action conforms to the ecological mandate (Gudynas 2009), namely the duty to consider and respect the rules that guarantee balance within and between ecosystems; in the social dimension, the primacy of relationality over self-determination gives rise to the principles of interculturality, fraternity and solidarity.

The *Caring state* is not currently fully applied in any country. It is a seed planted for the first time in the constitutions of Ecuador and Bolivia, where

it has sprouted only partially, producing a limited impact on the institutions, as demonstrated by the strong internal contradictions in the policies of implementation and development of those states. However, those innovations have generated a broad public debate, the emergence of subordinate classes and groups, the realisation that there are other possible alternatives to the *status quo*, both in Latin America and in the global North, inspiring new ways of considering law (one of the practical purposes of legal comparison). Some South-American authors have spoken of a transforming constitutionalism (Ávila Santamaría 2011).

The absence of substantial changes in the development policies of these countries and, indeed, sometimes their setbacks, both socially and in the field of environmental protection, fuel the criticisms on this proposed model. However socio-economic data in the first decade of implementation of this form of state had increased; and, from the legal perspective, this type of argument does not seem to hit the mark (Bagni 2020, p. 2). The transplant of the neoliberal development model in this area, supported by international organisations, has not produced better results; nor for this reason has the construction of a liberal-democratic state been abandoned. As jurists and constitutionalists, our task is to underline the mandatory obligations for the state and to denounce its violations, as a constitutional norm is not abrogated by incompliance.

Other criticisms have focused on the absence of any truly innovative nature in Andean constitutionalism and, as a consequence, in the *Caring state*, compared to the *Welfare state*.

The *Caring state* is the result of the intercultural encounter (generating new knowledge) between ancestral or pre-capitalist worldviews (everywhere, even in Europe: Bagni, 2019) with philosophies developed in the West, such as the Enlightenment liberalism, but also socialism and communism. Ecuador and Bolivia attempted, for the first time organically, to transform their legal systems in light of this cultural experiment, even though signs of this type of transition could already be seen, partly, in the legal system of South Africa and in the new constitution of Bhutan of 2008. Even though its origin lies in the legal traditions of the South, the model of the *Caring state* is not geo-referenced, as it is proposed as an alternative against current global crises. For example, it was recently partially and implicitly applied in some rulings of the French *Conseil constitutionnel* (Bagni 2018).

The *Welfare state* is a bourgeois state: it is on a halfway journey, looking contemptuously with one eye on its origins, but aiming, with some

trepidation, towards a different future, never fully realising what it has always been proclaiming in terms of liberty, autonomy and equality. It exalts rights of economic freedom and ownership, as a form of personal development, with the limit of the social function; it guarantees social rights, as a form of redistribution of income and an expression of the principle of vertical and horizontal solidarity; however, such rights are hardly ever considered to be duties of the state or legally binding obligations. It incorporates environmental rights, subjecting them, however, to – or at most balancing them with – other rights; it recognises the cultural rights of minority groups, despite remaining anchored to the idea of the nation state. There is a continuous internal conflict between the concept of citizenship as a source of rights and the extension of human rights to everyone as inherent to the human being.

The *Caring state* is much more radical, in the sense that it takes a precise position on the unresolved conflicts of the *Welfare state*, choosing social and environmental justice as its general objectives.

The *Welfare state* proposes sustainable development as key to guaranteeing economic growth according to the capitalist model of production and market, accepting possible alterations to ecosystem laws, in the belief that technology can provide sufficient mechanisms of mitigation. Conversely, the *Caring state* implements the ecological mandate, namely, it takes as a starting point harmony among individuals, species and the ecosystems; it believes that the legal system and the state model must be constructed based upon the laws that regulate such harmony (and which delimit the planetary boundaries), and not vice versa.

The *Welfare state* has governed cultural diversity applying over time various paradigms, the last of which was multiculturalism, permitting the coexistence of different cultures, and sometimes different legal systems, in the same territory; however, multiple cultures are rarely considered on the same level, favouring forms of top-down or superimposed solidarity or reasonable accommodation, on a case by case basis. The *Caring state* adopts the intercultural paradigm, based upon the practice of dialogue between equals, the recognition of egalitarian legal pluralism and interlegality (Parolari 2020). The principle of fraternity prevails over that of solidarity, justifying the concept of universal citizenship.

The *Caring state* should be seen as an evolution of the *Welfare state* or, rather, as its completion: it confirms its achievements but reinterprets one of its basic principles, that of autonomy. With rationalism, mechanism and the industrial revolution, man has denied God and placed himself at the cen-

tre of the universe. The *Caring state* changes this perspective. Obviously, it is not a question of upholding the theocratic principle but of reconsidering the issue of human nature. Social, environmental, climate, energy and health crises remind us that we are vulnerable, as we are dependent on each other, on the other members of our species, and we are a part of complex ecosystems. For this reason, the *Caring state* represents the only viable solution for the organisation of human society that Planet Earth can sustain in the current crisis situation, for a transition from the Anthropocene era (or Capitalocene, Moore 2017) to the Ecocene, an era in-between a new future and a return to the past (Carducci 2020).

REFERENCES

Acosta A., Martínez E. (comp.)
Plurinacionalidad. Democracia en la diversidad, Quito, 2009.

Amin S.
Eurocentrism. Modernity, Religion, and Democracy: A Critique of Eurocentrism and Culturalism, II ed., Cape Town, 2011.

Ávila Santamaría R.
El neoconstitucionalismo transformador. El Estado y el derecho en la Constitución de 2008, Quito, 2011.

Bagni S.
Il popolo legislatore, Bologna, 2017.

Bagni S.
"All you need [to compare] is love" revisited, in *Comparative Law Review*, 2, 2018.

Bagni S.
From the Andes to the EU: customary land law within the ecology of law, in *Rev. gen. der. públ. comp.*, 26, 2019.

Bagni S.
Il ruolo delle Corti costituzionali tra pluralismo giuridico, plurinazionalità e interculturalità, in *Pluralismo nel diritto costituzionale comparato. Blog per i 70 anni di Roberto Toniatti*, <https://www.robertotoniatti.eu/contributi/il-ruolo-delle-corti-costituzionali-tra-pluralismo-giuridico-plurinazionalita-e-interculturalita>, 2020.

Biscaretti di Ruffía P., Crespi Reghizzi G.
La Costituzione sovietica del 1977. Un sessantennio di evoluzione costituzionale nell'Urss, Milano, 1979.

Calloni S.
Los años del lobo. Operación Condor, II ed., Buenos Aires, 1999.

Carducci M.
Sulla (im)possibilità dell'ecocene, <https://www.cedeuam.it/pubblicazioni/>, 2020.

Dussel E.
El Episcopado Latinoamericano y la liberación de los pobres 1504-1620, Buenos Aires, 2014.

Fabelo R.
Nueva Constitución en Cuba. Un camino de participación y aprendizajes colectivos, <https://www.rosalux.org.mx/articulo/nueva-constitucion-en-cuba-un-camino-de-participacion-y-aprendizajes-colectivos>, 2019.

Galeano E.
Le vene aperte dell'America latina, Milano, 2018 (*Las venas abiertas de América Latina* (original title), 1976).

Garay Montañez N.
La revolución haitiana en los inicios del constitucionalismo: la cuestión de la raza y el sujeto jurídico y político, in *Historia Constitucional*, 15, 2014.

Giraudo L.
La questione indigena in America Latina, Roma, 2012.

Gudynas E.
El mandato ecológico. Derechos de la Naturaleza y políticas ambientales en la nueva Constitución, Quito, 2009.

Guevara E.
Discurso de Argel, Argel, 24 de febrero de 1965, in <https://www.archivochile.com/America_latina/Doc_paises_al/Cuba/Escritos_del_Che/escritosdelche0077.pdf>, 1965.

Guzmán Hernández T.Y.
El procedimiento de reforma, la participación popular y las reformas de la Constitución en Cuba (1959-2002), in *Estudios Constitucionales*, 2, 2015.

Hobsbawm E.J.
Il secolo breve. 1914-1991, VI ed., Milano, 2010 (*Age of Extremes. The Short Twentieth Century 1914-1991* (original title), London, 1994).

Leal Buitrago F.
La doctrina de seguridad nacional: Materialización de la Guerra Fría en América del Sur, in *Revista de Estudios Sociales*, 2003.

Lenin I.
Stato e rivoluzione, Milano, 2003.

Marcos A.
Vulnerability as a Part of Human Nature, in A. Masferrer, E. García-Sánchez (eds), *Human Dignity of the Vulnerable in the Age of Rights. Interdisciplinary Perspectives*, Cham, 2016.

Marquardt B.
Historia constitucional comparada de Iberoamérica. Las seis fases desde la revolución de 1810 hasta la transnacionalización del siglo XXI, Bogotá, 2016.

Mastromarino A.
La costituzione cubana del 2019 nel contesto del nuevo constitucionalismo latinoamericano: un dialogo regionale possibile?, in *DPCE Online*, 1, 2020.

Merino R., Valencia A. (coords)
Descolonizar el Derecho. Pueblos indígenas, derechos humanos y Estado plurinacional, Lima, 2018.

Mesa Cuadros G.
Ambientalismo popular, Bogotá, 2018.

Moore J.W.
Antropocene o Capitalocene? Scenari di ecología-mondo nell'era della crisi planetaria, Verona, 2017.

Moreno Cruz M.
La nueva Constitución económica. Repercusión en el actual ordenamiento jurídico cubano, in *Revista Universidad de La Habana*, 289, 2020.

Noguera Fernández A.
La Constitución cubana de 2019: un análisis crítico, in *Revista de Derecho Político*, 105, 2019.

Parolari P.
Taking interlegality seriously: some notes on (women's) human rights and the application of islamic family law in European countries, in *Rev. gen. der. públ. comp.*, 28, 2020.

Pegoraro L., Rinella A.
Sistemas constitucionales, in Id. (coords), *Derecho constitucional comparado*, vol. A, Buenos Aires/Torino, 2018.

Portal Cabellos M.J.
Oro y tragedia de los Incas, II ed., Municipalidad de Cajamarca, 2011.

Portillo Valdés J.M.
Historia mínima del constitucionalismo en América Latina, México D.F., 2016.

Prieto Valdés M.
Las novedades de la Constitución cubana aprobada el 24 de febrero de 2019, in *Cuadernos Manuel Giménez Abad*, 17, 2019.

Prieto Valdés M.
La Constitución cubana de 2019: nuevos contenidos y necesidades, in *Revista Universidad de La Habana*, 289, 2020.

Ribeiro D.
Le Americhe e la civiltà. Formazione e sviluppo ineguale dei popoli americani, vol. I, Torino, 1975 (*As Américas e a Civilização* (original title), Rio de Janeiro, 1970).

Schmitt C.
La dittatura. Dalle origini dell'idea moderna di sovranità alla lotta di classe proletaria, Bari, 1975.

Sciannella L.G.
Il principio di partecipazione popolare nella nuova costituzione cubana, in *DPCE Online*, 1, 2020.

Valarezo G.R.
¿Plurinacionalidad o interculturalidad en la Constitución?, in A. Acosta, E. Martínez (comp.), *Plurinacionalidad. Democracia en la diversidad*, Quito, 2009.

Viafora C., Zanotti R., Furlan E. (a cura di)
L'etica della cura: tra sentimenti e ragioni, Milano, 2007.

Villabella Armengol C.M.
Historia constitucional y poder político en Cuba, La Habana, 2008.

Volpi M.
Libertà e autorità. La classificazione delle forme di Stato e delle forme di governo, VI ed., Torino, 2016.

Yrigoyen Fajardo R.Z.
El horizonte del constitucionalismo pluralista: del multiculturalismo a la descolonización, in C. Rodríguez Garavito (coord.), *El derecho en América Latina: un mapa para el pensamiento jurídico del siglo XXI*, Buenos Aires, 2011.

Zanatta L.
Storia dell'America Latina contemporanea, Bari-Roma, 2017.

Territorial Organization

Chapter 4
Unitary State and Federal State in Latin America: Two Evolving Categories

GIORGIA PAVANI*

Summary: 1. Introduction. – 2. The Latin American area in comparative law studies. – 3. Centrifugal trends in the unitary states. – 4. Centripetal trends in federal states. – 5. Decentralization in Latin America and the crisis of traditional taxonomies.

1. Introduction

Decentralization processes and trends in federalism have been addressed in great depth within the contemporary literature, although there is no uniformity of opinion on the concept of federalism: there is no overarching thesis (Gamper 2005), nor a magic formula to define it (Rosenn 1988), as it is a concept that varies over time and in space.

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Many different disciplinary approaches have been adopted to study this phenomenon from a sociological, institutional/constitutional and political perspective; these range from considering federalism as a process, following an empirical-dynamic perspective (Friedrich 1968), to the idea of federalism as a pact (Elazar 1987).

The same consideration applies to the nuanced federal state category: the characteristics of the legal systems are such that "each decentralized State is decentralized in its own way" (Vandelli 2016).

Despite the crisis in theoretical categories, decentralization processes have been increasing due to a centrifugal tendency to distribute power and an apparent "revitalization of the federal idea" since the end of the Cold War (Burgess 2012).

In the face of this worldwide trend towards decentralization – in all its subtleties – the Latin American area may be considered an "experimental laboratory" of great value in studies relating to forms of state.

Both the earlier experiences as federal states and the new decentralization processes characterizing a part of the Andean area represent an excellent example of combined centrifugal and centripetal trends that may be studied in the broader context of the circulation of decentralization models. The transformations in the territorial organization of power occurring in many Latin American countries have implications for form of state transformation processes (intercultural: Bagni 2017) and the vertical and horizontal distribution of power (presidentialism and federalism seen as two sides of the same manifestation of power). Comparative analysis is used to study the evolution of decentralization in the various countries of the area through the determinant elements (the historical and constitutional framework), the principles that guide territorial organization, territorial levels, the distribution of competences, the elected nature of territorial bodies; the scope of the principle of territorial autonomy, centrifugal trends – towards decentralization – or centripetal trends – towards the centralization of power –, identifying the tools used by the central state to strengthen the federal or unitary nature of the state.

2. The Latin American area in comparative law studies

In the geographic area that stretches from Río Bravo, in the north, to Cape Horn at the tip of Patagonia, otherwise known as *América Latina* or *Latinoamérica*, there are countries that share some common traits, each pre-

serving its own identity. Most of these traits were acquired during the colonial period and in the decades following independence; they have been consolidated over time, becoming "traditional elements of cohesion", to which "novel" ones were added (Carpizo 2005).

The legal-political tradition – the foundations of which can be found in the common heritage of Spanish and Portuguese legal systems – was subsequently influenced by countries such as France and the United States, to which the literature has often assigned too much importance with respect to the Spanish and Portuguese roots (at least in the case of some longstanding public law institutions).

It is well known that ever since the territories were assigned to Spain and Portugal in 1493, the law in Latin American countries has been influenced by foreign laws extraneous to the area. These trends are reflected in the legal systemology: the influence of the French Civil Code was such that Latin American countries were placed in the category of *civil law*, at least in everything relating to private law (David-Jauffret-Spinosi, 2010), at the same time contributing to their relegation to "the margins" (Somma 2015). The United States played an important role, initially in the acquisition of constitutional law institutions and models (such as the presidential form of government and a federal organization) and subsequently outside the sphere of public law.

Foreign influences can be seen in the part of the Constitutions dedicated to territorial organization and the choice of the type of state. In this case, it is impossible to identify a single "element of cohesion" or a single foreign influence, because the area is clearly bipolar and has historically seen the emergence of two different types of territorial organization: the unitary state and the federal state. The largest states in size and population looked to the US federal model, whereas most developed instead under the unitary state paradigm and adopted the French-Napoleonic organization model, which was enabled by the "three hundred years of centralized colonial domination" (Véliz 1984).

Although until recently the two "sub-areas" were internally quite homogeneous, the decentralization process now affecting – in different ways – some states of the Andean area mar the homogeneity of the sub-area of unitary states. Many are undergoing a process of "transformation or reorganization" of the unitary state that is impossible to describe following the rigid 19th and 20th century criteria and the classic taxonomies (based on legal criteria alone) revolving around the distinction between unitary state and compound state (Pavani-Estupiñán Achury 2016).

In particular, the constituent processes of Ecuador and Bolivia were based on a project of a plural society, and the new Constitutions, approved in 2008 and 2009 respectively, show how this is a principle that shall have to guide all political processes, including that of decentralization (see D'Andrea, chap. 5 this volume).

This push towards decentralization confirms that centrifugal and centripetal trends have overlapped in Latin America: just as centralism has marked not only unitary states, so federalism has marked not only federal states. Many countries that adopted the unitary form of state had experienced federalism, even for short periods: the Federal Republic of Central America, after Mexico's independence in 1821; Simón Bolívar's 1826 proclamation regarding Colombia, Peru and Bolivia; Chile's very brief experience that began with the implementation of the Federal Law of July 14, 1826 and ended on August 12, 1827; the small federal interregnum in Colombia, promoted by the Constitutional Charters of 1858 and 1863 (Morelli 1991).

At the same time, the centralist structure implanted by Spain in America through the municipalities, *cabildos*, *intendencias* and *diputaciones provinciales* is such that in countries like Argentina and Mexico the adopted federal model "is not merely a copy of the North American model" (Fernández Segado 2002) but has some distinctive features suggestive of centralist federalism and neo-federalism (§ 4).

The history of each country and the centrifugal and centripetal trends that have characterized the Latin American area in recent times make it difficult to ascribe individual countries to one class or another. In studying the transformations of the unitary state model, we can group some states (Colombia, Ecuador, Bolivia, Peru, Chile, Paraguay and Uruguay) on the basis of their origin. These states confirm the unitary model in their constitutional texts (with initial bureaucratic-administrative decentralization). Nevertheless, some are undergoing decentralization processes and present certain special or unique characteristics which lend themselves well to studying the evolution of the traditional form of unitary state. States may be classed differently according to the aims of the analysis: if reference were made to centrifugal forces, Uruguay and Paraguay could almost be excluded; if centripetal forces were also considered, the class of unitary states would include Venezuela, which is formally classified as a federal state. If the focus were solely on the constant unitary trait, one could exclude countries such as Bolivia and Ecuador, which are in theory moving away from the unitary model through a very distinctive decentralization process.

Depending on the degree of similarity to the Napoleonic model, it is possible to formulate an initial classification, stating that different variants of the unitary state have developed in Latin America (§ 3), and assert that the unitary state is not a monolith, as: "it could be stated that, while each decentralized State is decentralized in its own way, the unitary States, instead, are all unitary in the same way. This belief – widespread – is now disproved [...]" (Vandelli 2016).

The selection of federal states is less complicated than that of unitary states. From the start, the leading scholarship considered Argentina, Brazil, Mexico, and Venezuela as the four federal countries of Latin America.

As clarified earlier, this does not mean that there have been no other federal experiences in the history of that part of the American continent, but that the territorial organization of these countries has looked to the federal state model from the start and continues to do so, albeit with "centralist intervals" often due to military governments. Nor does it mean that Latin American states are assigned to one class or the other in accordance with self-definitions in their respective Constitutions, since the wording embodies the political-cultural commitments emerging from the constituent assemblies and is at times seemingly conflicting.

Latin American countries provide a good example of this semantic conflict. Many of them define the unitary form of state while providing for forms of decentralization: Bolivia (*a unitary/plurinational communitarian state; unitary/decentralized and with autonomy*: art. 1, Cost. 2009); Ecuador (*an independent/unitary/intercultural, plurinational State, organized in the form of a republic and governed in a decentralized manner*: art. 1, Cost. 2008).

Reference to the federal structure is found in today's Constitutions and in many of the earlier ones also. The classic denomination of federalism – 'United States' – was adopted by Brazil until 1967, by Venezuela until 1953 and by Mexico, the only country that has maintained it to date. The Brazilian constitution of 1967 called the country Brazil only, but the 1969 amendment added the adjective federal, whereas Venezuela was called the Republic of Venezuela without any other adjective, which some authors consider suggestive of a centralized form of government (Alexander 1965).

In the current Constitutions the term federal state is found in the Preamble and in art. 4 of the 1999 constitution of the Bolivarian Republic of Venezuela (*federal and decentralized*), art. 1 of the 1994 constitution of Argentina (*The Argentine Nation adopts the federal republican representative form of government.* [...]), and art. 1 of the constitution of the Federative Republic of Brazil (*formed by the indissoluble union of the states and munic-*

ipalities and of the Federal District [...]). The political constitution of the United Mexican States declares that the Mexican nation is one and indivisible, while the federal pact is found subsequently, under point A III.

3. Centrifugal trends in the unitary states

Having completed the processes of decolonization, most Latin American states adopted the unitary form of state, which in its Napoleonic phase is characterized by: the homogeneity and uniformity of the municipal organization; the creation of a municipality for each urban area; the elected local administrations; the division of functions assigned to the territorial institutions, distinguishing between "own" functions and "delegated" state functions; the establishment of the department or of an intermediate level of government to allow control by the state; the establishment in that level of government of a prefect, mayor, governor or representative of the state in the territories.

The essential features of this model have been assimilated by states in different ways, depending on their decolonization processes and the construction of nation-states, and have been transformed, adapted or incorporated into Spanish institutions already present in the American area. This is why the French influence alone cannot explain Latin America's trend towards centralization: "no doubt the three hundred years of centralist, unitary and hierarchical colonial domination have produced a unique form of territorial organization" (Pavani-Estupiñán Achury 2016).

In any case, the centralist character was undermined by the diversity and heterogeneous geography of America: "in the central Andes, a relatively homogeneous type of territorial organization predominated, reflecting and reinforcing the control that the colonial state had over the population"; in the Caribbean, heterogeneity prevailed both in the forms of territorial regulation and in the question of territorial control (Herrera 1999).

As was the case during the initial implementation of the unitary model (neither peaceful nor uniform), even at this time of transformation of territorial organization, it is difficult to argue that many Latin American states are abandoning the unitary model and shifting towards the model of a regional or even federal state, as defined in the literature, because "the context, the mixing, the hybridization of institutions have in recent decades taken on a fresh dimension that is specific to these territories, their people and their needs" (Pavani-Estupiñán Achury 2016).

An initial attempt to classify Latin American unitary states in the light of current transformations and adopting an approach based on similarities (or differences) with respect to the essential characteristics of the Napoleonic model leads to the following considerations. It can be stated that different variants of unitary states have emerged in Latin America: some with almost no political decentralization (e.g., Uruguay and Paraguay), others with processes somewhere between *déconcentration* and *décentralisation* (e.g., Chile, Colombia, Peru), and yet others more decentralized, with even a certain degree of asymmetric territorial autonomy (e.g., Bolivia and Ecuador).

The constitutional reforms and constituent processes of recent decades have brought novelty and represent a new stage in the development of modern constitutionalism. The reiteration of the unitary model stands out among the novel elements, along with the principles that govern the decentralized states and their expressions of ancestral autonomy, as they are recalled in the Bolivian Constitution: *suma qamaña* (*vivir bien*), *ñandereko* (*vida armoniosa*), *teko kavi* (*vida buena*), *ivi maraei* (*tierra sin mal*) e *qhapaj ñan* (*camino o vida noble*), principles that should inspire the entire territorial organization (Baldin 2019).

The choice of the decentralized form, in line with the political design defined by the constituent assemblies, is particularly evident in the specific cases of Ecuador and Bolivia, in which political decentralization can be understood as a necessary condition for realizing the project of an intercultural and plurinational state (Gargarella-Courtis, 2009; Salazar Ugarte, 2013).

The role of native communities is one of the most important elements of this decentralization process: it is a key feature contrasting with the paradigm of classical sovereignty of Western-liberal origin, based on a concept of pluralism/multiculturalism, of "assimilation" and not integration. The new wave of constitutionalism, with the recognition in constitutional texts of the rights of indigenous peoples (and their territories) and the affirmation of the "intercultural" state, breaks with this paradigm; it also upsets the traditional categories of state organization, defined according to rules of Western-European derivation governing relations between centre and periphery and between state and citizens.

Despite the paradigm shift, particularly evident in some countries, the French-Napoleonic influence is perceived in the centralized organization of power, albeit with some peculiarities. In some cases, the classic elements of the unitary state mentioned above prevail over the new elements and overshadow the centrifugal trends towards decentralization that the constitutional and/or legislative reforms were intended to bring about.

This is the case of the intermediate level of government, which in several countries continues to be identified with the French model of the department (Colombia and Peru do not complete the constitutional project of forming Regions). Even when Regions are established, as in Chile, the rationale is the *déconcentration* of power rather than *décentralisation*, in part a vestige of the periods of dictatorship that strengthened the power of the central government.

A change can be seen in Bolivia, where there has been a shift from viewing departments as executors of central state policies, to considering them bodies possibly able to define their own policies and manage their own territory. Regions, created in opposition (politically) to the departments, appear less autonomous. In the case of Bolivia, the emblematic feature of French-Napoleonic *déconcentration* has been transformed into an entity more like the Regions of European regional states.

The idea of the municipality as the building block of local government is a remnant of the French-Napoleonic system; governed by a directly elected mayor, it has its own powers and powers delegated by the centre, although there has lately been a tendency to promote associative mechanisms between territorial entities (as evidenced by the *Ley Orgánica de Ordenamiento Territorial colombiana* no. 1454 of 2011).

Even though legislative and constitutional reforms have maintained some of the entities typical of the unitary model, the break from the principle of *uniformité* – an expression of the principle of *egalité,* a precept of the French Revolution and already present in the centrist structure implanted in Latin America by the Spanish crown – marks a change. The defining feature of the unitary state theoretical construct falters in nearly all the states examined, especially in Bolivia and Ecuador, where the principle of unity is not equivalent to the idea of homogeneity characterizing unitary states, at least in the initial version, but to the cohesion required to implement the process of state integration based on autonomy.

A territorial organization based more on asymmetry than on uniformity emerges in these countries. It is not, however, the asymmetric character that has characterized regionalism in some European states, used as a tool to recognize the rights of minorities (linguistic communities or nationalities that existed prior to the formation of nation-states). The asymmetry in Andean states is not due to the division of territory to exclude but determined by the participation of the territories assigned to indigenous/ancestral peoples in a single plurinational state (a state in which all these peoples coexist). That is why the aim was not to build a new state with the characteristics of the ethnic

federal form, but rather a state (self-proclaimed unitary) that embraces all ethnic differences (recognized through a decentralized territorial organization).

4. Centripetal trends in federal states

The renewal of the concept of federalism in recent years has enabled emergent federal states to develop in different ways with respect to the models in the literature (USA, Switzerland and, in part, Germany), abandoning the aggregative, symmetrical, egalitarian and homogeneous process of formation (i.e. based on the concept of a nation with a liberal imprint that pursues cultural homogeneity) in favour of new federative processes (based on devolution and founded on different historical-cultural and constitutional paradigms) in which asymmetry becomes the rule. In Latin America, these processes affect the states originally adopting the unitary model – as in the case of Ecuador and Bolivia – more than those adopting the federal model from the start.

In the past, these countries have been identified and classified as "emergent" federations rather than "mature" federations, a distinction based primarily on time, institutional features and adaptability to change (Watts, 2008). Along with other emergent federations, the four Latin American states have been considered "fragile," because they experienced military rule and dictatorships (Steytler-De Visser 2015). In the most recent comparative studies, these countries continue to be contrasted with the "mature" American model (Palermo-Kössler 2017).

These circumstances have produced and continue to produce differences with respect to the United States model. In Latin-American federal states "the political system does not always succeed in configuring federalism as a brake on central power, according to Hamilton's well-known assertion: both because of the clauses that in fact limit peripheral powers and because of the non-uniform democratic praxis, due to the fact that states of emergency and the concentration of power have in the past been imposed on the democratic parentheses" (Pegoraro-Rinella 2018). "Latin American hyper-presidentialism" with its traditional concentration of power in the federal government and, internally, in the President, as well as the almost total absence of true fiscal federalism, has granted very little autonomy to the territorial entities (Fernández Segado 2002).

All these social, cultural, political and legal circumstances have had an impact on the development of federalism in Latin America, preventing or seriously hindering its consolidation.

This difference may be explained by the different approach to federalism adopted in legislation, doctrine and jurisprudence, the main legal formants (Sacco 1991), i.e., the different sets of rules and propositions that help generate the legal order of a group within the system and that, in this case, appear somewhat "misaligned".

From the comparative law perspective, the analysis of legal formants suggests that the four Latin American countries are not merely a different way of implementing the US model.

According to the constitutional (normative) formant, "the four countries follow the so-called North American system: everything that is not expressly granted to the federation are powers reserved to the federative entities" (Carpizo 1973). It is the mechanism of dual federalism that has characterized the early federal phase of many states and, in the area under study, of Argentina and Mexico in particular, at least in theory. Despite the clarity of the rule reported in various constitutional texts, in practice the legislative and administrative development of the Latin American federal states has been different.

Right from the start of federal experiences, there has been a trend towards the centralization of power in the hands of the Federation, in particular the federal Executive, far removed from the theory of dual federalism. This has been particularly true in Venezuela, the constitutional design of which weakens the legislative power, preventing it from exercising control over the executive power (articles 156 and 164 of the Constitution).

Except for Venezuela, the Constitutions of the other states define the essential features of the federal state identified in academic writings.

However, legislative development and interpretation of the constitution have moved some states away from these minimum requirements, leading to a misalignment between law in books and law in action, particularly in some areas subject to legislative reform (as in the case of health in Venezuela and of tax co-participation in Argentina and Mexico). This trend towards the centralization of power and this "centralizing culture" have been favoured by the doctrine of the courts. Often the Constitutional Courts charged with settling disputes between the federation and the member states have ruled in favour of the federation, through what has been dubbed "centrist jurisprudence" (and this happens even when the Court is not formally the arbitrator, as in Brazil).

The literature, after studying the historical evolution and the different functioning of the two previous legal formants, has adopted a set of models to describe the evolution of federalism in the Latin American area. It

has used the category of centralized federalism to describe the phenomenon of concentration of power in the Federation. In the case of Venezuela, the terms "authoritarian centralism", then "democratic centralism" and, lastly, "neofederalism" (López Aranguren 1987) have been used to describe the situation in which member states have only the powers granted by the federal legislature.

As for centralized federalism, it should be noted that this category does not identify the generalized process of "centralization" affecting practically all existing federal systems worldwide. This is not the phenomenon to which scholarship refers when it uses the model of centralized federalism to describe Latin American cases: "on the contrary, it seeks to define a different federalism in which state, provincial or regional and local powers are totally dependent on decisions of national scope adopted by the central power" (Fernández Segado 2002). In addition to the dominant scholarship that shares the view of centralized federalism, some scholars have considered certain features of constitutional and legislative reforms as typical of cooperative federalism, the evolution of federalism in which powers and functions are shared between the two levels of government (federal and state).

In this context, we wish to point out the evocative power of federalism models in the literature and their different application in the (self-defined) Latin American federal states through the analysis of legal formants, highlighting the marked dissociation of constitutional text, legislative evolution validated by the legal interpretation of federal courts and by doctrinal theories.

This methodological approach has revealed that the federal state in Latin America has not only diverged from the US model but also developed differently in the four countries, each of which has followed its own "growth curve".

Each country has had moments in which federalism developed at a slower pace, particularly during military rule and other times of democratic crisis. Furthermore, in some of the cases examined, it is possible to detect an involution rather than an evolution of the curve (*i.e.*, of federalism, with the extreme case of Venezuela). In terms of verifying the uniformity of growth curves among states, the analysis of legal formants outlined above helps corroborate certain trends, going beyond the specific data (quantity and type of legislative powers distributed between federation and states, etc.) providing useful information for interpreting the curve.

The trend towards centralization seems predominant with respect to the (few) attempts to increase (or fully recognize) the constitutional autonomy of member states and, in some cases, even of municipalities vis-à-vis the Federation.

Although the choice of the federal model is common to all four of the states mentioned, there are differences: Venezuela confirms an involution of the growth curve; Brazil's growth curve is characterized by many "fits and starts" due to the multiple periods of military rule, which halted the implementation of the federal design and affected its development; the curves of Mexico and Argentina would be the most consistent with the federal model and its determinants, but each is characterized by peculiar elements that have strengthened the Federation at the expense of the autonomy of member states (in Mexico the political influence and role of the President, along with numerous constitutional reforms; in Argentina the very limited financial autonomy of the provinces, among other factors).

5. Decentralization in Latin America and the crisis of traditional taxonomies

All this leads us to a broader reflection on the categories and the criteria used to define them.

The literature had already reconsidered the initial category of federalism, reasoning in terms of "neofederalism" and "unitary federal States" (Hesse 1962) with reference to Brazil, Argentina, Venezuela and Mexico, and in terms of various forms of decentralization for the other Latin American countries that adopted the initial unitary form of state, even envisaging a form of federalism based on a plurinational criterion (Pegoraro-Rinella, 2018).

As highlighted earlier, it is difficult to assign the various Latin American countries to either the federal state or the unitary state category, because the Latin American area lends itself to a different way of study, depending on the classification criteria adopted. If for some countries the doubts are mitigated by the historical (and constitutional) data and by the fact that many of the minimum requirements indicated in the literature are met (e.g.: Mexico and Argentina, which are closer to the federal state model, whereas Uruguay and Paraguay are very close to the unitary state model), for other countries it is not so simple.

Classic categories also falter in the face of the new Constitutions of Ecuador and Bolivia, which on paper are moving away from the unitary model through a very atypical decentralization process.

It is difficult to place each country in a set category (unitary state/composite state, whether federal or regional), particularly in the case of (initially) unitary states that have established intermediate political-territorial

structures or levels with varying degrees of autonomy. In some cases, these levels of government have proven to be more effective than those represented by the member states of some federal states. In addition, the (initially) federal states all record a general trend towards the centralization of power at both the legislative and the administrative level. The (initial) decentralization of unitary states operated essentially at the administrative level and strengthened the central state at the expense of the territorial entities; in contrast, the decentralization of federal states operated essentially at the political level and allowed for the recognition and autonomy of intermediate territorial entities.

In Latin America both categories have evolved but remained distinct: "the decentralizing trends in the unitary State do not necessarily lead to the development of a federal form. Nor does the centralizing federal State always result in a unitary State." (Hernández Becerra 1995).

The previously mentioned trend towards centralization in the federal states follows different trajectories from those that characterized the centralism of unitary states, and the centrifugal trends recorded in the unitary states look to forms of autonomy different from those granted to the member states of the federations, focusing on forms of participation that bring citizens ever closer to their territories. The (initially) unitary states have established intermediate political-territorial bodies or levels with more or less marked autonomy (in some cases more effective than that of the member states of some federations).

In Latin America, these phenomena are particularly evident when considering the (lack of) mutual exchange and influence among the various states in the adopted solutions. Ecuador and Bolivia, in regulating their respective decentralization processes, have not looked to (and have not been inspired by) the federal experiences of their neighbouring federal states, but have promoted a new form of state (unitary and decentralized) respecting plurinationalism. These are the reasons why the old, classic bipartite division unitary state/federal cannot apply to the Latin American area, as it does not represent the many peculiarities of contemporary forms of state.

REFERENCES

Alexander R.J.
Latin American Politics and Government, New York, 1965.

Bagni S.
Lo Stato interculturale: una nuova eutopia?, Bologna, 2017.

Baldin S.
Il buen vivir *nel costituzionalismo andino. Profili comparativi*, Torino, 2019.

Burgess M.
In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives, Oxford, 2012.

Carpizo J.
Federalismo en Latinoamérica, México, 1973.

Carpizo J.
Derecho constitucional latinoamericano y comparado, in *Boletín Mexicano de Derecho Comparado*, 114, 2005.

David R.
Jauffret-Spinosi C., *Los Grandes Sistemas Jurídicos Contemporáneos*, México, 2010.

Elazar D.J.
Exploring Federalism, Tuscaloosa, 1987.

Fernández Segado F.
Reflexiones críticas en torno al Federalismo en América Latina, México, 2002.

Friedrich C.J.
Trends of Federalism in Theory and Practice, New York, 1968.

Gamper A.
A Global Theory of Federalism: The Nature and Challenges of a Federal State, in *German Law Journal*, 6, 2005.

Gargarella R. Courtis C.
El nuevo constitucionalismo latinoamericano: promesas e interrogantes, Santiago de Chile, 2009.

Hernández Becerra A.
El federalismo en Colombia; pasado y perspectivas, in AA.VV., *Congreso internacional sobre Derecho público y filosofía del derecho: perspectivas para el próximo milenio*, Bogotá, 1995.

Herrera M.
Ordenar para controlar: Ordenamiento espacial y control político en las Llanuras del Caribe y los Andes Centrales Neogranadinos Siglo XVIII, Bogotá, 1999.

Hesse K.
Der unitarische Bundesstaat, Karlsruhe, 1962.

López Aranguren E.
El federalismo americano: las relaciones entre poderes en Estados Unidos, Madrid, 1987.

Morelli S.
La revolución francesa y la administración territorial en Colombia, Bogotá, 1991.

Palermo F.
Kössler K., *Comparative federalism. Constitutional arrangements and case law*, Oxford-Portland, 2017.

Pavani G.
Estupiñán Achury L., *Las tendencias del Estado Unitario en América latina*, in *Rev. Gen. Der. Públ. Comp.*, 19, 2016.

Pegoraro L.
Rinella A., *Sistemas constitucionales comparados*, Buenos Aires, 2018.

Rosenn K.S.
El federalismo en las Américas, una comparación perspectiva, in AA.VV., *V Congreso Iberoamericano de Derecho Constitucional*, México, 1988.

Sacco R.
Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II), in *Am. J. Comp. L.*, 1, 1991.

Salazar Ugarte P.
El nuevo constitucionalismo latinoamericano (Una perspectiva crítica), in L.R. González Pérez, D. Valadés (coords), *El constitucionalismo contemporáneo. Homenaje a Jorge Carpizo*, México, 2013.

Somma A.
Le parole della modernizzazione latinoamericana. Centro, periferia, individuo e ordine, in M.R. Polotto, T. Keiser, K. Thorsten, T. Duve (eds), *Derecho privado y modernización. América Latina y Europa en la primera mitad del siglo XX*, Frankfurt, 2015.

Steytler N.
De Visser J., *"Fragile Federations" and the Dynamics of Devolution*, in F. Palermo, E. Alber (eds), *Federalism as Decision-Making: Changes in Structures, Procedures and Policies*, Leiden, 2015.

Vandelli L.
Las múltiples caras del Estado unitario, in G. Pavani, L. Estupiñán Achury (coord.), *Plurinacionalismo y centralismo. Tensiones del Estado unitario en América latina*, Bogotá, 2018.

Watts R.L.
Comparing Federal System, III ed., Montreal, 2008.

Véliz C.
La tradición centralista de América Latina, Barcelona, 1984.

Chapter 5
Decentralisation, Pluralism, Indigenous Communities and Popular Power in Latin America between Unitary States and Federal States

AMILCARE D'ANDREA*

Summary: 1. Methodological premises and terminological clarifications: administrative decentralization and territorial autonomies between the unitary state and the federal state. – 2. The peculiarities of the unitary state. – 2.1. The plurinational state – 2.2. The socialist unitary state of the 21st century. – 3. The peculiarities of the federal state and the "socialist federalism of the 21st century". – 4. Conclusions.

1. Methodological premises and terminological clarifications: administrative decentralization and territorial autonomies between the unitary state and the federal state

In the comparison of public law, the investigation aimed at determining the "identity" of a state requires a methodological framework that allows us to read the fundamental rules, at the basis of the state legal order, in the light of

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the historical, philosophical and political substratum of reference, to objectively understand their modalities of intervention in the sphere of reality. The division of powers, the form of state and the form of government make up the structure that gives birth to political-institutional objectives, capable of satisfying the request for social organization of a dominant group, whether it is an *élite*, a religious community, or a political community, capable to some extent of being the spokesperson for majorities and citizen / popular compromises. If the unifying role of constitutions is observed in the light of legal families and the role of various cultures in the processes of law production, it is possible to frame specific areas of micro-comparison, considering at the same time, on the one hand, the processes of global interconnection and, on the other, the living law. Thus, the convergence between comparative law and comparative constitutional law is also noted, while at the same time maintaining, as has been noted, their distinct structural autonomy (Pegoraro, Rinella 2017), distancing oneself from the "monist" perspectives of global constitutionalism, which would instead entail "a sort of dilution of the State in the *mare magnum* of globalization" (Amirante 2014).

The investigation into pluralism and decentralization requires reflections that intersect with the recognition of the role of the values of culture and tradition, understood as "a work of representation of reality based on a set of previously learned data" (Glenn 2011), of the related communities within a legal system. The observation of the territorial organization of the state in Latin American legal systems, between popular power in the new "socialisms", participatory democracy, pluralism and indigenous community-nations, does not allow to delineate defined counterparts, but "hybrids" sculpted by history, by confrontation-clash of cultures and political economic processes. The forms of decentralization thus highlight, as has been noted, "centrifugal tendencies in the unitary states" and "centripetal tendencies in the federal states" (see *above*, chapter 4; Pavani 2019).

With the appearance of the *nuevo constitucionalismo latinoamericano* and with the democratic-revolutionary waves that, at the turn of the twentieth and twenty-first centuries, overwhelmed the American subcontinent through requests for substantial equality and guarantees of fundamental freedoms, there has been the implementation of organizational-territorial asymmetries in order to respond to the demands of pluralism and self-determination of local and / or indigenous communities, experimenting with innovative approaches to participatory democracy and specific policies for the decentralization of power. The "type of state" concentrates the study and reflection precisely on national identification in relation to a higher or lower

decentralization. This also includes the constitutional investigation on the role of local cultural communities, as well as populations both non-sedentary and specifically rooted in a territory, such as indigenous peoples (Pegoraro, Rinella, 2017; Lanchester 1990).

Here, the analysis of the types of state will move between the "State-Regions / Federated States-local communities" relations in Latin America, where certain powers are expressed differently, over associated life of entities or social groups within a limited and recognized territory, or a rural spatial area.

The type of state has become an independent field of study for the horizontality of the form of state. The expansion or limitation of more or less incisive policies of territorial decentralization, and the constitutionalisation of community rights, increasingly take place independently from the horizontal relationship between authority and freedom. Western public law, in analysing the vertical relationship of the form of state, has moved exclusively between federalism and regionalism for a long time, excluding the equally relevant relationships between, for example, power and territories, clans and tribes, as happens in many geographical areas of the world. Not only is it the state-apparatus confronted with peripheral institutional entities, but also with groups and communities structured differently from the centre, overcoming the mere reproduction of the central model on a portion of the territory. The colonial residues or the pro-West proposals that remain or prevail in the constituent processes in other latitudes of the world, just like for the forms of state and the forms of government, do not always achieve perfect adherence with the receiving juridical-political culture. As far as the types of state are concerned, decentralization is not always contained in the unitary, federal or regional models understood in the West. The imposed territorial models clash with different ethnic groups, religions, indigenous and political-economic paradigms, creating original legal-social structures, largely born from the superimposition of pre-existing legal-social structures, often through forms of colonialism.

The analysis of decentralization, capable of moving beyond the bureaucratic-administrative aspect, will try to highlight the multifunctional link between the distribution of political power and sovereignty with historical, traditional and cultural pre-juridical elements. For the reasons just mentioned, the study of decentralization phenomena can concern both the relationship between authority and society in the broad sense of the term, insofar as the peripheral entities represent the latter politically, and the mere distribution of power to the inside of the apparatus, intersecting interdisciplinarily also with the form of government.

The term decentralization is used to mean organizational policies regarding the ownership of certain functions and their effective exercise, which can affect all the types of state briefly mentioned above. As established in the doctrine, it initially implied the "bureaucratic decentralization" and the "institutional decentralization" (Pegoraro, Rinella 2017). The first indicates the mere administrative organization of the state, in which the central system, holder of the powers of control and direction, in a hierarchical relationship, aims to satisfy certain local and peripheral needs. So-called "institutional decentralization", on the other hand, attributes functions, usually purely technical, to entities that are separate from the state for the exercise of economic activities. With administrative decentralization, on the other hand, a power that is not merely executive or functional is transferred to the bureaucratic machine; furthermore, it is not only aimed at externalizing a technical role, but also an effective decision-making power. This attribution of powers takes place through a specific connection, normally constitutionalized, no longer hierarchical but based on the criterion of competence, establishing limited powers of call-back (Pegoraro, Rinella 2017). Authoritative action in the exercise of administratively decentralized functions represents the first step towards the socio-political evolution of autonomy, affecting the form of state and the relations between authorities, freedom and citizens, expanding the decision-making space for certain purposes, which affect the conquest of legal powers or the change of political-administrative orientations up to the attribution of territorial legislative powers. These indications, as a rule, are included in the constitutional provision, and represent one of the triggers, in the case of intolerance of the reference system, of the appearance of a new constituent power. In some countries of the Latin American subcontinent, it is interesting to notice how the implementation of the political direction, which does not always follow a hierarchical order, is more incisive in the lower territorial levels (*muncipios, comunas*) compared to intermediate levels (*regiones, estados miembros*) or there is "almost a substantial institutional equality between Municipalities and States" (Pegoraro, Rinella 2017).

In the sections of the Latin American constitutions dedicated to territorial organization and the choice of the type of state, the two main forms of territorial organization are generally found: "The largest states in terms of size and population were inspired by the US federal archetype, while most were born under the unitary state paradigm and adopted the Franco-Napoleonic model of organization" (Pavani 2019; Véliz 1984; see above, chapter 4). Following this overview of Latin America, it will be possible

to see how the types of state are converging within increasingly blurred categorical boundaries.

As has been carefully noted, the rigid separation between the unitary state and the compound state, which characterized the legal doctrine of the nineteenth and twentieth centuries, can officially be considered obsolete today, especially if we analyse Latin American "federalisms" (Pavani, Estupiñan Achurry 2016), between decentralization, indigenous communities and popular power in the new "socialisms". By "federalism" we mean "the movement of thought that advocates a form of social organization capable of combining two opposite tendencies of modern society: that of globalization of the economy and sharing of resources on the one hand, and that of the defence of the cultural-historical identity of groups and individuals, on the other" (Bagni 2002), finding fulfilment in the federal state but without exhausting itself in it. Federalist practice and federal philosophy also manifest themselves in the unitary and regional state, and in its intermediate variants (Mastromarino 2010).

As G. Pavani recalls, in analysing the types of state and their relations with decentralization policies, pluralism, and the role of local or indigenous communities, within the formants, regarding legal norms, doctrine or jurisprudence, it is possible to identify the rules that, in a legal system, contribute to the achievement of the legal order (Sacco 1991; Pavani 2019), also with a specific definitional need. The comparative approach thus makes it possible to evaluate the trends towards the abandonment of classical taxonomies and to verify the evolutionary peculiarities of certain states (Pavani 2019; see above, chapter 4), through diachronic analysis, in contexts where principles rooted in the territories, through political-social actions, manage to become an integral part of the legal system of reference, intersecting at the various territorial levels and at the distribution of powers.

2. The peculiarities of the unitary state

We are assuming that even the unitary state can articulate its territorial organization in favour of basic entities, such as municipalities; of intermediate bodies, such as the provinces; of higher entities, such as regions or metropolitan cities. Local authorities can also join in association forms for the management and administration of specific services (Pavani, Pegoraro 2006).

Here, we will examine prototype models of unitary states with a centrifugal tendency and characterized by an asymmetrical declination of the prin-

ciple of autonomy, in which the influences of the theories of the new democratic socialisms are also evident: the plurinational state and the "unitary socialist state ("rule of law and social justice") of the 21st century".

2.1. The plurinational state

In the Latin American scenario, the concept of "plurination" is affirmed. The plurinational state, which is still difficult to define, emerged from the struggles and claims of indigenous communities-nations, carried out by indigenous movements, in particular in Ecuador and Bolivia, and sanctioned after the new constitutional reforms and the peculiar achievements of intercultural society. It embodies a model that is placed in the bed of the unitary state but composed of different nationalities within it: different cultures, traditions, languages and different peoples exist and are recognized with significant autonomy within a single state. Starting from the recognition of linguistic rights, the constitutional texts enunciate large declarations of collective rights and recognition of autonomies, allowing the drafting of very incisive detailed legislation, thanks to the extensive constitutional recognition. Specific competences are divided between the Legislative Assembly and the territorial and regional assemblies, from territorial economic management, and public finance, up to the recognition of specific procedural rights, with the establishment of special courts. While structuring itself on the liberal pillars of Western-style constitutionalism, the plurination proposes a strong evolution above because of the affirmation of the so-called "decolonized" social state, placing itself first of all as a claim of indigenous peoples (see above, chapter 4). The detachment from the concept of "minority" and its recognition, at the basis of liberal multiculturalism, highlights the affirmation of a fully intercultural society. Catalogued both within the types of state and among the forms of state, the plurination, structured on the regional-*autonómico* system, tries to distinguish itself from the federal systems, without, however, obtaining the hoped-for success, that is, the obvious detachment between the unitary and federal state. After the advent of multinational federalism (in which the prototype is recognizable in Canada), this is how plurinational regionalism in Latin America appears to be a mirror image. These experiments also create an interesting interconnection between neomunicipalism and regionalism (Pegoraro, 2016) an example of which is *autonomía indígena originaria campesina* (AIOC) in Bolivia, among the most combative and well-known in the area. In fact, it is also attributed to the

municipalities: "*Son autonomías indígena originario campesinas los territorios indígena originario campesinos, y los municipios, y regiones que adoptan tal cualidad de acuerdo a lo establecido en esta Constitución y la ley*" (art. 291, paragraph 1). This *autonomía* consists of "self-government, as the exercise of the free self-determination of nations and of the original peasant peoples, whose population shares their territory, culture, history, languages and organization or legal, political, social and economic institutions" (art. 289), and it is exercised through "its own rules and forms of organization, with the denomination corresponding to each people, nation or community, as established in the respective statutes and conformity with the constitution and the law" (art. 296). The plurination within the intercultural state, as also reiterated by the Bolivian *Tribunal Constitucional Plurinacional*, aims at reorganizing "unity in plurality", through "plural structures of a community character" (*SCP* n ° 1714/2012, 1 October 2012).

The role played by indigenous communities is one of the most significant elements of decentralization processes. Here, the fundamental directives are elaborated starting from the principles of pluralism and the rights of the original peoples: with the recognition in the constitutional texts of the rights of indigenous peoples, including territorial self-determination, and with the affirmation of the "intercultural" state (Bagni 2017), a break with the unitary model and assimilationist integration of the French type takes place, especially in Ecuador and Bolivia. In these countries, a territorial organization based on asymmetry has established itself, which is totally different from the process undertaken, for example, in Europe, which aims to recognize the rights of linguistic minorities or nationalities that pre-exist the formation of nation-states through pseudo-federalists built on the need for the mere division of the territory (Pavani, 2019). This "change of course" arises from the revolutionary and constituent thrusts of the most marginalized populations, especially indigenous ones, and from the needs of social inclusion and participation in the realization of social justice, to adhere to a single unitary state, and recognizing the ethnic element through a decentralized territorial organization. In these countries, the "political vanguards" of decentralization have made it possible to organize the unitary state in a renewed way, creating an intercultural national identity, recognizing the *buen vivir-sumak kawsay* (Baldin 2019). For instance, theories of "socialism *sumak kawsay*"/"Republican biosocialism" (Ramirez 2010) or "Andean community socialism"/"community socialism of *vivir bien*" (García Linera 2010), have been developed also to ensure that the constitutional structure allowed "the indigenous people of Ecuador and Bolivia, as well as oppressed peasants and workers, to have access to the insti-

tutional spaces of power and representation, and to contribute to the re-elaboration of the economic system; and to do this, they took into consideration the cultural and traditional peculiarities of the indigenous peoples of both countries. These governments have also organized meetings and promoted research to deepen the relationship between *buen vivir* and socialism" (Hidalgo Capitàn, Cubillo Guevara 2017). Intellectuals like Boaventura de Sousa Santos (2010) and François Houtart (2010) "have made a significant contribution to the development of the currents of *Buen vivir posdesarrollista* and *Buen vivir socialista*" (Hidalgo Capitàn, Cubillo Guevara 2017).

Art. 8 of the Bolivian constitution states that the state must also absorb and promote the ancestral/ indigenous and ethical-moral principles of Bolivian plural society, such as: "*ama qhilla, ama llulla, ama suwa (no seas flojo, no seas mentiroso ni seas ladrón), suma qamaña (vivir bien), ñandereko (vida armoniosa), teko kavi (vida buena), ivi maraei (tierra sin mal) y qhapaj ñan (camino o vida noble)*". In the past, the departments, an expression of the central state, did not have political autonomy in Bolivia.

With the new constitution and the proclamation of the plurinational state, the political self-determination of the regions has taken over, accompanied by a "paradigmatic model of the constitutional recognition of plurilingualism" (Buono 2016), providing for 37 languages, 36 of which are indigenous. In Bolivia there was also talk of "community democracy", marking, as Carducci recalls, the difference between "consultation" or "information" of people, "endo-procedural" participation, and "holistic" and "biomimicry" participation (Carducci 2018). It is exercised "through the election, designation or appointment of the authorities and representatives of the nations and indigenous peoples of peasant origin" (Pegoraro, Rinella 2017), as reaffirmed pursuant to art. 11 paragraph 3 of the Constitution. They are provided for by art. 11, paragraph 2, of the Constitution, decision-making powers to meetings and *cabildos*. The people "through organized civil society, participates in the design of public policies and the control of the management of public affairs at all levels of government, as well as in public companies, with mixed participation and in private ones that manage tax revenues" (Pegoraro, Rinella 2017), as outlined in arts. 241 and 242 of the Constitution.

The jurisprudential formant, in particular of the *Tribunal Constitucional Plurinacional,* reaffirms the Bolivian paradigm of *pluralismo jurídico egualitario* opposed to unitary juridical pluralism: the state has not recognized "the (hetero) determination of recognized legal systems: it is the indigenous peoples themselves who - in exercising the right to self-determination - es-

tablish the rules, procedures and institutions applicable to them, without state interference, in a constitutional framework that promotes the complementarity of functions and hierarchical equality between jurisdictions on equal terms" (Buono 2018).

Ecuador, in art. 57 of the Constitution, recognizes the right of minority groups to "maintain, develop and strengthen their identity, sense of belonging, ancestral traditions and forms of social organization, and to exercise authority over legally recognized territories and community lands" (Pegoraro, Rinella 2017). Pursuant to art. 60, they can form territorial districts to preserve their culture, with the procedures established by law. Art. 171 of the constitution is dedicated to indigenous jurisdiction, offering communities legal institutions to resolve their conflicts (Baldin 2015; Pegoraro, Rinella 2017). Decentralization shows a highly developed local power for a unitary state, as confirmed also in this case by the jurisprudential formant, in particular of the Constitutional Court, in relation to the leading role of *municipios* (*Tribunal Constitucional del Ecuador, Rol* n ° 050-2001-TC).

The constitutionalization of the principles of indigenous communities in Bolivia and Ecuador has also had an impact on the construction of new socio-economic models, allowing the development of new forms of state (Bagni 2013), modelled on the implementation of the concept of Welfare state (see above, chapter 3, § 6).

2.2. The socialist unitary state of the 21st century

Even following the transition from *Estado socialista de trabajadores* to *Estado socialista de derecho* with the new constitution in 2019*,* the Republic of Cuba shows interesting peculiarities, configuring what we can define as the "Socialist unitary state of the 21st century". The Cuban constitution maintains the unitary and socialist form of state, and provides, after the enunciation of the principles governing the *Gobierno provincial del poder popular*, the institution of *Organos locales del poder popular*. Among the duties of the Municipal Assembly of People Power, the art. 191 of the constitution refers to the duty to guarantee the participation of the territories, in the wake of the new "socialisms of the 21st century". As political-administrative demarcations divide the national territory, the Local Administrations direct the economic bodies and services to meet the economic, health, educational, cultural, sporting, recreational and environmental protection needs of the community of the territory affected by the jurisdiction of the respective Assembly. Pursuant to art. 192 of the Constitution, for the

exercise of their functions, the local Assemblies of popular power rely on work commissions, on initiative and wide participation of the population, and act in close coordination with mass and social organizations. In particular, they rely on the *consejos populares*, which are made up of cities, towns, neighbourhoods, rural areas. Invested with the highest authority in the exercise of their functions, they represent the territory in which they are established. Among their main objectives is the development of the production and supply of services and for the satisfaction of the assistance needs of the population, both economic and educational, cultural, environmental and social. This is done through the promotion of popular participation and local initiatives. The *consejos,* pursuant to art. 194 letter a) of the Constitution, are made up of the delegates elected in the constituencies of the district of the Municipal Assembly and subsequently elect the President from among them. The delegates, pursuant to art. 195 letter a) of the Constitution, have the duty to "*mantener una relación permanente con sus electores, promoviendo la participación de la comunidad en la solución de sus problemas*" (D'Andrea 2019). These *consejos* did not fail to demonstrate, however, signs of weakness due to a lack of accountability established by law, with the consequent limitation of autonomous powers. A radical transformation is expected, following the entry into force of the new constitution, in particular concerning a "bottom-up" mechanism of decentralization and democracy.

Among the general provisions of the electoral system, art. 204 crystallizes precisely the paradigm of participation combined with the representative one, as "*todos los ciudadanos, con capacidad legal para ello, tienen derecho a intervenir en la direcciòn del Estado, bien directamente o por intermedio de sus representantes eligidos para integrar los Organos del poder popular, y a participar, con ese propòsito, en la forma prevista en la ley, en elecciones periòdicas y referendos populares, que seràn de voto libre, igual y secreto*". The rights *de petición y participación* are regulated by art. 200 of the Constitution, in the section relating to *Garantías a los derechos de petición and participación popular* (D'Andrea 2019). Pursuant to art. 176 of the new electoral act of 2019, n. 127, 50% of the total pre-candidates to be elected for the Provincial Assemblies and for the National Assembly must be constituted among the delegates of the municipal assemblies. The art. 153.1 also provides that: "The nomination commissions are made up of representatives of the Central Workers House of Cuba, the Committees for the Defense of the Revolution, the Federation of Cuban Women, the National Association of Small Farmers, the Federation of University Students and the Federation of Middle-High School Students, nominated by the respective national, provincial and municipal directorates". It should be noted that "the overwhelm-

ing majority of the nearly 8 million citizens over the age of 16 with the right to vote belongs to these mass organizations. They represent an element of particular significance on the front of political participation, as a real link between the electorate and the representative bodies" (Sciannella 2020).

A historical institute theorized by Fidel Castro, to implement popular participation and for the continuous renewal of Cuban socialism, is the "*Consulta popular*". We also find it in the new constitution *ex* art. 108, lett. c). The National Assembly may submit legal texts to him if it deems it appropriate "regarding the nature of the legislation in question". In the legislative history of Cuban socialism, this institution has been used to elaborate, with popular participation, the legislative contents then proposed in the consequent referendums, to make the people participate beyond the mere approval or repeal of an act or statute. "It represents one of the most significant institutions of participation in the constitutional architecture of Cuban socialism, used by Fidel Castro to strengthen ties with his people" (Sciannella 2020). The most varied political-legislative projects were discussed by means of the *Consulta popular*, from the 1976 reform of the constitution, up, for example, to the Criminal Code of 1979, the Labor Code of 1984, the Act on agricultural cooperatives of 1982, etc. Under the influence of the Marxist and Leninist doctrine, democracy cannot and must not be exhausted, in the Republic of Cuba, in the mere exercise of voting in cyclical elections, but in the participatory practice and popular control, through that decentralization aimed at the construction of popular power.

The new Cuban constitution of 2019 was certainly not born from the emancipation from the conditions of exploitation and marginalization of indigenous communities, as happened in other Latin American countries. Consider the lack of indigenous "continental" social conflicts (in particular Andean) and the central role played by indigenous nationalism in contemporary Cuban history and *mestiza* culture, guiding philosophy extrapolated from the intellectual contribution of José Martí, poet and national hero, a symbol of the struggle for Cuban independence. In Cuba, characterized by "socialist legality" (art. 9 of the Constitution), there are different declinations of the concepts of participation and pluralism as compared to, for example, the new unitary states of the *nuevo constitucionalismo latinoamericano* (D'Andrea 2019). As in the previous constitutional text, there is no reference to pluralism and multiculturalism in the constitution. The prohibition of discrimination is reiterated in art. 42, which includes gender, sexual orientation, gender identity, age, skin colour, and disability, among the reasons that prohibit any discrimination concerning the previous constitution. But, as T. Volpato recalls, the

perception of multiculturalism in Cuba is detached from the strictly political conception, unlike the principle of equality and non-discrimination, "being (on the contrary) a vision aimed at evaluating the mentality and the use of cultural diversity as elements of exchange and syncretism which, on the island, seem to represent the most developed practice of cultural coexistence. From this perspective, Cuba embodies a clearly multicultural socio-cultural environment, of which integration and intergroup practice are its most relevant elements" (Volpato 2013). The pluralism "underlying this model represents a theoretical meta-dimension that despite ignoring the demographic-descriptive, programmatic-political and ideological-normative meanings (internationally recognized as multicultural reference models for the implementation of policies in modern liberal-democratic states), perpetuates the principle of relative self-ascription as an essential condition for the production of a certain type of ethnic classification which, if recognized institutionally, would almost automatically assign a specific position and *status* to the participants to the Cuban social structure" (Volpato 2013). The cultural integration of the late nineteenth century went far beyond a simple form of cultural contamination, transforming itself into a social mutation which, at its origins, affirmed the existence of "revolutionary traditions that proclaimed that all Cubans were equal" (De la Fuente 2000) and that guaranteed the same right to claim the birth of a new nation, generated by their collective action. Sticking to the mere constitutional text, the same concept of balance and equity is increasingly consistent with the concept of socio-cultural absorption and assimilation. But sociological observation tries to confront itself with its most intimate aspects, highlighting in the constitutional text the common revolutionary resistance of cultures within the same territory, of the same unitary state. In these terms, "the diversity and the different needs of each national cultural group coexist without mixing, in a symbolic universe that includes diversity, not as a limitation to integration and coexistence", but highlighting an "innovative perspective of the contemporary multicultural phenomenon" (Volpato 2015).

3. The peculiarities of the federal state and the "socialist federalism of the 21st century"

The doctrine has always included Argentina, Brazil, Mexico and Venezuela among the Latin American federal states, as per the constitutional dictate, highlighting the goal of limiting central power along the lines of the North American system, where anything that is not attributed to

Federación is reserved for *Entidades federativas* (Carpizo 1973; Pavani 2019; see above, chapter 4).

In Latin America it is customary to speak of "centralist federalism" (see above, chapter 4). As Pavani recalls, he does not refer to the mere centralization of power, already common to the evolution of modern federalism after the First World War, as a consequence of the new conditions of modern society and increasing industrialization, but to that federalism in which the state, provincial or regional powers, and local authorities are entirely oriented by the decisions taken at the national level by the central power, where the impact of provincial or regional and local power centers on political decisions is often irrelevant (Pavani 2019; Fernàndez Segado 2002). This tendency towards the centralization of power has often been supported also by the jurisprudential formant, through a "centralist jurisprudence" (Pavani 2019; see above, chapter 4).

In the observation of Latin America, the country that traces the federal state in a particularly different way is Venezuela, where the peripheral bodies are above all without a representative chamber. The art. 136 of the constitution establishes that "public power is divided into municipal power, state power and national power", thus identifying the three levels of power.

Since 1901, when the liberal federal state system established in 1864 collapsed, Venezuela gradually began to become a "centralized Federation" through the national concentration of almost all powers; a situation that essentially continued until the new constitution, despite the political-institutional changes of 1946 and 1958 (Brewer-Carías 2003). With the constituent process of 1999 the art. 4 states that *"La República Bolivariana de Venezuela es un Estado federal descentralizado en los términos consagrados en esta Constitución",* recalling the wording of art. 2 of the 1961 constitution, according to which "*La República de Venezuela es un Estado Federal, en los términos consagrados por esta Constitución*". However, many principles of the *Ley Orgánica de descentralización, delimitación and transferencia de competencias del poder público* of 1989 are constitutionalised (Brewer-Carías 2003; Brewer-Carías *et al*. 1994). These measures were followed by others, such as the elimination of the senate, establishing, pursuant to art. 186 of the Constitution, a unicameral parliament: the National Assembly. The redistribution of power must take place, pursuant to art. 4, "*por los princípios de integridad territorial, cooperación, solidaridad, concurrencia y corresponsabilidad*".

In addition to the above principles, art. 165 of the Constitution, which refers to the concurrent competence between the three territorial levels of public power, refers the development of institutions to the ordinary law,

through *leyes de bases* issued by "*poder nacional, y leyes de desarrollo aprobadas por los Estados",* specifying that "*Esta legislación estará orientada por los princípios de la interdependencia, coordinación, cooperación, corresponsabilidad y subsidiariedad*" (Brewer-Carías 2003).

Concerning the principle of interdependence, the territorial levels, in the exercise of concurrent powers, must express relationships of dependence on each other, on a reciprocal basis and through coordination. This coordination is then in practice controlled and managed by an intergovernmental body set up by the new constitution *ex* art. 185: the *Consejo Federal de Gobierno* (Brewer-Carías 2003). As reiterated in art. 136, each of the branches of Public Power has its own functions, but the bodies responsible for its exercise must collaborate for the realization of the objectives of the state , under the validity of the cooperative principle and solidarity between political entities, thus establishing cooperative federalism as opposed to dual federalism, which on the contrary is based on an agreement between the different political-territorial entities and which would embody the principle of the intangibility of action of federal power. An institutional expression of Venezuelan cooperative federalism is given precisely by *Consejo Federal de Gobierno*. It is from this body that it depends, pursuant to art. 185 of the Constitution, the inter-territorial compensation fund, "intended to finance public investments aimed at promoting the balanced development of the regions, the cooperation and complementarity of the policies and development initiatives of the various local public bodies, and above all to contribute towards essential works and services to less developed regions and communities. The Federal Council of Government, based on regional imbalances, annually discusses and approves the resources to be allocated to the Territorial Compensation Fund and the priority investment areas to which these resources should be allocated".

The vertical distribution of public power between municipal, state and national power, in the terms defined in art. 136 of the Constitution, makes it possible to distinguish between the powers assigned to the bodies of the three territorial levels and the matters of respective competence, pursuant to art. 156, 164, 178 and 179 of the constitution (Brewer-Carías 2003). As for the *municipios*, the constitution also establishes the normative distinction between "*atribuciones"* and "*materias*"; art. 178 regulates "*la competencia del Municipio*" translated into a series of not exclusive *materias*; and in articles 174 et seq. are specified *atribuciones* of the organs of the municipal public power, which are exclusive : the competence to exercise the legislative function of the municipality is attributed to the Town Hall

Council, and to the Mayor the competence to exercise "the government and administration of the municipality", pursuant to art. 174 of the constitution (Brewer-Carías 2003).

A central role, in the legislative deployment that has structured popular power, is covered by art. 184 of the Constitution, which establishes that the law defines open and flexible mechanisms to ensure that states and municipalities decentralize and transfer certain services to organized communities and groups of citizens. This has allowed an innovative ramification, the expression of a specific federalist practice inspired by the constitution, through forms of institutional decentralization in other territorial spaces, influenced by the evolution of times and internal migrations, going beyond *municipal* decentralization. Currently, the *consejos comunales* and the *comunas* have a central role in Venezuela.

Starting in 2007, with the announcement of the government to build the "21st-century socialism", a series of considerations were formulated, which directly influenced the political-territorial division of the Republic, since they included the creation of *comunas*, entities modelled by the aggregation of communities and constituted as forms of self-government and direct democracy, to build that effective territorial decentralization in which popular power could be expressed.

In the establishment phase, in particular with the reform of the *Ley Orgánica de descentralización, delimitación y transferencia de competencias del poder público* in 2009, the control of the reorganization process was transferred to the central state. Then, with a series of acts on popular power of 2010, the system of interrelationships of the *comunas* is realised, which fuels the political-territorial decentralization and the distribution of power at the local level. In carrying out the project of this federalism of "21st-century socialism", socialism, in Venezuela, becomes a non-partisan value closely linked to the concept of "*suprema felicidad social*", of autonomy and protagonism.

Socialism is precisely defined by the *Organic ley of the poder popular* of 2010 as "a kind of social production relations, focused on solidarity coexistence and on the satisfaction of the material and immaterial needs of the whole society, whose fundamental basis is the recovery of the value of work as a producer of goods and services to satisfy human needs and achieve the *suprema felicidad social* and integral human development. For this, it is necessary to develop social property concerning the basic and strategic factors and means of production, which allow all Venezuelan families and citizens to use and enjoy their individual or family assets or property and exercise the full enjoyment of their economic, social, political and cultural rights" (art. 8.14).

This development is possible through Popular Power, defined in art. 2 as "The full exercise of sovereignty by the people at the political, economic, social, cultural, environmental, international level and in all areas of *desenvolvimiento y desarrollo* of the society, through its *diversas y disímiles* forms of organization, which build the *Estado comunal*". The *Estado comunal* is defined as a "Form of political-social organization, based on the democratic and social rule of law and justice established in the constitution of the Republic, in which power is exercised directly by the people, with an economic model of social ownership and sustainable endogenous development, which makes it possible to achieve the supreme social happiness of Venezuelans in socialist society. The *comuna* is the fundamental conformation cell of the *Estado comunal*" (art. 8.8).

The *comuna* would therefore be the ideal space to form self-government: a space with a smaller territorial dimension than the *Municipio*, but greater than the area of the *Consejo comunal*: it must be economically self-sustainable and must receive the transfer of certain functions and services performed up to now by *municipios*. This proposal was contained in the *Primer Plan Socialista de Desarrollo Económico y Social de la Nación* (2007-2013) which contemplated the creation of a new institutional framework in which the *comunas* were to become "the fundamental cell for the formation of the *Estado comunal*", as required by art. 8.8 of *Ley orgánica del poder popular*. The *consejos comunales* are conceived as organs for the direct exercise of popular sovereignty and the *comunas* are framed in the geographic and population area that allow the deployment of *consejos* themselves. The construction of popular power represents the fundamental objective, and has, as its purpose, pursuant to art. 4 of the *Ley orgánica del poder popular,* to "guarantee the life and social well-being of people, creating mechanisms for their social and spiritual development, seeking equal conditions so that everyone can freely develop their personality, direct their destiny, enjoy human rights and achieve supreme social happiness; without discrimination based on ethnicity, religion, social status, sex, sexual orientation, gender identity and expression, language, political opinion, nationality or origin, age, economic position, disability or any other personal, legal or social circumstance, and which has the consequence of cancelling or compromising the recognition, enjoyment or exercise of human rights and constitutional guarantees".

In the third final provision, as far as indigenous communities are concerned, it is established that "the exercise of the participation of the people and the encouragement of the initiative and organization of popular power

established in this act, will be applied in indigenous cities and communities, according to their uses, customs and traditions".

As established in the definitions referred to in art. 3 of *Reglamento de la Ley Orgánica del Consejo Federal de Gobierno* (*Gaceta Oficial Nº 39.382* of 9 March 2010*, Decree Nº 7.306 09* of March 2010), Venezuela establishes a cooperative federalism that we can define as "21st century socialist federalism".

In Venezuela, "federalism" is clearly defined in *Reglamento* as "a system of political organization of the Bolivarian Republic of Venezuela, governed by the principles of territorial, economic and political integrity of the Venezuelan nation, cooperation, solidarity, competition and co-responsibility between the institutions of the state and the sovereign people, for the construction of socialist society and of the democratic and social rule of law and justice, through participation *protagónica* of the organized people, to perform functions of government and administration of *factores* and *medios de producción de bienes y servicios* of social property, as a guarantee of the full exercise of popular sovereignty against any attempt by national and regional oligarchies to concentrate, centralize and monopolize the political and economic power of the Nation and the regions".

It is defined, in *Reglamento,* also the *descentralización*: "Strategic policy for the full restitution of power to the sovereign people, through the gradual transfer of competences and services from national, regional and local institutions to organized communities and other basic organizations of popular power, aimed at promoting popular participation, realizing authentic democracy by restoring the government's capacities to the people, establishing efficient and effective practices in the distribution of financial resources and promoting complementary and balanced development in the regions of the country".

4. Conclusions

If we look at the new constitutions of Ecuador and Bolivia, the objectives of creating a plural society, always within the figure of the unitary state, as stated in the constitution, characterize in full the political processes and, therefore, also the processes of decentralization and recognition of the original nations, through the elaboration of the "plurinational" state.

Cuba, a unitary state "*socialista de derecho*" ex art. 1 of the new constitution of 2019, proposes different and innovative declinations of the concepts of decentralization, participation, and pluralism linked to its historical, po-

litical, economic and cultural substratum, innovating both the contemporary multicultural phenomenon and the democratic participation of local populations-communities.

In Venezuelan federalism we can see a promotion "from the center" of the process of transfer of power, with an active impact on the planning, execution, control and evaluation of public policies, and a specific form of implementation of participatory democracy and of "popular power". The art. 25 *Ley orgánica del poder popular* specifically provides: "The national executive power, in accordance with the development and consolidation initiatives originating from popular power, will plan, articulate and coordinate joint actions with social organizations, organized communities, municipalities and systems of aggregation and articulation that arise among them, with the aim of maintaining consistency with national, regional, local, municipal and community strategies and policies". The national central government also puts into practice mechanisms for the attainment of national unity through central management aimed at implementing the model of cooperative federalism, in particular on the fiscal level to reduce the economic discrepancies between federated states. At the same time, through an innovative process of construction of participation, linked to the new theories of "21st-century socialism" and to the new acts on popular power of 2010, a completely new experiment is put into practice aimed at creating mechanisms of self-government, pluralism and popular power through which, together with "states" and "municipalities", local and indigenous communities also participate according to their uses, customs and traditions.

In all the cases analysed, the theoretical influence of the new "democratic socialisms"-"21st century socialisms" is evident.

We can conclude, therefore, not only by confirming that in the Latin American subcontinent, the federal state has by now distanced itself from the North American archetype, just as the unitary state has distanced itself from the Franco-Napoleonic model, but also that states and peoples, with their own historical, political and cultural peculiarities, can deploy innovative forms of organization of the state, of popular power, of decentralization and pluralism, in relation to local and/or indigenous communities, delivering, in the presence of the legal scholar, increasingly numerous and frequent "defining oxymorons".

REFERENCES

Amirante D.
Lo Stato multiculturale. Contributo alla teoria dello Stato dalla prospettiva dell'Unione Indiana, Bologna, 2014.

Bagni S.
Lo Stato interculturale: una nuova eutopia?, Bologna, 2017.

Bagni S.
Dal Welfare State *al* Caring State*?*, in Id. (a cura di), *Dallo Stato del* bienestar *allo Stato del* buen vivir. *Innovazione e tradizione nel costituzionalismo latino-americano*, Bologna, 2013.

Bagni S.
voce *Federalismo*, in Pegoraro L., Bagni S., Pavani G. (a cura di), *Glossario di amministrazione locale comparata*, Milano, 2002.

Baldin S.
Il Buen Vivir *nel costituzionalismo andino. Profili comparativi*, Torino, 2019.

Baldin S.
Lo statuto costituzionale dei popoli autoctoni in Bolivia con particolare riguardo alla giustizia indigena, in *Federalismi.it*, n. 24, 2015.

Brewer-Carías A.R.
La distribución territorial de competencias en la Federación venezolana, in *Revista de estudios de la administración local,* n. 291, 2003.

Brewer-Carías A.R. et al.
Leyes y reglamentos para la descentralización política de la Federación, Caracas, 1994.

Buono E.
Pluralismo jurídico igualitario: il mandato costituzionale "inascoltato" nel modello boliviano di cooperazione intergiurisdizionale, in *DPCE online*, 37, 2018.

Buono E.
Questione linguistica, questione indigena e paradigma plurinazionale nell'esperienza latinoamericana, in *Diritto pubblico comparato ed europeo,* n. 4, 2016.

Carducci M.
"*Demodiversità*" *e futuro ecologico, in S. Bagni (coord.), Come governare l'ecosistema. Un approccio multidisciplinare, Bologna, 2018.*

Carpizo J.
Federalismo en Latinoamérica, México, 1973.

D'Andrea A.
Tra socialismo e "Buen vivir"*? L'ambiente nella nuova Costituzione cubana*, in V. Pepe, L. Colella (a cura di), *Saggi di diritto ambientale italiano e comparato. Prospettive di cambiamento,* Salerno, 2019.

De la Fuente A.
Una nación para todos. Raza, desigualdad y política en Cuba 1900-2000, Madrid, 2000.

De Sousa Santos B.
Hablamos del Socialismo del Buen vivir, in *América Latina en Movimiento,* 34, 452, 2010.

Fernàndez Segado F.
Reflexiones críticas en torno al Federalismo en América Latina, México, 2002.

García Linera A.
El socialismo comunitario. Un aporte de Bolivia al mundo, in *Revista de Análisis. Reflexiones sobre la coyuntura*, 3, 5, La Paz, 2010.

Glenn H.P.
Legal Traditions of the World, II ed., Oxford, 2004 (Italian translation: *Tradizioni giuridiche nel mondo. La sostenibilità della differenza*, Bologna, 2011.

Hidalgo-Capitàn A.L.
Cubillo-Guevara A.P., *Deconstruction and Genealogy of Latin American Good Living (Buen Vivir). The (Triune) Good Living and its Diverse Intellectual Wellsprings,* in *International Development Policy - Revue internationale de politique de développement* [Online], 9, URL: <http:// journals.openedition.org/ poldev/2351, 2017>.

Houtart F.
La crisis del modelo de desarrollo y la filosofía del sumak kawsay', in *Socialismo y Sumak Kawsay*, Quito, Ecuador: Secretaría Nacional de Planificación y Desarrollo, 2010.

Lanchester F.
voce *Stato (forme di)*, in *Enc. dir.*, LXIII, Milano, 1990.

Mastromarino A.
Il diritto comparato alle prese con il multiculturalismo: una sfida aperta. Il federalismo disaggregativo nella teoria dei tipi di Stato, in *Diritto Pubblico Comparato ed Europeo*, III, 2010.

Mortati C.
Istituzioni di diritto pubblico, Padova, 1975.

Pavani G.
Tendencias centrífugas y centrípetas de la descentralización en América Latina, in *Federalismi.it*, 5, 2019.

Pavani G.
Estupiñan Achury L., *Las tendencias del Estado Unitario en América Latina*, in *Revista General de Derecho público comparado*, 19, 2016.

Pavani G., Pegoraro L.
Municipi d'occidente. Il governo locale in Europa e nelle Americhe, Roma, 2006 (Spanish translation: *Derecho comparado y estudio del gobierno local*, in Id., *Municipios de Occidente. El gobierno local en Europa y en las Américas*, Bogotá, 2006).

Pegoraro L., Rinella A.
Sistemi costituzionali comparati, Torino, 2017.

Pegoraro L.
Para una teoría integradora del federalismo y la plurinación, in *Federalismi.it*, 19, 2016.

Ramirez R.
Socialismo del Sumak Kawsay o biosocialismo republicano, Quito, 2010.

Sacco R.
Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II), in *The American Journal of Comparative Law*, 39, 1, 1991.

Sciannella L.G.
Il principio di partecipazione popolare nella nuova costituzione cubana, in *DPCE online,* 1, 2020.

Véliz C.
La tradición centralista de América Latina, Barcelona, 1984.

Volpato T.
"Nuevas" dimensiones del multiculturalismo cubano: crítica y propuesta conceptual, in *Visioni Latinoamericane,* 13, 2015.

Volpato T.
Diversidad cultural y pluralismo. La africanía cubana en el multiculturalismo isleño, in *Visioni Latinoamericane*, 9, 2013.

Forms of Government

Chapter 6
The Other Side of Latin American Presidentialism: Costa Rica and Uruguay

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Summary: 1. The Monroe Doctrine, Latin America and the invention of the West. – 2. Presidentialism in the Latin American subcontinent. – 3. The form of government of Costa Rica and Uruguay in the Latin American context. – 4. The constitutional discipline of the form of government: the style of the constitutional texts. – 4.1 Elective bodies and the process of their formation. – 4.2. The collegiate body reporting to the President. – 4.3. The legislative function and the veto power. – 4.4. The suspension of rights in case of emergency. – 5. The role of the form of government in Costa Rican and Uruguayan constitutional evolution.

1. The Monroe Doctrine, Latin America and the invention of the West

In comparative legal studies, reference to the *West* is frequent, as an apparently objective geopolitical indication devoid of ideological connotations.

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In other words, expressions such as western legal tradition claim to refer to a well-defined area of the world that is objectively separable from other legal contexts, composed of countries that present a significant number of common and characterising elements.

In fact, the definition of the *West* and the opposition between the Western and the Eastern 'hemispheres' is a relatively recent phenomenon, which only became established in the aftermath of the Second World War, in the context of the Cold War. Above all, the idea of the West is the translation into geopolitical terms of the hegemony that the United States has deployed over a certain area of the world during the last century and that, in the aftermath of the collapse of the Soviet Union and the end of the Cold War, seemed to be able to be extended to the entire globe, in a pacifying perspective that would prevent future conflicts (Fukuyama 1992). In essence, the expression 'the *West*' crystallises in common parlance – and, later, in that of several disciplines, including legal comparison – a well-known element of the history of the 20th century and the first two decades of the present one.

Less well known, however, is the genealogy of the concept, which has a very important link with the geographical area we are about to discuss. In fact, the idea of the *West* is the development – or, rather, the idealisation and generalisation – of the concept of the *Western Hemisphere*, outlined in the first half of the 19th century by the United States in order to affirm and thus consolidate its hegemony over the entire American continent.

To fully understand the relevance of such distant events, it is necessary to broaden briefly the horizon of investigation and start from what happened in Europe following the French Revolution and, in particular, in the aftermath of Napoleon's coronation. Indeed, between 1808 and 1814, the Napoleonic epic swept over Spain, with the understandable consequences for the country's relations with its Latin American colonies. Seen from the American point of view, it is an opportunity to emulate what had already been done by the now former British colonies in the north and give rise to a long cycle of wars of independence, which will have a development that cannot be retraced here, over a period of about 25 years. In this context, the United States – at the time nothing more than a regional power – sided with the cause of independence and was among the first to recognise the new republics where there was a chance (Robertson 1918). Against this historical backdrop, in a speech to Congress on 2 December 1823, President James Monroe – himself a veteran of the War of Independence of 1775-1783 – enunciated what would go down in history as the *Monroe Doctrine*:

from then on, the United States would not tolerate European meddling 'in this hemisphere', except in the relations already existing between European states and their colonies.

In other words, the concept of the *West* is inextricably linked with the establishment of US hegemony over an important portion of the globe. In the beginning, this portion is the *western hemisphere*, while the hegemony is built on political support for the cause of independence of the Latin American subcontinent, in tacit but evident polemic with European domination (Schmitt 1950).

2. Presidentialism in the Latin American subcontinent

The brief historical overviews developed in the previous section have the task of explaining the fundamental reasons for the success of the institutional solutions adopted north of the Rio Grande in the context of the nascent republics in the rest of the continent, in spite of even profound distances in terms of political culture and social structuring. Of course, the US influence is not alone. In the constituent debate of many Latin American countries there is a strong echo, for example, of the Cadiz constitution (see e.g. Esteva Gallicchio 2012). However, especially in the matter of the form of government – also due to the monarchical character of this second text – the US influence appears absolutely prevalent, as demonstrated by the great diffusion in the area of the presidential model.

The American influence is indeed particularly marked in the texts drafted during the 19th century, starting with the Argentine (1826 and 1835), Mexican (1824) and Venezuelan (1811) Constitutions; conversely, as the indigenous experience matured, the compilers of subsequent constitutional texts showed greater autonomy, with hybridisations, admittedly not always brilliant, of the original model of checks and balances (Cheibub, Elkins, Ginsburg 2011). However, in the vast majority of cases, the choice in favour of the autonomous popular legitimisation of a body, called upon to perform the functions of head of state and head of executive power at the same time, will no longer be called into question.

Turning our attention to the current landscape, we note some significant differences with the model outlined in the US Constitution: on the one hand, in many countries, a collegiate body is institutionalised under the President, whose members are freely appointed and removed by him and, in a large number of cases, can also be removed at the initiative of the legislature. At the same time, in a very large number of cases, the Presidency is invested with the power

to submit bills to Congress, including – in most experiences – the possibility of initiating the budget process (Testa 2019). Those just listed are, however, provisions that introduce all in all marginal variations and that, above all, at least partially replicate practices that also characterise the US model.

The original model of checks and balances is instead put under considerable pressure by other powers attributed to the subject invested with executive power in many Latin American Constitutions currently in force (Basabe-Serrano 2017). On the one hand, these texts entrust the president with a wide range of emergency powers, in almost all cases including the possibility of adopting acts with the force of law. Furthermore, remaining within the sphere of the sources of law, a power of *veto parcial* (Alcántara Sanz and Sánchez Lopez 2001) is broadly recognised; so, the president can prevent the entry into force – not of the entire text of the law, but – of individual art. of it (a faculty declared constitutionally inadmissible by the US Supreme Court in *Clinton v. City of New York*, 524 US 417 (1998)). Again, completely incompatible with the idea of checks and balances appears to be the presidential power of early dissolution of the Assembly, given the clear ability to undermine that symmetry between powers equally legitimised by the suffrage that characterises the model.

A separate discussion deserves the other major element of the US system of government, which, from the perspective of domestic scholars, primarily concerns the form of government and not the form of state. We are alluding to the federal structure of the state, which – in the unequivocal words of the *Federalist Papers* – completes on a vertical level that separation of powers which, declined instead on a horizontal level, gives rise to the structure of the federal government. In other words, according to the drafters of the US Constitution, the frame of government must first and foremost be oriented towards protecting the fundamental freedoms of citizens. This purpose leads to a great enhancement of the principle of separation of powers, since the fragmentation of sovereignty into a plurality of centres of imputation is the best guarantee to prevent abuses and, more generally, prevent that political power is arbitrarily exercised. Consequently, at the level of the federal government, the three fundamental functions are assigned to three bodies, strictly separated and each endowed with its own autonomous legitimacy. This organisational principle, however, finds an even more significant declination in the idea of competitive federalism. It postulates that the exercise of sovereign power is divided between two levels of government: the federal level, which is more threatening for trivial dimensional reasons, enjoys a limited number of constitutional attributions and can only adopt laws in the matters expressly attributed to it by the Constitution; the state level, on the other hand, enjoys general

competence and legislates in all matters not devolved to the Federation. The adjective competitive, finally, indicates that the state-federal system lacks coordination mechanisms, so that each entity exercises its own attributions independently of what the other elements of the overall construction do.

Going back to Latin America, during the 19th century the federal formula seems to have enjoyed some success, as witnessed by the experience of the Federal Republic of Central America (1823-1841), that of Simón Bolívar's Greater Colombia and a long debate on the subject in Chile, as well as the Constitutions of the states still marked by federalism today (Argentina, Brazil, Mexico, Venezuela). However, over the decades, the demise of the federal experiences first mentioned was accompanied by an insufficient level of protection of the autonomy of the federated states in Argentina and Brazil, where the aforementioned emergency powers allowed the federal president to easily overstep the principle of the horizontal separation of powers.

This parenthesis on the federal principle has a twofold reason. Firstly, it would appear methodologically incorrect to address the issue of the circulation of the presidential form of government without considering the fate of an element – precisely federalism – which constitutes, according to its very creators, its ideal complement. Secondly, it is necessary to emphasize that federalism, especially in its competitive version, constitutes an obvious brake on the authoritarian drifts that the presidential model can assume and which, in the context under study, it has concretely taken. In other words, the correlation with a strong declination of the vertical separation of powers constitutes a bulwark to prevent those degenerations of the presidential form of government that have blackened the constitutional history of Latin America.

3. The form of government of Costa Rica and Uruguay in the Latin American context

In Italian (Amato 2006) and foreign constitutionalist literature (e.g. Loewenstein, 1949), there is frequent criticism of Latin American presidential regimes, that are particularly unbalanced – for reasons related to both constitutional design and the regularity of their political systems (Friedrich 1967) – in favour of the President of the Republic. This would find further confirmation in the frequency with which coups d'état or authoritarian drifts have occurred in the area (Linz 1994).

The literature has long questioned the links between these frequent drifts and the choice for a form of government that emphasises the role of the

individual and is structurally sensitive to the lure of the strong man (Davis 1958). However, in my opinion, the importance of the merely institutional datum risks being overestimated, if we do not consider the ideological polarisation of Latin American societies – which has deep historical roots (Somma 2016) – and that sort of external constraint constituted by the frequent and sometimes blatant US interference; in particular, the influence of the latter – established at the time of the Monroe Doctrine on the basis of the common cause of independence – in the course of the 20th century, especially during the Cold War, has taken on forms that are purely neo-colonial. In fact, it is not possible to judge otherwise, just to limit ourselves to an undisputed and peaceful example, the establishment of the School of the Americas, in which various exponents of the dictatorial regimes of the 1970s and 1980s were 'trained' (Gill 2004).

In this more general context, however, there have been experiences that have proved their worth. One of these, Costa Rica, has remained unscathed by the authoritarian drifts that marked the history of the sub-continent during the second half of the 20th century. On the other hand, despite having experienced dictatorship, Uruguay is also generally considered a positive example. Both countries, in fact, have shown an entirely satisfactory performance of democratic-representative institutions (Lehoucq 2005; Davis 1962), a circumstance testified – moreover – by the high level of trust that these institutions inspire in the generality of the population, at least according to research conducted in political science (Martínez 1997).

The purpose of the following pages is therefore to take a closer look at the experience of these two countries, dwelling on the institutional rules that have produced a satisfactory balance between the two pivotal organs of the form of government and that, in spite of the exclusively horizontal declination of the principle of the separation of powers, have preserved the institutional system from dangerous Caesarist drifts.

4. The constitutional regulation of the form of government

4.1. The style of the constitutional texts

To the reader who approaches the constitutional texts of Costa Rica and Uruguay for the first time, one characteristic immediately springs to attention: the overall length of the texts, which preludes a high level of analyticity.

They consist of 197 (Costa Rica) and 332 (Uruguay) articles. The purely numerical data acquires particular significance when one then considers the individual articles, that are anything but concise or apodictic.

The mere quantitative data is reflected in the choice of drafting of the two texts, which in both cases is rather analytical, especially when compared to the greater laconicism of the Constitutions adopted in the European area, even in the aftermath of the Second World War, when the rationalisation (a concept enucleated with reference to the parliamentary regime – Mirkine-Guetzévitch 1936) of the form of government – through the adoption of a sufficiently precise discipline of the internal dynamics of the "triangle of great power" (Ågh 1998) – had by then become a necessity recognised by most. Thus, the texts under analysis not only prove to be very precise in assigning attributions and competences to the legislative or executive branches, but also proceed to regulate in detail the political dynamics that could most put the institutional design under pressure. Just as an example, in Uruguay the attribution of the power of veto to the President and the possible reaction of the legislature is developed along five articles of the constitutional text (art. 137-141). Even more detailed is the regulation of the possible approval of a motion of censure against ministers, discussed below.

The basic idea that moves the two constituents towards a high level of analyticity seems to be twofold. On the one hand, the choice in favour of a very punctual and balanced distribution of those attributions whose exercise seems to entail more risks for the stability of republican-democratic institutions. On the other hand – and this applies above all to the constitution of Uruguay – the idea of proceduralising in a wide plurality of stages the moments of greatest conflict, so that the 'victory' of the presidential political will over the parliamentary one – or vice versa – ends up being costly and, therefore, wearisome for the winner.

This first basic characteristic that, albeit with different declinations, characterises the Constitutions of the two countries under examination, seems to help in better understanding and evaluating the individual institutions through which the two forms of government are regulated. In the following exposition, they will be grouped around four homogeneous themes, to foster clarity in the analysis: the structure of the Presidency and Parliament and the constitutional rules on their election; the constitutional discipline of a collegial body to assist the President; the relations between powers in the exercise of the legislative function; the competence to adopt general and temporary limitations on fundamental rights in the event of an emergency.

The constitution of Costa Rica dedicates Titles IX and X (articles 105-129 and 130-151), respectively devoted to legislative and executive power, to the regulation of the form of government. Even more elaborate, the Uruguayan constitutional text dedicates sections IV-X to the same subject, totalling over 100 articles (82-184). This is a multiplicity of provisions that partly concern the organs and partly their reciprocal relations: all issues that directly affect the concrete functioning of the form of government.

Starting with the definition of the central organs of the form of government, in accordance with the presidential model, the Costa Rican constitution provides that both the Legislative Assembly – which is single-chamber in nature and composed of 57 deputies, one for every approximately 90,000 inhabitants – and the President are elected by the people, on the first Sunday in February of the year in which the previous ones expire, by universal and direct suffrage, and have a four-year term of office. The constitution says nothing about the election of the Assembly, beyond the provincial level at which it must take place, whereas ordinary legislation has established an electoral system centred on multi-nominal constituencies (each coinciding with the territory of a province) and on a proportional electoral formula. Conversely, for the election of the presidential ticket (consisting of the president and two deputies), a special *majority* system is constitutionally provided for, in which the ticket that obtains the most votes is elected provided that these are at least 40% of the votes validly cast; otherwise, the run-off is set for the first Sunday in April, i.e. two months after the first round of elections. In any case, the President shall be fully sworn in at the beginning of May.

To an extent not very dissimilar, the constitution of Uruguay provides for the simultaneous election – on the last Sunday of October – of the presidential ticket (composed not only of the President, but also of a single deputy) and of a Parliament that, unlike Costa Rica, has bicameral structure, while the term of office lasts five years. Also the electoral formulas is similar: the proportional option for the election of the assembly and the confirmation of the double-round majority system (albeit with a more common elective *quorum of* 50% of the validly cast votes, for election on the first ballot) are directly dictated by the Constitution. As the Costa Rican Constitution, the Uruguayan text also sanctions the date of the possible runoff (last Sunday in November) and of the assumption of office, at the beginning of March. Finally, the bicameral Parliament is divided into the

House of Representatives, composed by 99 members (one for every 35.000 inhabitants), and a 30-members Senate. Their joint session is finally called the 'General Assembly'.

The abundance of detail that characterises the Uruguayan constitution is reflected not only in the constitutionalisation of the electoral method of the two chambers, but also in the strict discipline of presidential candidacies: thanks to the 2004 constitutional revision, it was established that each party could only present a single ticket of candidates and, in accordance with art. 77, that this would be chosen through primary elections, to be regulated by a special law adopted by qualified majority.

The attention of both Constitutions to electoral issues is confirmed by the numerous provisions on the requirements and causes of incompatibility and ineligibility of both Deputies and members of the Presidential Ticket.

Prominent among these are the provisions on the *incumbency of incumbents*. Particularly strict, the Central American country's text stipulates that neither deputies nor the outgoing president may run again for the office they have just held. In particular, the original text of the constitution forbade the re-election at any time of anyone who had held the presidential office (not that of deputy); the issue was submitted twice to the *Sala Constitucional* of the country's Supreme Court, which ruled that the perennial prohibition was illegitimate, with the consequence that today the outgoing President cannot run again for two consecutive terms and is therefore re-eligible after a cooling-off period of eight years.

In the case of Uruguay, on the other hand, only the members of the presidential ticket are not eligible for re-election: for the president, the ineligibility is absolute; vice versa, his deputy can only aspire to the presidential office if he has not replaced the president for a period of more than one year. For both, finally, the preclusion applies for a single five-year period.

In both cases, these are very important provisions, which aim at a twofold purpose: on the one hand, to promote the turnover of the ruling classes; on the other, to prevent a president, perhaps even a particularly popular one, from consolidating a network of power that could threaten the democratic-republican character of the form of state. It is only with this in mind that one can understand the rigour of provisions that eliminate the very possibility of re-election, with all the consequences regarding the impossibility for citizens to offer a judgement on the individual president at the end of the first term, in the elsewhere frequent hypothesis of re-election.

Contrary to the US experience, but similar to what happens in most Latin American countries, in both Costa Rica and Uruguay the President is flanked by a collegial body, composed of the President himself and ministers. The latter are appointed and dismissed without any particular formality by the President, but may also be censured by the Assembly if this considers them guilty of having committed acts contrary to the constitution or the law, or of serious errors that have caused obvious prejudice to the public interest (in Costa Rica) or if it considers that it wishes to politically censure their conduct (in Uruguay, where censure is clearly distinct from impeachment).

The equality of the instrument is not reflected in a similar procedure by which it can be activated. The scheme adopted in Costa Rica is simpler: here the assembly proceeds to censure by a vote to be taken by a qualified 2/3 majority, calculated, however, on the voters and not on the members of the body.

The Uruguayan discipline is much more complex. Here the procedure can start in both assemblies, each of which has the power to adopt an act that refers the minister to the General Assembly. It is up to the latter to deliberate on the motion of censure, which – by explicit constitutional provision – can be individual (if it concerns a single minister), plural (if it concerns more than one minister) or collective (if it is addressed to the majority of the members of the Council of Ministers). If the motion is approved by an absolute majority (calculated with respect to the members of the body), the addressee is obliged to resign, but the President is given a Veto power. If this is actually exercised, the matter is again submitted, within ten days, to the General Assembly, with three possible outcomes. Firstly, this body can confirm the censure, by a majority of 3/5 of the members: in this case, the act becomes effective immediately. Conversely, the legislature may relent and not re-approve the motion, which becomes ineffective. Lastly, it may happen that the motion is confirmed but without the qualified majority described above being reached: in this case, the final word lies with the president, who may – by a formal act, to be adopted within the short term of 48 hours – retain the minister and dissolve the Chamber. In the latter case, general parliamentary elections of a supplementary nature (i.e. those elected will remain in office only until the end of the ordinary five-year term) will be held on the eighth Sunday after the adoption of the act.

Apart from this complex procedure, in both countries the existence of the Council and the possibility of censuring the conduct of individual ministers constitute a significant rebalancing of the powers attributed by the president.

On the one hand, in Costa Rica, the constitution is very analytical in regulating the attributions of the individual subjects that make up the executive power: art. 139 in fact lists the exclusively presidential attributions, which are reduced to the aforementioned appointment and dismissal of ministers, the representation of the Nation and the supreme command of the public forces, to which is added the power-duty to address the Chamber annually, with a written message, to inform it of the political state of the Republic and to outline the main measures that he intends to promote in the following twelve months. Conversely, most of the powers of the executive are exercised by the President in consultation with the minister concerned or, alternatively, with the Council of Ministers. On the other hand, in Uruguay, the powers pertaining to the President in concert with the Ministers or the Council of Ministers are listed, while the powers pertaining to the President alone can be reconstructed from the remaining provisions and coincide, at least in general, with those already seen for Costa Rica.

This "forced accompaniment" of the President with a minister, coupled with the censurability of the latter's actions by the Assembly (with a high qualified majority, in Costa Rica, or at the end of a potentially complex procedure, in Uruguay), not only rebalances the relationship between the President and the Assembly, but also offers a major possibility of mediation where a clash between the two powers of the state exceeds the guarded levels. As, on the other hand, has happened during the evolution of monarchical forms of government (Di Giovine 2014), the sacrifice of the minister – who is perhaps forced to take responsibility for the President's decisions – can open the way for accommodations between the President and the Assembly, which otherwise could only be resolved by the potentially traumatic exit of one of the two main actors.

Finally, the prerogatives of the legislature receive substantive depth through significant powers of inspection over ministers, also with a view to the subsequent activation of the latter's responsibility, recognised in both constitutional texts.

4.4. The legislative function and the veto power

As regards the attribution of the legislative function, the influence exerted on both countries by the United States constitution is evident: the attribution is generally in favour of the Assembly; the President is granted a power of veto, with a view to checks and balances. However, some relevant

corrections are made to the design, starting with the provision of the so-called *line-item veto* or, if preferred, the *veto parcial* (Alcántara Sanz and Sánchez Lopez 2001).

The first corrective relates to the power of initiative, which the President of the United States formally lacks but which he makes up for through the intervention of a few members of Congress. In fact, both Constitutions under review attribute such a power to the president. In addition, in the Uruguayan experience, the initiative is reserved to the top executive for bills establishing tax exemptions or setting a minimum income or maximum prices for certain categories of goods or services. At the same time, members of the legislature are prohibited from amending the government proposal to expand the tax exemptions, raise the minimum income or decrease maximum prices.

Also peculiar is the Uruguayan Constitution's provision regarding the declaration of urgency of a certain government bill. This, to be issued exclusively at the time the proposal is presented, determines a strict time frame for approval or rejection. Above all, if one of the two chambers has not pronounced itself within the specified time, silence has the value of approval, with an obvious rebalancing of attributions in the matter in favour of the executive. This provision is, however, tempered in two ways: on the one hand, the President may declare only one proposal urgent at a time and no other declaration of urgency is permitted until the time limits for the approval of the current one have expired; on the other hand, each chamber may overrule the presidential declaration by a resolution passed by a qualified majority of three-fifths of its members.

The greater streamlining of the procedures provided for by the Costa Rican constitution is also confirmed with regard to the power of veto: it can generally be overcome by a qualified majority of 2/3 of the members of the single-chamber Assembly. However, art. 127 provides that the presidential veto is not absolute, but on the contrary accompanied by amendment proposals: if these are adopted by the Assembly (by a simple majority), the President is expressly obliged to enact them. Conversely, if the amendments are rejected, there is a stern alternative: either the original act is confirmed with the aforementioned qualified majority, or it is archived and can no longer be re-proposed during the legislature.

The Uruguayan design is more articulated.

Also in this country, the exercise of the veto power is linked to the submission of objections or observations. Where it is exercised by the President, the General Assembly convenes and may resolve to override the refusal of promulgation by a 3/5 majority, calculated, however, for both components of the

House. At the same time, the legislature can also deliberate a simple opposition to the presidential amendments, but without insisting on the adoption of the bill, with the consequence of making the adoption of the proposal under consideration unfeasible for the rest of the legislature. Finally, there is the further possibility of adherence to the presidential objections, which may be explicit or tacit. Indeed, in the event of prolonged inactivity for 30 days, the text, as amended according to the President's remarks, is deemed adopted.

4.5. The suspension of rights in case of emergency

A final relevant feature of the balance between the organs of great power designed by the Constitutions of Costa Rica and Uruguay concerns the power to suspend specific constitutional rights for a fixed period of time, where this is necessary to deal with emergencies of particular importance. This is clearly a power of great moment, the attribution of which has a particularly evident impact on the institutional balance and its maintenance in the diachronic dimension (see already Valadés 1974).

The model outlined by the Costa Rican constitution appears to be particularly protective of citizenship rights and the role of the legislature. In fact, it is up to the latter – with the strict qualified majority of two-thirds of its members – to declare the suspension of certain constitutionally sanctioned rights, in cases of evident public necessity (art. 121, par. 7). The suspension concerns individual legal positions, can also concern only one part of the state territory and has a maximum duration of one month. When the Assembly is not in session – and therefore cannot take the decision in question in a timely manner – the relevant power is granted to the President in the Council of Ministers, on a completely temporary basis: the Assembly is in fact immediately convened and must make the Executive's determination its own within the peremptory term of forty-eight hours.

The centrality of the Assembly is further underlined by the need for the government to give an account of the measures taken to safeguard public order or to preserve state security at the first useful meeting of the legislature.

The Uruguayan model is only partially similar. The similarity lies in the fact that the (General) Assembly still has the final say on rights restrictions and emergency measures. However, the procedure is quite dissimilar and ends up emphasising the decision-making role of the Presidential Executive. The initiative is in fact reserved for the President of the Republic, in consultation with the Council of Ministers. The latter, in the event of a foreign mil-

itary attack or internal unrest, has the power-duty to take the measures that seem most appropriate to it. In particular, in the case of individuals, these measures may authorise their confinement or temporary detention, provided this takes place in places other than those designated for the imprisonment of criminals. In all these cases, the presidential initiative is promptly – within 24 hours – communicated to the General Assembly, that makes a final decision on the measure.

The difference between the two schemes just outlined appears subtle but should not be underestimated. Faced with a President intent on exceeding his constitutional attributions, the Costa Rican Assembly – *rectius*: its presidency – can act pre-emptively and, by convening, prevent its institutional counterpart from exploiting the state of emergency. Conversely, the Uruguayan president has the advantage of the first move, which puts him in the happy position of determining the timing and perimeter of the game, in a possible clash with the parliamentary majority. Again, only in Costa Rica is the declaration of emergency and the consequent limitation of constitutional rights subject to a deliberative *quorum* equal to 2/3 of the Assembly's members (even when the initiative starts as a matter of urgency from the President), in an obvious function of guarantee for the legal positions of citizens with fundamental content.

5. The form of government and constitutional evolution of Costa Rica and Uruguay

The minute analysis of the constitutional provisions regarding the form of government helps to clarify the reasons that have made Costa Rica and, albeit with some additional vicissitudes, Uruguay two examples in contrast to the generally less successful experiences of Latin American presidentialism.

In both cases, the drafters of the constitutional text paid great attention to the balance between the Legislature and the President, taking advantage of those experiences that had shown how – contrary to James Madison's expectations – it was the latter subject and not the former that tended to exceed its constitutional attributions and to be – if one may say so – problematic. From this perspective, the Costa Rican constitution prefers to resort to the punctual definition of the powers of the single-chamber Assembly, thus drawing a presidency that tends to be weak and forced to resort to the assistance of a government that is always liable to parliamentary censure. Although it also resorts to this last contrivance, the Uruguayan constitution

prefers instead the careful proceduralisation of the most relevant hypotheses of conflict between the two politically active powers, as demonstrated by the cases of the power of veto and the declaration of urgency of a bill, on the basis of the hypothesis (Linz 1994) that it is the paralysis deriving from their rivalry that constitutes the main risk to the stability of democratic institutions.

Of course, as already stated in the course of the exposition, constitutional rules have also been able to give concrete proof of themselves thanks to contextual elements. In fact, the constitutional history of Costa Rica and, to a not entirely dissimilar extent, that of Uruguay, developed positively during the second half of the 20th century, also thanks to the virtuous behaviour of the main political figures, who bet on the good functioning of the democratic rules and thus steered the country's political culture towards a positive future. One thinks, just to give a few significant examples, of the role played by President Picado (1944-1948), whose political activity led to the adoption of a modern electoral code and, above all, to the definition soon after of a public electoral register (1949), that took control over the electoral lists away from political parties and thus drastically limited the possibility of undue influence on the free determination of voters (Lehoucq 2000). Or again, the importance held – in a social context in which the corruption of election results had until recently been a major scourge – by the coeval institution of an independent electoral tribunal, charged with overseeing the electoral process and carrying out the verification of powers.

The central element that these considerations seek to grasp consists of the relationship – sometimes vicious, sometimes virtuous – that can be established between the rules of law – especially constitutional law –, the regularities of the political system and the more general characteristics of the political community. A good institutional set-up is not only a guarantor of the continuation of a correct balance of powers, but must also be able to accompany the evolution of both the political system and the community in a direction that is consistent with the basic requirements of democratic-representative institutions.

The specificity of the experiences analysed up to this point, in the more general Latin American context, lies precisely in the virtuous nature of this relationship, indeed essential, between legal scheme and social dynamics.

REFERENCES

Ågh A.
The Politics of Central Europe, London, 1998.

Alcántara Sanz M., Sánchez Lopez F.
Las relaciones Ejecutivo-Legislativo en América Latina: Un análisis de la estructura del veto – insistencia y control político, in *Revista de Estudios Politicos*, 2001.

Amato G.
Forme di Stato e forme di governo, Bologna, 2006.

Basabe-Serrano S.
Las distintas caras del presidencialismo: debate conceptual y evidencia empírica en dieciocho países de América Latina, in *Revista Española de Investigaciones Sociológicas*, 157, 2017.

Cheibub J.A., Elkins Z., Ginsburg T.
Latin American Presidentialism in Comparative and Historical Perspective, University of Chicago Public Law and Legal Theory WP, 361, 2011.

Davis H.
The Presidency, in Id. (ed.), *Government and Politics in Latin America*, New York, 1958.

Davis H.
La presidencia en Chile, in *Ciencias Políticas y Sociales*, 8, 29, 1962.

Di Giovine A.
Forme di governo, in P. Carrozza, A. Di Giovine, G.F. Ferrari, *Diritto costituzionale comparato*, Roma-Bari, 2014.

Esteva Gallicchio E.G.
Influencia de la Constituccion de Cadiz en el derecho constituccional uruguayo, in *Revista de Derecho Político*, 2012.

Friedrich C.
The Impact of American Constitutionalism Abroad, Boston, 1967.

Fukuyama F.
The End of History and the Last Man, New York, 1992.

Gill L.
The School of the Americas. Military Training and Political Violence in the Americas, Durham, 2004.

Lehoucq F.E.
Institutionalising Democracy: constraints and Ambition in the Politics of Electoral Reform, in *Comparative Politics*, 32, 2000.

Lehoucq F.E.
Constitutional Design and Democratic Performance in Latin America, in *Verfassung und Recht in Übersee*, 2005.

Linz J.
Presidential or Parliamentary Democracy: Does It Make a Difference, in J. Linz, A. Valenzuela (eds), *The Failure of Presidential democracy: Comparative Perspectives*, Baltimore, 1994.

Loewenstein K.
The Presidency Outside the United States: A Study in Comparative Political institutions, in *Journal of Politics*, 11, 1949.

Martínez A.
Cultura política, gobernabilidad y élites parlamentarias en America Latina, in *Revista Mexicana de Sociología*, 59, 1, 1997.

Mirkine-Guetzévitch B.
Le régime parlementaire dans les Constitutions européennes d'après-guerre, in *Annuaire de l'Institut international de Droit public*, Paris, 1936.

Robertson W.S.
The Recognition of the Hispanic American Nations by the United States, in *The Hispanic American Historical Review*, 1, 3, 1918.

Schmitt C.
Der Nomos *Der Erde: Im Volkerrecht Des* Jus Publicum Europaeum, Berlin, 1950 (Italian translation: *Il* nomos *della Terra nel diritto internazionale dello* "jus publicum europaeum", Milano, 1991).

Somma N.M.
How do Party Systems Shape Insurgency Levels? A Comparison of Four Nineteenth-Century Latin American Republics, in *Social Science History*, 40, 2016.

Valadés D.
La Dictadura Constitucional en América Latina, México, 1974.

Chapter 7
The Presidential Form of Government in Argentina and Chile

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Summary: 1. Methodological premise. – 2. The presidential form of government and its circulation in Latin America. – 3. Presidents and parliaments in Argentina and Chile. – 4. The form of government in the emergency.

1. Methodological premise

Reasoning about forms of government in comparative public law requires, first, to outline clear methodological premises.

On the subject of forms of government, it certainly seems appropriate, from the point of view of the method of approaching the question, to have recourse also to the data and acquisitions of other sciences – including, in particular, political science – which have, over time, collected a series of elements useful to the investigation, expressly taking into account the fact that, in the field of analysis of the institutional system of the various legal systems, a constructive interdisciplinary comparison allows comparative investigation to be more effective (Hirschl 2014).

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In the study of forms of government, what differentiates, in any case, the analyses of constitutionalists from those of political scientists is, precisely, the method, since legal scholars are concerned with studying the constitutional regulatory framework and the rules governing the relationship between organs, whereas the comparative contribution of political scientists concentrate on the incidence of political subjects in relation to the functioning of institutions.

At the same time, however, the comparatist lawyer dealing with forms of government cannot, of course, disregard the historical, social, and political context in which legal institutions live, so that it is certainly appropriate to make use of the results achieved by other sciences, with the specific caveat, however, of bringing them back within the framework of one's own legal method of approaching the inquiry (Volpi 2020).

Without, in any case, forgetting that in borderline areas – such as forms of government – the necessary need for comparatists, jurists and political scientists, to employ the results of inquiry from their respective areas of research, must give adequate indication of the ends and means employed, with the other caveat that, while making use of each other's expertise, should avoid the risk of carrying out a legal analysis by assuming as the determinants element the mere description of the performance of constitutional institutions, rather than proceeding to the necessary identification of the prescriptive profiles related to the constitutional arrangement examined (Pegoraro 2014).

This is particularly appropriate about the presidential form of government, which has been, as it is well known, the subject of investigation mainly by political science scholars.

In this contribution the approach of investigation will, therefore, be the comparative constitutional law one, taking into consideration the various normative profiles related to the relationship between the constitutional organs that define in an overall sense the form of government of the systems under analysis.

The choice has, then, fallen on the comparison between two countries of the extreme *Cono Sur* (Argentina and Chile) bordering each other, which, at the end of the long and complex authoritarian season, have adopted their own constitutions without, however, proceeding to the election of a Constituent Assembly and whose respective presidential forms of government show various traits of differentiation (at least) at the constitutional level, so that – as effectively noted in the opening essay of this volume (Pegoraro, chapter 1) – "within this framework, the study of the

form of government makes it possible to highlight the differences between the various systems and to make the resulting sub-classifications".

2. The presidential form of government and its circulation in Latin America

The classification of forms of government and the criteria for identifying the various models have long fascinated comparatists.

Without going back over here the extensive, stimulating, reflections that have accompanied the numerous researches in the field over time, several elements now appear to have tended to be common to the studies done on the subject.

First, the very definition of the form of government according to the constitutional perspective, which can be identified as that set of legal norms (written and unwritten) that characterize the distribution of power among the constitutional organs at the top of the system (Head of State, Parliament, and Government).

Secondly, the profile concerning the determinants elements to be taken into consideration to proceed to the typological classification of forms of government.

In this regard, two legal-constitutional profiles appear to be essential to classify the various forms of government present in contemporary systems, namely: a) the presence or absence of the relationship of confidence between Parliament and Government; b) the different modes of derivation of the Government, which can be an emanation of Parliament or of a monocratic organ of executive power (Head of State or Prime Minister).

Thus, by jointly employing these classification criteria, it is possible to identify the presidential form of government, which is characterized by a monocratic executive (President) as a direct expression of the will of the people and by the strict separation of powers, based on the absence of the relationship of confidence between Parliament and Government, as well as the non-existence of the power of dissolution of Parliament by the President, the constitutional institutions being in office for the term provided for and prefixed directly by the constitutional text.

It is widely known, in this regard, that the idealtype of the presidential form of government is the constitutional experience of the United States of America, which is the only democratic system that has continuously adopted this model since the constitution of 1787 (Pegoraro, Rinella 2017).

Without further investigating the issue of the form of government in the US (which is obviously not the subject of this contribution), this experience, even in the context of the different phases it has gone through over time, is characterized by one aspect – the real cornerstone of the US constitutional structure – that is absolutely central in its most widespread interpretation, namely the overall constitutional balance between powers achieved by means of the various checks and balances set up for this purpose by the federal constitution (Martinelli 2020).

The principle of the strict separation of powers must, thus, be understood as being combined with that of the dynamic balancing between constitutional institutions, whereby none of them can end up overwhelming the others, but each has – within the scope of its own constitutional attributions – the prerogative to control and moderate the others in the exercise of their respective functions, with the result of effectively guaranteeing not only the harmonious balance of powers, but also the fundamental freedoms of citizens (Volpi 2020).

The US presidential form of government has circulated in various other systems in Asia and Africa, but mainly in Latin America, where it began to spread from the achievement of independence in the first half of the 19th century and today distinguishes – although in different variations – the totality of the systems in the area, without any of them having adopted the parliamentary form of government.

After a long and complex authoritarian season, Latin American constitutional orders began, as is well known, their democratic transition – with different paths and different outcomes – only in the late 1980s.

What seems to emerge most clearly from the reflections of scholars who studied the subject of the presidential form of government in Latin America is, in any case, the considerable diversity of constitutional arrangements achieved in the systems of the area, such as to prevent the reconstruction of a single – and unitary – model of Latin American presidential form of government (Carpizo 2009).

Another element of strong convergence in the doctrine is, then, certainly represented by the profound difference of the form of government of Latin American systems from the US presidential idealtype, so that its transposition has given rise to an implementation considered degenerative compared to the original model – variously defined by scholars as presidentialist regime, hyperpresidentialism, caudillism, presidential preponderance, democratic dictatorship, elective monarchy, representative caesarism (Ceccherini 2020) – since it is characterized by the excessive series of constitutional pre-

rogatives and institutional resources available to Presidents, such as to profoundly alter the recalled constitutional balance between powers typical of the US form of government.

Consider, in this regard, the power to dissolve Parliament; the power (sometimes exclusive) of legislative initiative; the possibility of resorting – even in cases other than those of emergency – to the adoption of presidential decrees with the force of law; the possibility (often without particular constitutional constraints) of calling a referendum; and the power to proclaim states of emergency or exception (with profound weakening of constitutional guarantees for citizens' rights and freedoms): elements, these, that – with different combinations between them – recur in numerous constitutional systems of Latin America.

Extending the analysis to the party system, the deviation from the US idealtype appears, then, even more pronounced: instead of being based on a consolidated two-party system, the Latin American political scenario appears, in fact, to be characterized by a fragmented multipartyism – thanks also to the adoption of non-selective electoral systems for the election of Assemblies – with political formations that are not very cohesive, poorly institutionalized and often unable to ensure solid support for presidential policies, nor to oppose them alternatively (Di Giovine 2020).

Based on these interpretive premises, scholars have proposed an attempt to reconstruct the common elements recurring in the presidential form of government in Latin American systems, identifying as such: a) an autonomous, strong, political legitimisation of the presidential office, deriving from popular election by direct suffrage; b) the broad constitutional powers – ordinary and extraordinary – in favour of the president; c) the inadequate institutional control (of the legislative and the judicial) over the executive; and d) the consequent, problematic balancing of the powers of the state, not consistent to the North American model of effective checks and balances between them (Mezzetti 2020a).

Thus, rather than an effective system of checks and balances in the constitutional relations between the executive and the legislative, there is rather a *mutuo bloqueo* between them, given that: a) the presidential power of legislative initiative sometimes requires qualified quorums for subsequent parliamentary approval; b) the presidential power of veto (which can be either total or partial) turns out to be surmountable by Parliament, in many cases, only with particularly high majorities, thus conditioning – if frequently employed – significantly the actual exercise of the legislative function; c) the complexity of the legislative process and the lack of cohesion of parliamen-

tary majorities increase the (often abusive) use of presidential decree; d) different electoral systems and non-simultaneous elections for Parliament and the President produce, in not a few cases, political outcomes of varying complexity, resulting in complicated, institutional deadlocks (Mezzetti 2020a).

Therefore, the invitation – proposed by careful doctrine – to construct "*clases 'ductiles' de la forma de gobierno*" in Latin America seems particularly appropriate (Pegoraro 2018).

Thus, at least three classificatory subtypes can currently be identified within the Latin American presidential form of government: pure presidentialism, attenuated presidentialism and parliamentarised presidentialism (Carpizo 2009), or – according to other definitions – pure presidentialism, attenuated parliamentarised presidentialism and hegemonic parliamentarised presidentialism (Nogueira Alcalà 2017).

The first subtype – pure presidentialism – in the Latin American version is characterized by the power granted to the President of the Republic to appoint (without prior advice from Parliament) and dismiss ministers; in the mutual irrevocability between the President and Parliament; in the presidential (exclusive) legislative initiative in economic-social matters; in the prerogative granted to the President of vetoing laws; in parliamentary control over the executive limited to questions and interpellations, without any possibility of actually bringing into play the political responsibility of ministers; in the configuration of the impeachment against the President and federal officials. This first subtype characterizes the constitutional experiences of Chile, Brazil, Honduras and Mexico, among others.

The second subtype – attenuated presidentialism – also provides for a monist executive in which the President is Head of State and Government, holder of numerous and relevant constitutional powers, but is balanced by a Parliament, elected by a non-selective proportional electoral system, which is given the prerogative of expressing no-confidence in individual ministers and in the *Jefe de Gabinete* (a sort of embryonic Prime Minister, where provided for in the constitution). The constitutional systems of Argentina, Costa Rica, Guatemala and Bolivia, for example, can be placed in this second subtype.

Lastly, the third subtype – hegemonic presidentialism – is marked, as a genuinely distinctive trait from the previous ones, by the attribution to the President of the power to dissolve Congress, without, however, the latter being able to symmetrically cause the early termination of the President's office for purely political/fiduciary reasons. Parliament can, however, challenge ministers, individually or collectively, thus forcing them to resign. Hegemonic presidentialism, in the recalled classificatory proposal, char-

acterizes, among others, the experiences of Uruguay, Peru, Venezuela and Ecuador (Nogueira Alcalà 2017).

3. Presidents and parliaments in Argentina and Chile

With the Argentine elections of 1983 and the Chilean elections of 1989, the democratic transition in the two countries began, as is well known, after the long and dramatic authoritarian season, marked by military regimes that were strongly repressive of citizens' rights and freedoms.

In both *Cono Sur* jurisdictions – unlike many post-authoritarian constitutional experiences in Latin America (Mezzetti 2020b) – there is no election of a Constituent Assembly to approve a new fundamental charter: in Argentina, the constitutional text that predates the authoritarian period survives; in Chile, the drafting of the 1980 constitution is, on the other hand, strongly marked by the authoritarian influence of General Pinochet and his followers.

Without exploring in depth the albeit interesting question of the democratic transition and constituent path undertaken by the two countries, the most important institutional element here is represented by the numerous constitutional revisions adopted over the years in the two systems, culminating with the wide-ranging Argentine charter reform adopted in 1994 and the equally wide-ranging Chilean constitutional revision of 2005, which constitute (substantially) the constitutional set-up still in force today and which, therefore, will be dealt with in the following, taking into comparative consideration the various elements of analogy and distinction between the two systems.

As for the election of the president, the two charters – although both provide for election by direct universal suffrage – differ as to the electoral mechanism concretely adopted for choosing the officeholder.

In Chile, the constitution (art. 26) stipulates that the president is elected by an absolute majority of the votes cast: if none of the candidates obtains this quorum, a second round of voting is held reserved for the two candidates with the most votes in the first round, with the candidate who obtains the most votes in the run-off being elected.

In Argentina, the election of the president and vice president takes place in two rounds of voting (art. 94 const.); the second round, however, is not held in two cases: a) if the presidential ticket with the most votes obtains at least 45% of the votes cast in the first round (art. 97 const.);

or, b) if the ticket with the most votes in the first round obtains at least 40% of the votes and there is a margin of more than 10% over the runner-up (art. 98 const.).

The constitutional rules on the duration of the presidential term, the limits to re-eligibility and the cases of substitution for (temporary and permanent) impediment of the President also differ appreciably.

In Argentina, the term of office of the president is four years, renewable consecutively for one time only (art. 90 const.). In the cases of death, resignation, revocation or impediment of the President, the Vice-President performs the presidential functions, until the end of the term of office; if he/she also falls into one of the previous conditions, it is the Congress that regulates the substitution until the election of a new President (art. 88 const.).

In Chile, the term of office of the President is likewise four years, but the officeholder is not immediately eligible, upon expiration, for re-election for a subsequent term (art. 25 const.).

Since a Vice-President is not elected at the same time as the President of the Republic, the Chilean constitution regulates the possibility of a deputy President in a very articulate manner (art. 29): if the President is temporarily unable to perform his duties, the deputy President is successively assigned to the most senior minister in office or, if he/she is unable to do so, to the President of the Senate, to the President of the Chamber of Deputies or, again, to the President of the Supreme Court.

In the event of a permanent impediment, if there are less than two years left before the end of the presidential term, Congress is called upon to elect – by an absolute majority of the deputies and senators – his successor; if, on the other hand, there are more than two years left before the end of the term, a new presidential election must be held by direct universal suffrage: in both cases, however, the newly elected President remains in office until the end of the original term of office of the person replaced and cannot stand for the next presidential election.

As for the President's powers, both the Argentine (art. 99) and Chilean (art. 32) constitutions contain a broad enumeration of constitutional prerogatives assigned to the Head of State.

Among the main powers granted to the President, it is of interest here to consider those related to legislative powers and relations with Parliament.

In both Argentina and Chile, the constitution assigns legislative initiative to the President, but only in Chile does the charter give him exclusive legislative initiative in economic-financial, social and budgetary matters (art. 65), thus giving him an absolutely dominant role in the legislative process.

The presidential veto power is, then, regulated in both constitutions and can be overridden by the respective parliaments only with a quorum of two-thirds of the votes (art. 83 const. Argentina; art. 73 const. Chile), but only in Argentina is the partial veto power expressly regulated, which allows the President the significant prerogative of enacting only part of a law approved by Congress, referring the remaining text to the Houses of Parliament for reconsideration (art. 80 const.).

In both systems, the president is, therefore, a true "*órgano colegislador*" (Nogueira Alcalà 2017).

Still about legislative powers, the power to adopt decrees with the force of law conferred on the President by the two charters is of relevance.

In Chile, the constitution establishes that Congress may, by law, delegate to the President the power to adopt decrees with the force of law in matters not reserved by the constitution to the Chambers themselves: the decree remains in force for one year from its entry into force and the delegation law may establish further conditions and limitations to the decree (art. 64 const.).

In Argentina, the President cannot adopt decrees with the force of law except in exceptional circumstances in which it is not possible to wait – for reasons of necessity and urgency – the time required for the law formation process.

The decree-law (which cannot intervene in penal, fiscal, electoral and political party matters) is countersigned by all the ministers and is submitted by the *Jefe de Gabinete*, within ten days of its adoption, to the Permanent Bicameral Commission – composed of deputies and senators proportionally respecting the composition of the two Chambers – which in the following ten days must render its opinion on the matter to Congress (art. 99 of the Constitution).

The Argentine constitution also provides for the possible adoption of delegated decrees in favour of the executive (art. 76).

The Presidents of Argentina and Chile have, in any case, wide-ranging powers in relation to the regulation of states of constitutional exception and emergency (which will be adequately discussed in the following section).

The constitutional prerogatives assigned to Parliaments – both of which have a Bicameral structure (Chamber of Deputies and Senate) – for the exercise of the function of control over the executive are of a different nature and institutional characteristics in the two systems.

In Chile (art. 52, paragraph 1 of the Constitution), one-third of the members of the Chamber of Deputies are granted the right to submit ques-

tions and interpellations to ministers who are called to answer them before the Assembly; in any case, such acts of scrutiny may not be adopted more than three times in each session against the same minister.

With a quorum of at least two-fifths of the deputies, the Chamber may also establish a commission of enquiry to request acts and information from members of the executive. The same constitutional provision, however, expressly clarifies that all the acts of inquiry – which fall within the exclusive competence of the Chamber of Deputies alone – never have the effect of bringing into play the political responsibility of ministers.

In Argentina, both Chambers are granted the prerogative to submit questions and interpellations to ministers, who are required to appear before the Assemblies to provide the requested information (art. 71 const.).

But in Argentina – unlike the Chilean system – the possibility of sanctioning the political responsibility of the (only) *Jefe de Gabinete* through the approval of an explicit motion of no-confidence by both Chambers is also constitutionally established: pursuant to art. 101 of the Constitution, in fact, each of the Houses has the possibility – by an absolute majority of its members – to call a motion of no-confidence against the *Jefe de Gabinete*, which, in order to determine the obligation for the latter to resign, must be approved by both Houses with the quorum of an absolute majority of their respective members.

The constitutions of both systems provide, then – similar to the US model – for the impeachment of the President, which can be activated, for the serious violations indicated by the norms (art. 52 const. Chile; art. 53 const. Argentina) by the respective Chambers of Deputies (in Chile, by an absolute majority; in Argentina, by a two-thirds majority) and judged by the Senates, which may convict and remove from office Presidents only with the approval of a qualified majority of two-thirds of their members (art. 53 const. Chile; art. 59 const. Argentina).

From the analysis of the constitutional arrangements of the two systems emerges, therefore, the institutional attempt practised (only) in Argentina – with the 1994 revision – to mitigate the excessive presidential preponderance, introducing an element of strengthening the Parliament through the institution of parliamentary censure against the *Jefe de Gabinete*, in order to enhance a sort of "parliamentarisation" of the system (Gambino 2020).

Constitutional practice, however, shows that this attempt does not appear, at present, to be productive of any effect in the sense indicated.

In Argentina (as, for that matter, in Chile), Parliament still constitutes an "*órgano debilitado que no permite contrapesar efectivamente al gobierno*"

(Nogueira Alcalà 2017), nor has the *Jefe de Gabinete* evolved into a sort of effective Prime minister, but is rather a mere coordinator of the other ministerial colleagues, at the complete disposal (and confidence) of the President of the Republic and without any margin of real autonomy in identifying the political direction of the executive.

Not even the institution of ministerial countersignature – necessary for the validity of any presidential act (art. 100 const. Argentina; art. 35 const. Chile) – has ever departed from its nature as a mere control on the formal regularity of the act, with the consequence that ministerial refusal of countersignature has always entailed, in institutional practice, the resignation of the minister and his/her rapid replacement by the President.

Thus, ultimately, "*en el contexto latinoamericano la hibridación del presidencialismo con algunas instituciones parlamentarias no ha frenado la hegemonía presidencial, la que se ha mantenido incólume en los países, como Argentina, en que dichos mecanismos han sido introducidos*" (Nogueira Alcalá 2017).

From the point of view of constitutional practice, the typological classification that sees the experiences of Argentina and Chile placed in two distinct classes tends, therefore, to blur, since the presidential preponderance appears, however – also in Argentina – to significantly characterize the actual functioning of the constitutional order.

This does not affect, however, the fact that – as pointed out acutely by others – the introduction in Argentina of parliamentary censure against the *Jefe de Gabinete* may evolve, in the future, the form of government "*hacia el semipresidencialismo*" (Pegoraro 2018).

4. The form of government in the emergency

The Presidents of Argentina and Chile have, as previously stated, considerable constitutional powers to manage states of crisis, emergency, and exception.

Thus, in Chile, the constitution contains an entire chapter (*Estados de excepción constitucional*: art. 39-45) dedicated to the analytical regulation of states of constitutional exception, which can be decreed by the President of the Republic alone – who also determines their geographical area of application (Piergigli 2021) – for the hypotheses of internal and external war, serious internal disorder, emergency and public calamity (art. 39).

The declaration of a state of siege (art. 40 const.) – for internal/external war or serious internal disorder – is attributed to the President, while

Congress must decide (accepting or rejecting the presidential declaration) within five days. A state of siege due to internal unrest or war can last up to fifteen days, with no possibility for the President to request an extension.

The state of catastrophe (art. 41 const.), in case of public calamity, is likewise declared by the President, informing Congress of the actual measures taken to manage the emergency situation, which is entrusted by the President to the *Jefe de la Defensa Nacional*. After six months have elapsed, Congress may pronounce for the termination of the state of catastrophe, unless the President requests – with the consequent consent of Congress – an extension for a period even longer than one year.

A state of emergency (art. 42 const.) may be declared by the President, in case of serious breach of public order or serious danger to national security, for a period of fifteen days, which may be extended for a further fifteen days. For subsequent extensions, the President must obtain the prior consent of Congress, providing the necessary information on the measures taken.

The constitution (art. 43), in any case, specifies the constitutional freedoms and rights that may be restricted by the President's decision for each of the various states of constitutional exception stated in the preceding articles.

These limitations may not, however, extend to constitutional institutions, nor to the holders of their respective offices (art. 44); while the guarantee of effective judicial remedy against limitations on the constitutional rights of citizens continues to apply, without, however, the courts – unlike in other countries (Piergigli 2021) – being able to rule on the *de facto* circumstances that determine the presidential decree in states of exception (art. 45).

In Argentina, the President may declare a state of siege in the event of internal disorder or external attack to protect the constitution and its institutions, decreeing the suspension of citizens' constitutional guarantees, without, however, being able to impose punishments or sentences, but can, however, order the arrest or forced transfer of citizens (art. 23 of the constitution).

The recent health emergency in connection with the Covid-19 pandemic was the most interesting stress test for the latest developments in emergency management in the form of government in the two systems under consideration.

Chile and Argentina were, in this regard, the first countries in Latin America to react quickly to the health emergency: in Chile, with Decree no. 4/2020 of 5 February 2020 and the subsequent presidential decree on 18 March 2020 of the state of catastrophe provided for by art. 41 const.; in Argentina, with the *decreto de necesidad y urgencia* no. 260/2020 of 12 March 2020, containing

measures of prevention and sanitary containment for the period of thirty days, then further extended by subsequent decrees, without resorting to the *estado de sitio* referred to in art. 23 const., but with the adoption of the decree-laws governed by art. 99(3) of the Charter.

In Argentina, the adoption of Decree-Law no. 260/2020 and subsequent decrees was not, however, followed – as the constitution requires – by a meeting of the Permanent Bicameral Commission to evaluate the contents of the decree, nor did Congress meet to express its political considerations on the matter, so that the long inactivity of the Houses during the phase of the health emergency "has in fact generated a situation of 'hyper-presidentialism', as has already occurred at various times in Argentine history" (Spigno 2020).

The question of constitutionality of Decree no. 260/2020 was, however, subjected to judicial scrutiny in the *Kingston, Patricio s/ Habeas corpus* case, where both the criminal court of first instance and the court of appeal recognised its constitutional compliance in each case.

In Chile, the health emergency has, first of all, entailed the postponement of the referendum on the election of the Constituent Convention from 26 April to the following 25 October 2020, but – unlike in Argentina – the Chilean Congress has continued to meet, albeit in virtual mode, considering and evaluating the various measures adopted by the executive under art. 41 of the Constitution, which (as seen) provides that the management of the emergency situation resulting from the state of catastrophe is entrusted by the President to the *Jefe de la Defensa Nacional*.

The Chilean Supreme Court, hearing – with *recurso de protección* (art. 20 of the Constitution) – numerous questions concerning the legality and proportionality of the various measures adopted by the executive, has, in any case, recognised their full legitimacy (sentence no. 39506-2020).

REFERENCES

Ackerman B.
Brazil's Constitutional Dilemma in Comparative Perspective: Do Chile and Spain Cast Light on the Bolsonaro Crisis?, in ICONNECT-Blog, July 16, 2020.

Carpizo J.
voice *Forma di governo presidenziale*, in L. Pegoraro (a cura di), *Glossario di diritto pubblico comparato*, Roma, 2009.

Ceccherini E.
Le democrazie incerte in America Latina. Le ragioni di un mancato consolidamento, in *DPCE OnLine*, 3, 2020.

Chaisty P.
Cheeseman N., Power T.J., *Coalitional Presidentialism in Comparative Perspective. Minority Presidents in Multiparty Systems*, Oxford, 2018.

Cheibub J.A., Elkinks Z., Ginsburg T.
Latin American Presidentialism in Comparative and Historical Perspective, in *Texas Law Review*, 89, 2011.

Di Giovine A.
Le forme di governo, in P. Carrozza, A. Di Giovine, G.F. Ferrari, *Diritto costituzionale comparato*, V ed., Roma-Bari, 2020.

Dixon R., Ginsburg T. (eds)
Comparative Constitutional Law in Latin America, Cheltenham-Northampton, 2017.

Frosini T.E.
Le forme di governo e i sistemi elettorali, in T.E. Frosini (a cura di), *Diritto pubblico comparato. Le democrazie stabilizzate*, Bologna, 2019.

Gambino S.
Democrazia e forme di governo nelle esperienze costituzionali latinoamericane: derive illiberali o degenerazioni autoritarie?, in *DPCE Online*, 3, 2020.

Groppi T.
Chile 2021: Una Constitución para el Siglo XXI, in *DPCE Online*, 1, 2021.

Hernandez A.H.
Presidencialismo y Federalismo en Argentina, in *Federalismi.it*, 1, 2010.

Hirschl R.
Comparative Matters. The Renaissance of Comparative Constitutional Law, Oxford, 2014.

Hübner Mendes C., Gargarella R. (eds)
The Oxford Handbook of Constitutional Law in Latin America, Oxford, 2021.

Martinelli C.
Il ruolo del Parlamento nei sistemi presidenziali maturi, in R. Tarchi (a cura di), *Parlamento e parlamentarismi nel diritto comparato*, Milano, 2020.

Mezzetti L.
Ruolo ed evoluzione del Parlamento nei sistemi presidenziali latino-americani, in R. Tarchi (a cura di), *Parlamento e parlamentarismi nel diritto comparato*, 2020a.

Mezzetti L.
*L'America Latina*in P. Carrozza, A. Di Giovine, G.F. Ferrari (a cura di), *Diritto costituzionale comparato*, V ed., Roma-Bari, 2020b.

Nogueira Alcalà H.
La tipología de gobiernos presidencialista de América Latina y gobiernos semipresidenciales en Europa, in *Estudios Constitucionales*, 2, 2017.

Olivetti M.
Il plebiscito del 25 ottobre 2020, prima tappa del processo costituente cileno, in *DPCE Online*, 1, 2021.

Olivetti M.
Il Cile torna sotto i riflettori: un processo costituente in una democrazia consolidata, in *Federalismi.it*, 33, 2020.

Pegoraro L.
Diritto costituzionale comparato. La scienza e il metodo, Bologna, 2014.

Pegoraro L.
América Latina como categoría y objeto de comparación, in *Diritto pubblico comparato ed europeo*, 1, 2018.

Pegoraro L., Rinella A.
Sistemi costituzionali comparati, Torino, 2017.

Piergigli V.
Dagli "stati di eccezione" al processo costituente. Una ricostruzione della recente esperienza cilena, in *DPCE Online – Osservatorio sul processo costituente cileno*, 2021.

Spigno I.
Emergenza sanitaria vs. emergenza costituzionale in America latina: una prospettiva comparata, in *DPCE Online*, 3, 2020.

Tarchi R. (a cura di)
Parlamento e parlamentarismi nel diritto comparato, Milano, 2020.

Volpi M.
Libertà e autorità. La classificazione delle forme di Stato e delle forme di governo, VII ed., Torino, 2018.

Volpi M.
La classificazione delle forme di governo, in G. Morbidelli, M. Volpi, G. Cerrina Feroni (a cura di), *Diritto costituzionale comparato*, Torino, 2020.

Constitutional Justice

Chapter 8
The Pantocratic Model of Constitutional Justice in Ecuador and Bolivia*

SERENA BALDIN** AND ENRICO BUONO***

1. Introduction

The comparison between Ecuador and Bolivia can lead to valuable insights, as the constitutions of these countries (in force since 2008 and 2009, respectively) reflect the popular will to create a new state structure, embracing different paradigms from those established in Western legal systems. This derives from the acceptance of Andean ancestral worldviews, indigenous sources of law and ways of handling public af-

* Sections 1, 2, 2.1, 3 and 3.1 have been written by Serena Baldin, sections 2.2 and 3.2 have been written by Enrico Buono, while section 4 has been written jointly.

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fairs, which have given birth to 'plurinational and intercultural' states. Another element of novelty lies in the rejection of the sustainable development model implemented in most parts of the world, with the consequent adoption of an institutional design that proposes an alternative path towards sustainability, based on innovative political, legal, economic, social and cultural premises.

Therefore, these constitutions present the elements that best express the counter-hegemonic legal tradition of the so called *buen vivir* (Baldin 2015 and 2019). This counter-hegemonic legal tradition is based on the assumptions of "subaltern cosmopolitanism", opposed to neoliberal globalization (de Sousa Santos 2004). The radical constitutional reforms introduced in Ecuador and Bolivia also affect the relationship between authority and freedom, seeking to address the unresolved issues of the Welfare state. The emerging result is a form of state in which new legal subjectivities, including nature, and the values of sharing community life are brought together, and in which the principle of fraternity prevails over that of solidarity (the so-called Caring state: Bagni, in this book).

In light of this, this chapter sets out to investigate whether the reforms have also affected constitutional justice bodies, developing original solutions in line with the trends observed in other fields.

Secondly, and in a broader perspective, the research seeks to verify the degree of adherence of Ecuador and Bolivia to the pantocratic model of constitutional justice. It must be noted that these countries have initially adopted a centralized system of constitutional justice, establishing a specific body to resolve constitutional issues. This model differs from the diffuse model of judicial review, where any judge can exercise constitutionality control and disapply the law if it does not comply with the constitution (Cappelletti 1979). These two classical archetypes have expanded throughout the world considerably over time, in various hybrid forms (Pegoraro 2019). According to a recent taxonomic proposal based on functional criteria, the nature and competences of constitutional justice bodies lie in either the nomocratic or the pantocratic model (Bagni, Nicolini 2021). The first model exemplifies those experiences which present a minimum enforcement of constitutional justice, where only the legitimacy of legislation can be reviewed; the second model, defined as pantocratic, enhanced or total model, refers to those legal systems in which the activity of all public powers is subject to forms of constitutional review. Adopting a *fuzzy* approach to legal taxonomies (Baldin 2017), the pantocratic model, in particular, presents many possible subclasses, marked by

various degrees of intensity, according to the number and kinds of control over state authorities.

The *Corte Constitucional* of Ecuador and the *Tribunal Constitucional Plurinacional* of Bolivia are the institutions specifically in charge of monitoring compliance with the constitution. Their current configuration differs from the past, when a mixed model prevailed, which established both a specific body and the direct involvement of ordinary judges in the constitutional review of laws (Grijalva Jiménez 2012, p. 183; Rivera Santiváñez 1999, p. 208).

The research aims to understand whether an attempt has been made to overcome the problem of politicized judges recorded in the past by intervening in the selection process. It also aims to verify whether, in the selection process, social pluralism is reflected to some extent within these courts. On one hand, plurinationality is a primary element of the institutional organization, which implies the full recognition of natives and their culture in the public sphere. On the other hand, guarantees of gender equality are stated in several constitutional provisions. It is therefore interesting to understand if the theory of reflective judiciary, according to which the legitimacy of judges can be enhanced through selection processes that are sensitive to the representation of society, has taken root in Ecuador and Bolivia and through which policies.

A further aspect of analysis regards the assigned functions and, in particular, the ways in which the constitutional review is exercised. In this sense, the research sets out to ascertain whether the Andean Courts show a tendency to extend the methods of control to include both *a priori* and *a posteriori* review and concrete and abstract review. Thereafter, it seeks to investigate the review of conventionality, which is emblematic of the trend towards the internationalisation of constitutional law, through the transposition of covenants in the block of constitutionality (Pegoraro 2019, p. 202). In the Latin American context, this is done by including the American Convention on Human Rights (and possibly other human rights treaties) in the parameter of judgment. This scrutiny determines the obligation for all authorities of the state Parties to set aside any domestic law in conflict with the Convention and with its interpretation by the Inter-American Court of Human Rights (Ferrer Mac-Gregor 2020, p. 375 f.).

Section 2 therefore illustrates the guarantees of independence of the constitutional judges and the methods for their selection, while Section 3 focuses on the review of constitutionality and conventionality. Section 4 provides a summary of the collected data with the purpose of highlight-

ing both the similarities and the differences between Ecuador and Bolivia, while placing them at the "low" or "high" extreme within the pantocratic model of constitutional justice. In order to achieve this, the comparative law method is employed, especially through the use of the *tertium comparationis*. The *tertium comparationis* is the term of reference for identifying similarities and differences between Ecuador and Bolivia on the basis of a predefined comparison grid. The *tertium comparationis* is outlined at the beginning of the next two paragraphs, each divided into subsections dedicated to Ecuador and Bolivia.

2. Guarantees of independence and reflective judiciary

From a comparative perspective, the structure of Constitutional Courts often presents similar characteristics; this is understandable given that their composition influences the very legitimacy of constitutional justice. The Constitutional Courts are bodies that, by their very nature, must ensure maximum independence from political power and provide the best guarantees of impartiality. How can this be achieved? Through the way in which judges are selected, the provision for a long term of office and the prohibition from reappointment. Therefore, these three elements serve as *tertium comparationis* to verify similarities and differences between the states under analysis.

Hans Kelsen was one of the first scholars to offer an overview of the elements contributing to the formation of a Constitutional Court. He theorized the centralised model of constitutional justice that later became reality in the constitutions of Czechoslovakia of 1919 and Austria of 1920 (Kelsen 1981).

With reference to the procedures for selecting judges, the renowned Prague-born jurist advocated a mixed system of election and appointment by other constitutional bodies (Head of State, Parliament, Government, Judiciary), also allowing for the possibility of co-option by the Court itself for any vacancies. It cannot be argued *a priori* that appointment is preferable to election or vice versa: in both cases only experience can reveal whether in a specific context the subjects or bodies with power of choice have ensured the guarantees of independence of the Court or have instead aimed to influence the political orientation of the judges. Selection procedures guarantee the greatest possible balance, a factor which, usually combined with the periodic turnover of judges, allows the political orientations expressed by public

opinion in Parliament (and also in the Government and/or the presidential office) to be reflected in the composition of the Constitutional Court.

In addition to Kelsen's reasoning, it must also be added another aspect that may affect the composition of the Constitutional Courts, and which calls into question the theory of reflective judiciary. This concept refers to a selection process of judges that takes into account the social heterogeneity given by factors such as gender, ethnicity, religion, language, etc. The underlying intention is to ensure that the different sensitivities in society are represented within the Court by means of the judges' backgrounds. This ensures that decisions are made with a full understanding of the reasons of the parties (Mastromarino 2018, p. 469 f.).

At the same time, a long term of office also guarantees the neutrality of the Court, by avoiding solidarity with the subjects and bodies involved in the selection process. In other words, the duration of the mandate is essential in order to guarantee independence from political power and, therefore, greater objectivity of judgement. For this reason, the mandate of the constitutional judges is generally longer than that of the bodies appointing them, in order to reduce the possibility of influence and interference on the Court's activity.

Furthermore, the requirement of the ban on consecutive terms averts the risk that expectations of reconfirmation could affect the fair judgement of the Court. However, within the comparative panorama it can observed that reappointment is often allowed.

2.1. Ecuador

In Ecuador, the profiles of the *Corte Constitucional* are regulated in Title IX "Supremacy of the Constitution", chapter two "Constitutional Court of the Constitution (art. 429-440) and in the *Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional* (LOGJ) of 2009.

Art. 432 const. foresees a Court composed by nine members, who perform their duties in the plenary court and in chambers. The requirements for office are set out in art. 433 const., which states that candidates must hold Ecuadorian citizenship and enjoy full political rights; they must hold a law degree; they must have exercised with notable rectitude the profession of attorney-at-law, judge or university professor in law for at least ten years. In addition, proof of probity and ethics is required, and the candidates must not have been members of political parties or movements in the previous ten

years. Art. 173 LOGJ supplements the constitution by listing a number of situations which prevent appointment, i.e., causes of incapacity, including active service in the armed forces or the police force or being the spouse or cohabiting partner or a relative up to the fourth degree of a constitutional judge or a member of the selection committee. The office of judge is full-time, making the exercise of other functions incompatible, with the exception of university teaching (art. 174 LOGJ).

The selection process is quite original, based on a public competition on the basis of qualifications and examinations. Several rules form the legal basis of this procedure: art. 434 of the constitution, articles 177-184 LOGJ and the rules and procedures for public competition established by the Council of Citizen Participation and Social Control, a constitutional body which cooperates with the other institutions in the management of public affairs.

Candidacies must come from three constitutional functions, namely Legislative, Executive and Transparency and social control. As specified in the final part of the Constitution, in art. 25 of the Transitional Provisions, each function proposes at least nine candidates. The joint committee in charge of examining the candidates consists of six members, with two commissioners appointed by each of the three constitutional bodies that have the power to make the proposals. The judges are appointed following an evaluation procedure in which, after checking their requirements and awarding a score for their qualifications, candidates are required to take a written and an oral examination. The result of the evaluation can be challenged by any citizen who believes that the candidates do not meet the requirements due to a lack of probity or suitability, or because they have omitted relevant information. The evaluation board itself decides on appeals.

Art. 434 const. also ensures gender equality in the formation of the Court. An issue arises as to whether this requirement applies at the time of proposing candidates or whether it is a criterion to be met at the end of the selection procedure, or at both stages. Reading the LOGJ, attention must be paid to gender balance at both stages, but in different ways. In the initial phase, each of the three constitutional bodies is required to present nine "alternating male and female candidates" (art. 180, par. 3), which means that there must be an alternation of gender in the list of candidates. At the stage of the public examination, on the other hand, the LOGJ is concerned with guaranteeing the representation of women by providing that if "there are two candidates in equal conditions, preference shall be given to the application of the woman" (art. 181, par. 3). The solution with the least impact on the principle of equality is therefore preferred since it is only applicable in

the event of equal ranking. However, this choice does not necessarily lead to an effective gender balance, even though this has been achieved so far.

The lack of a rule guaranteeing the ethnic component in the Court is puzzling, despite the fact that Ecuador is a plurinational and intercultural state according to art. 1 const. and it provides an extensive set of rights for indigenous groups. On the other hand, this result is in line with the choice of not implementing any mechanism to promote the political representation of natives in Parliament. On a practical level, in the first period of the Court's activity, Nina Pacari was a member of indigenous descent; currently, there is no judge of indigenous descent.

Under art. 432 const., the term of office of constitutional judges is nine years. It is therefore longer than that of other constitutional bodies (four years for the Head of State, four for the members of the National Assembly, four or five years for the members of the Transparency and social control function). The removal of a judge from office on the grounds of criminal liability in connection with the performance of his/her duties is decided by the Constitutional Court with a two-thirds majority of the votes cast by its members (art. 431, par. 2, const.).

Constitutional judges cannot be re-appointed immediately. Their mandate can be renewed but not consecutively, a solution that is not very common in the comparative panorama. The rule can be justified by the fact that in such a sparsely populated country it is difficult to ensure a constant turnover of adequately trained personnel. This, however, leads to a risk of fostering bonds of political partisanship in the hope of a second appointment. A further distinguishing criterion is given by the timing of the renewal procedure. In this case, one third of the members of the Court are renewed every three years.

2.2. Bolivia

In Bolivia, the *Tribunal Constitucional Plurinacional* is regulated by Title III "Judicial Organ and Plurinational Constitutional Court", chapter VI "Plurinational Constitutional Court" of the constitution (articles 196-204) and by the *Ley N° 027 del Tribunal Constitucional Plurinacional* (LTC) of 2010.

Art. 198 const. states the elective principle for constitutional judges by referring to the procedure, mechanism and formalities used for the election of the members of the Supreme Court of Judges (art. 182 const.), which also

apply to the election of the Agro-Environmental Court (art. 188 const.) and the Council of Ministers of Justice (art. 194 const.).

Art. 197.III const. introduces a statutory reservation for the composition, organization and functions of the Plurinational Constitutional Court, all regulated by the LTC: as for its composition, art. 13 LTC establishes the number of titled judges at seven, who operate in three sections (each made up of two judges) or in a plenary session, as well as in a rotating admissions committee (made up of three judges).

The requisites for the appointment of constitutional judges (in addition to the general requisites to become a public servant) consist of a minimum age requirement (thirty-five years) and specialized or credited experience of at least eight years in the disciplines of constitutional law, administrative law or Human Rights law (art. 199.I const.), in addition to the professional title of attorney (art. 17.I.8 LTC).

Art. 201 const. refers to the same system of prohibitions and incompatibilities applied to public servants, as established in articles 236 and 238 const.: the function of constitutional judge is therefore prohibited in case of simultaneous performance of more than one full-time remunerated public job, in case of conflict of interest (both direct and indirect), and in case of the assignment of public positions to relatives up to the fourth degree of consanguinity and second of affinity.

Art. 238 const. lists the following causes of ineligibility: the office of constitutional judge is excluded for those that were or are directors of enterprises or corporations that have contracts or agreements with the state; those who have been directors of foreign international enterprises that have contracts or agreements with the state; those who hold elected positions; the members of the Armed Forces and the Bolivian Police in active service; the ministers of any religious cult. Art. 18.II LTC adds four further causes of ineligibility: being a member of a political organization at the time of candidacy; being part of the administrative or management body of a commercial company whose bankruptcy has been declared fraudulent; sponsoring people who are responsible of crimes against the unity of the state or who have sold natural resources and national heritage; finally, those who have participated in dictatorial governments are excluded from the office of constitutional judge.

As mentioned earlier, the electoral procedure for the judges of the Plurinational Constitutional Court reproduces the procedure for the election of the magistrates of the Supreme Court of Justice (art. 182 const.). Anyone who meets the requirements may submit his or her candidacy to the Plurinational Legislative Assembly (art. 19.I LTC), which approves

(by a two-thirds majority of its members) a shortlist of twenty-eight candidates to be sent to the Plurinational Electoral Organ, in order to organize the electoral process.

Gender equality and the inclusion of indigenous peoples is promoted by specific provisions designed to pursue the plurinational paradigm, enshrined in art. 1 of the constitution: at least two of the seven constitutional judges must identify themselves as members of the so-called native indigenous rural peoples (art. 13.2 LTC), and half of the twenty-eight candidates must be women (art. 19.III LTC). For purposes of determining merit, experience as a native authority under its system of justice shall be taken into account (art. 199.I const. and art. 17.II LTC): this reflects the plurinational composition of the Court established by art. 197.I Const. ("The Plurinational Constitutional Court shall consist of Judges elected on the basis of plurinationality, with representation from the ordinary system and the rural native indigenous system") and the proposal powers attributed to native indigenous rural peoples (art. 199.II const. and art. 19.II LTC).

Candidates may not campaign (not even indirectly: see art. 20.II LTC), otherwise being sanctioned with ineligibility: the Electoral Organ is the sole responsible for the dissemination of the candidates' curricula and merits (art. 182.III LTC). The seven candidates with the highest number of votes are elected as full judges of the Plurinational Constitutional Court, and the following seven candidates are appointed as substitute judges (art. 20.V LTC). According to art. 20.VII LTC, citizen participation in the pre-selection process is guaranteed in order to exercise social control of public governance (articles 241-242 const.), but there is no appeal procedure as in Ecuador.

According to art. 14 LTC, constitutional judges hold office for six years (one year longer than other elective offices), and there is a ban on consecutive terms.

It has been argued that constitutional judges are subject to recall, an issue closely related to the position of the Plurinational Constitutional Court in the Judicial Organ. The first commentators of the new constitution have, in fact, defined the Plurinational Constitutional Court as the impartial and independent head of the Judicial Organ, specialised in constitutional review. According to this interpretation, the revocation of constitutional judges could only be imposed by the Council of Ministers of Justice, pursuant to art.195.I const.

On the contrary, art. 11 LTC reaffirmed the opposed principle of independence of the Plurinational Constitutional Court ("independent from the other constitutional bodies and subject exclusively to the constitution and this

law"). If the Constitutional Court is independent from the Judicial Organ, the principle of general revocability of elective offices (enshrined in art. 240 const.) would apply: "the mandate of anyone who occupies an elected position, with the exception of those of the Judicial Organ, may be revoked". This possibility is purely theoretical: no constitutional judge has ever been revoked.

3. The review of constitutionality and conventionality

The assumption that legitimates constitutional justice bodies is that they facilitate, or should facilitate, the consolidation of democracy through the constitutional review as well as other, sometimes very numerous, competences aiming to regulate the relations between institutions and between institutions and society. This is due to the fact that Constitutional Courts are perceived as more suitable than other bodies to settle controversies that affect fundamental rights, the democratic stability of the state, the separation of powers and the distribution of competences among territorial entities.

As for the review of the constitutionality of laws and other types of acts, this control can be either prior or subsequent to the adoption of the act. Moreover, it may be abstract and/or concrete, i.e. exercised over rules irrespective of conflicts in which those rules have to be applied or over rules which should be applied in cases before the Court.

In addition, the work of constitutional judges may also cover the review of conventionality. In this regard, it is interesting to mention the application of this review in Ecuador and Bolivia. Generally speaking, the constitutions of the states that are parties to the Inter-American Convention on Human Rights may give treaties an infra-constitutional status, or a super-primary status by including them within the sphere of constitutionality, or they may require that the constitutional provisions on human rights be interpreted in accordance with this Convention or that the Inter-American Convention prevails if its provisions are more favourable than those of the constitution.

For more than a decade, there has been a significant expansive force of the conventional system, leading to a discussion of its hierarchical superiority rather than its complementarity with national constitutional justice systems. This is due to a number of developments in case law, starting with the legal doctrine of the diffuse review of conventionality. This theory, developed within the Inter-American Court of Human Rights (IACHR), holds that, in applying domestic law to a concrete case, national courts must verify whether it complies with the Treaty and, if not, must not apply it *inter*

partes. This assumption is accompanied by the duty, incumbent on all judges, of interpretation in conformity with the Convention. In addition, the IACHR affirms that the states parties are bound by its case law even when they are not directly involved in any adjudication. Very few states, including Argentina, Uruguay and Venezuela, oppose this centralising tendency of the IACHR (Bagni, Nicolini 2021).

In light of these considerations, the analysis dwells on the status of human rights treaties in Ecuador and Bolivia and on the relationship established between the review of constitutionality and that of conventionality, in order to assess the degree of adherence to the conventional system.

3.1. Ecuador

The *Corte Constitucional* is entrusted with several functions aiming to safeguard fundamental rights and the balance of powers between constitutional organs. Its duties are set out in art. 436 const. and in other precepts in various parts of the fundamental charter.

Art. 436 const. states that the Constitutional Court is the highest authority for the interpretation of the constitution and international treaties on human rights ratified by Ecuador. It is also responsible for: ruling on unconstitutional public actions against general regulatory acts issued by authorities of the state; declaring *ex officio* the unconstitutionality of norms related to those under scrutiny; ruling on the unconstitutionality of administrative acts with general effect issued by any public authority; ruling on claims of noncompliance that are filed to guarantee enforcement of norms or administrative acts with general effect, as well as for enforcement of rulings or reports by international human rights organisations that are not enforceable by ordinary courts; ruling on cases relating to protection, compliance, *habeas corpus*, *habeas data*, access to public information and other constitutional procedures, as well as on cases selected by the Court for review; solving conflicts of competence or attribution among the branches of government or bodies established by the constitution; monitoring *ex officio* the constitutionality of the declarations of state of emergency; recognising and sanctioning failure to comply with constitutional decisions; declaring unconstitutionality by omission incurred by state institutions or public authorities.

Pursuant to art. 134 const., the Ecuadorian Constitutional Court also holds the power of initiative to submit draft laws on matters pertaining its functions. This list is not exhaustive, as the powers are extendible by legislation.

The decisions adopted by the Constitutional Court are final and irrevocable, pursuant to art. 440 const.

The constitutional review is exercised in three ways: as a preventive control; as an abstract *a posteriori* control; and as a concrete *a posteriori* control (Grijalva Jiménez 2012, p. 190 ff.).

The preventive control of the constitutionality of acts or the opinion on certain issues or decisions is exercised on: international treaties, prior to ratification by the National Assembly (art. 438 const.); calls to national consultations or consultations at level of decentralized autonomous governments (articles 104 and 438 const.); objections of unconstitutionality submitted by the Head of State during the drafting of laws (articles 139 and 438 const.); the identification of the applicable procedure for constitutional revision (art. 443 const.); the admissibility of the impeachment of the President of the Republic by the National Assembly (art. 129, par. 2, const.); the removal of the Head of State from office by the National Assembly for having taken up duties that do not come under his/her competence (art. 130, par. 1, const.); the presidential decree dissolving the National Assembly for having taken up duties that do not pertain to it (art. 148 const.); removal of the President of the Republic from office (art. 145, par. 3, const.); draft statutes of regional autonomies (art. 245, par. 3, const.); draft reforms of regional statutes (art. 246, par. 2, const.); decrees of economic urgency adopted by the President of the Republic (art. 148, par. 4, const.).

The abstract type of *a posteriori* constitutional review implies the possibility guaranteed to anyone, individually or collectively, to file a constitutional claim, pursuant to art. 439 Const. The declaration of unconstitutionality of the challenged act determines its repeal from the national legal system. In accordance with the provision of par. 3 of art. 436 Const., the Court can declare *ex officio* the unconstitutionality of the norms related to those declared unconstitutional. The Court may also review the omissions of public authorities who may disregard the constitution by failing to implement the constitutional provisions (art. 436, par. 10, const.). Art. 166 const. also states that the Court expresses its opinion on the constitutionality of the declaration of a state of emergency made by the President of the Republic.

The concrete type of *a posteriori* constitutional review arises from a process in which the judge in charge of deciding on that case submits to the Constitutional Court doubts on the constitutionality of a provision to be applied (art. 428 const.).

With regards to the review of conventionality, from the point of view of the status assigned to human rights treaties, Ecuador has adopted a

two-fold approach. Firstly, it considers the international sources of law as interposed norms in the control of constitutionality, given that treaties and international conventions have an infra-constitutional status under art. 425 const. Secondly, in art. 417 const. is affirmed that "In the case of treaties and other international instruments on human rights, principles in favour of human beings, non-restriction of rights, direct applicability and the open clause as set forth in the Constitution shall be applied". From constitutional case law emerges the principle that international human rights instruments (even where they are not ratified treaties), as well as the advisory opinions of the IACHR and all its decisions (thus not only those relating to Ecuador) fall within the block of constitutionality (Barona Martínez, Tescaroli Espinosa 2018). It has also already been pointed out that the Ecuadorian Constitutional Court is the highest instance of interpretation of human rights treaties, pursuant to art. 436, par. 1, const. It follows that it would be inconceivable to delegate this competence to the IACHR.

It should also be added that ordinary judges do not have the power to set aside norms that are in contrast with human rights treaties. Art. 428 const. states in a very clear manner that "When a judge, by virtue of his/her office or at the request of a party, considers that a legal norm is contrary to the Constitution or to international human rights instruments that provide for rights that are more favourable than those enshrined in the Constitution, it shall suspend the case and refer it for consultation to the Constitutional Court". For this reason, the review of conventionality in Ecuador is defined at "low intensity", since it is reserved to the Constitutional Court (Villacís Londoño 2018, p. 89). However, it must be pointed out that ordinary judges are obliged to interpret national norms in the light of human rights treaties, in compliance with the *pro homine* principle, and they may also apply the standards set out in conventional case law if there are any shortcomings in national legislation (Aguirre Castro 2016, p. 307 f.).

Finally, the analysis of the *Resoluciones de Supervisión de Cumplimento de Sentencia* issued by the IACHR shows that Ecuador largely meets the requirements imposed by international judges. This does not mean, however, that the state is open to the entry of the conventional legal system in terms of its hierarchical superiority over the domestic judicial system, as outlined above.

3.2. Bolivia

Although it bears a degree of resemblance to the centralised model of constitutional review, the system outlined by the Bolivian constitution presents elements of considerable originality (Attard Bellido 2012, p. 156). The Plurinational Constitutional Court stands at the apex of constitutional justice, but all jurisdictional, administrative and indigenous authorities must interpret the law in light of the constitution, by virtue of the principle of direct application. The so-called *modelo plural de control de constitucionalidad* (art. 178.I const.) represents an innovative paradigm in the comparative horizon, inspired by the principles of pluralism, interculturality and decolonisation.

Twelve attributions of the Plurinational Constitutional Court are listed in art. 202 const.: in 2012, the enactment of the *Código Procesal Constitucional* (CPC, *Ley N° 254*) has completed the regulatory framework of constitutional procedure, pursuant to the statutory reservation in art. 204 const. In a similar way to the Ecuadorian Court, the attributions of the Bolivian Court can be traced back to three models of constitutional review: preventive control; abstract control; concrete control (incidental). In addition, the Constitutional Court decides over jurisdictional disputes and conflicts of attribution.

According to art. 202.1 const., the Plurinational Constitutional Court is the court of jurisdiction in "the matters of pure law", concerning the unconstitutionality of laws and of any other nonjudicial resolution: actions for unconstitutionality (articles 132-133 const.) of abstract nature (articles 74-78 CPC) may only be raised by the President of the State, senators, deputies and the highest executive authorities of autonomous governments. Concrete actions (articles 79-84 CPC) may be raised during judicial or administrative proceedings. Art. 133 const. establishes that the decision that declares a norm unconstitutional makes it inapplicable *erga omnes*. This effect is reinforced by the principle of *stare decisis* (articles 15, 78 and 84 CPC): the judgments of the Plurinational Constitutional Court represent universally binding precedents for lower courts, public authorities and every citizen.

As previously observed, the Plurinational Constitutional Court deals with conflicts of jurisdiction and powers among state bodies (art. 202.2 CPC): in accordance with art. 12 const., the state organizes and structures its public power through Legislative, Executive, Judicial and Electoral bodies. Consequently, the Constitutional Court has the power to resolve the conflicts arising between these bodies (articles 86-91 CPC) and the conflicts

of jurisdiction between the Plurinational government and the autonomous and decentralized territorial entities (art. 202.3 const.; articles 92-99 CPC).

The appeals of fees, taxes, rates, licenses, rights or contributions in violation of the constitution (art. 202.4 const.) ensures that any regulation that creates, modifies or suppresses a tax complies with constitutional principles (articles 133-138 CPC). The appeals of resolutions of the Legislative Organ, filed when they "affect one or more rights, regardless of who" (art. 202.5 const.; articles 139-142 CPC), can be included within the category of subsequent abstract reviews. The difference between this latter remedy and the *acción de amparo constitucional* (art. 129 const.; articles 51-57 CPC) lies in the jurisdiction: the *amparo* (as well as the *acciones de protección de privacidad, popular* and *de cumplimiento*) may be brought before any competent court and can be appealed to the Plurinational Constitutional Court (art. 202.6 const.); the *recurso* ex art. 202.5 const. on the other hand, introduces a direct form of protection against the violation of fundamental rights. Laws passed by the Plurinational Legislative Assembly can, in fact, be reviewed (as a last resort and without the possibility of appeal) only by a constitutional body of equal rank (such as the Plurinational Constitutional Court).

Preventive forms of constitutional review (articles 202.6, 202.7, 202.8, 202.9 and 202.10 const.) include auxiliary and advisory functions: for example, legal consultations on the constitutionality of proposed bills (art. 202.7 const.; articles 111-115 CPC) have a binding effect, forcing the legislative body to adapt or eliminate the provisions of draft laws that have been declared unconstitutional.

Of particular interest is the role of the Plurinational Constitutional Court in overseeing the framework of legal pluralism known as "*pluralismo jurídico igualitario*", given the uniqueness of such regime in comparative constitutional experiences: art. 179.II of the Bolivian Constitution., in fact, establishes the equal status of ordinary, agro-environmental and rural native indigenous jurisdictions. The potential for conflict of this framework has been emphasized by the lack of a proper inter-jurisdictional coordination protocol (Buono 2018, p. 1079 f.). The powers attributed to the Plurinational Constitutional Court to resolve jurisdictional conflicts are thus of fundamental importance (art. 202.11 const.).

While exercising the auxiliary function to rural native indigenous authorities on the application of their juridical norms in a concrete case (art. 202.8 const.), the decisions of the Plurinational Constitutional Court must result in an intercultural interpretation that takes into account the

internal logic of rural native indigenous justice systems. The *Secretaría Técnica y Descolonización*, formed exclusively by anthropologists, sociologists and legal scholars with an expertise in indigenous languages and legal practices, assists the judges in carrying out this delicate hermeneutic activity. This function is complemented by the constitutional review of the draft statutes proposed by rural native indigenous autonomies (AIOC), enforced by art. 53.II of *Ley N° 031 Marco de Autonomías y Descentralización "Andrés Ibáñez"* of 2010 (LMAD) and regulated by articles 116-120 CPC (Baldin 2019, p. 135 f.).

The Plurinational Constitutional Court rules on direct appeals of nullity (Art. 202.12 const.), declaring null and void the acts of persons who usurp functions, which are not their responsibility, as well as the acts of those who exercise jurisdiction or power that does not emanate from the law (art. 122 const.; articles 143-148 CPC). These rulings represent extraordinary and informal jurisdictional actions, exceptionally attributed to the Constitutional Court, as the final authority enforcing the principle of constitutional supremacy (art. 410 const.).

With regards to the control of conventionality, it should first be noted that Bolivian constitutional law expressly includes international Treaties and Conventions in the matter of human rights and the norms of Communitarian Law ratified by the country (art. 410.2 const.). The aforementioned constitutional norm reflects previous case law, which incorporated the doctrine of the *bloc de constitutionnalité* and granted the American Convention on Human Rights full constitutional status. The case law of the Plurinational Constitutional Court has further broadened the constitutionality block, including the IACHR's own rulings in axiomatic, extensive and systematic interpretation of the Bolivian constitution.

Articles 13.IV and 256 of the constitution state, respectively, that "rights and duties consecrated in this Constitution shall be interpreted in accordance with the International Human Rights Treaties ratified by Bolivia" and that "The international treaties and instruments in matters of human rights that have been signed and/or ratified, or those that have been joined by the state, which declare rights more favorable than those contained in the Constitution, shall have preferential application over those in this Constitution". From the interpretation of these two norms, the Constitutional Court has reconstructed a "diffuse" model of conventionality review: each administrative and jurisdictional authority is obliged, in fact, to analyse whether the provisions to be applied comply with the international treaties on human rights, as well as with the principles elaborated

by IACHR case law. In other words, they must guarantee the effective enjoyment of the rights enforced by the constitutionality block, according to the *pro homine* and *pro actione* principles.

Lastly, it should be noted that, from an analysis of the *Resoluciones de Supervisión de Cumplimento de Sentencia* by the IACHR, Bolivia has complied with the rulings of the international Courts.

4. Ecuador and Bolivia in a comparative framework

The preceding analysis offers some brief comparative reflections on Ecuador and Bolivia, in terms of the composition of the constitutional justice bodies and of the review of constitutionality and conventionality.

With regard to the composition of the two Constitutional Courts, it can be noted that these Andean countries have chosen rather unique ways of selecting the components of their Courts. Not only have they adopted two different solutions – public competition by qualifications and examinations in Ecuador; direct election in Bolivia – but both differ from the more standardized solutions found in the international panorama. Moreover, the elective nature of the Bolivian Court has given rise to allegations of "politicization", as in the occasion of the ruling that led to the fourth candidacy of Evo Morales, considered *contra constitutionem*. Such accusations have not, at least up to now, affected the Ecuadorian Court.

The common elements, on the other hand, include the prohibition of consecutive terms for constitutional judges and the adoption of the paradigm of reflective judiciary, although the provisions envisaged to guarantee gender balance raise some doubts over their effective application. Notwithstanding these doubts, in practice this principle has been respected so far.

Concerning indigenous representation within the Courts, Ecuador and Bolivia present a different approach. Indeed, only in Bolivia this representation is guaranteed by the Constitution. However, the criterion of personal self-identification (for candidates of indigenous origin) has been criticised.

Equally critical is the *dedicación exclusiva* to the function of constitutional judge, prescribed by Bolivian law. It prevents judges from holding the position of university professors, which is instead allowed in Ecuador.

With reference to the functions performed, both states are emblematic of the tendency to entrust constitutional justice bodies with the most diverse competences and to extend constitutional control to a maximum extent. The main difference between Ecuador and Bolivia seems to lie not so much in the

procedural tools available to the two Courts (substantially overlapping, despite their heterogeneity), but rather in the authentically "plural" ambition of the constitutional justice model to be pursued. Although imperfect in its implementation, Bolivia's "egalitarian" legal pluralism has given substance to the plurinational paradigm, raising the Court's functions far beyond the mere administration of justice. In fact, the Plurinational Constitutional Court plays a fundamental role in linking the legal systems recognized by the Bolivian state and is the main device for promoting indigenous autonomy and jurisdiction. The recognition of indigenous justice made by Ecuador through art. 171 const. is certainly less significant and, as far as is reported here, does not give any active role to the Ecuadorian Constitutional Court.

Finally, it must be noted that the there is a more widespread control of conventionality in Bolivian constitutional case law than in Ecuador, which places this function in the hands of the Constitutional Court. This discretionary profile probably derives from the different hierarchical status and acceptance of the conventional system adopted by these two states, although both adopt the provisions most favourable to individual rights, regardless of their national or international origin.

In conclusion, the research pointed out the wealth of instruments available to the two Courts and the forms of access to constitutional justice. Ecuador, and to an even greater extent Bolivia, can therefore be easily included in the most advanced version of the pantocratic model.

REFERENCES

Aguirre Castro P.A.
El control de convencionalidad y sus desafíos en Ecuador, in *Revista IIDH*, 64, 2016.

Attard Bellido M.E.
La Justiciabilidad de los DESC en el Constitucionalismo de la Justicia e Igualdad asumido por el Modelo Constitucional del Estado Plurinacional de Bolivia, in *Lex social: revista de los derechos sociales*, 1, 2012.

Bagni S., Nicolini M.
Giustizia costituzionale comparata, Padova, 2021.

Baldin S.
La tradizione giuridica contro-egemonica in Ecuador e Bolivia, in *Boletín Mexicano de Derecho Comparado*, 143, 2015.

Baldin S.
Classifications and fuzzy logic: a comparative law perspective, in S. Bagni, G.A. Figueroa Mejía, G. Pavani (coords), *La ciencia del derecho constitucional comparado. Estudios en Homenaje a Lucio Pegoraro*, I, Ciudad de México, 2017.

Baldin S.
Il buen vivir *nel costituzionalismo andino. Profili comparativi*, Torino, 2019.

Barona Martínez N., Tescaroli Espinosa A.
La gradación de instrumentos internacionales, el pacta sunt servanda *y* pro homine *como herramientas para la inclusión de normas de soft law en el bloque de constitucionalidad ecuatoriano*, in *USFQ Law Review*, 1, 2018.

Buono E.
Pluralismo jurídico igualitario: il mandato costituzionale "inascoltato" nel modello boliviano di cooperazione inter-giurisdizionale, in *DPCE Online*, 4, 2018.

Cappelletti C.
Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato, Milano, 1972.

Ferrer Mac-Gregor E.
Control de convencionalidad (sede interna), in E. Ferrer Mac-Gregor, F. Martínez Ramírez, G.A. Figueroa Mejía (coords), *Diccionario de Derecho Procesal Constitucional y Convencional*, tomo I, México, 2020.

Grijalva Jiménez A.
Constitucionalismo en Ecuador, Quito, 2012.

Kelsen H.
La giustizia costituzionale, a cura di C. Geraci, Milano, 1981.

Mastromarino A.
Separazione linguistica o comunitarismo giurisdizionale? Ragionando di reflective judiciary in Belgio, in C.A. d'Alessandro, C. Marchese (a cura di), Ius dicere *in a globalized world. A comparative overview*, Roma, 2018.

Pegoraro L.
Sistemi di giustizia costituzionale, Torino, 2019.

Rivera Santiváñez J.A.
El control de constitucionalidad en Bolivia, in *Anuario Iberoamericano de Justicia Constitucional*, 3, 1999.

de Sousa Santos B.
Casi di diritto emancipatorio, in *Democrazia e Diritto*, 2, 2004.

Villacís Londoño H.
El control de convencionalidad y su aplicación en Ecuador, in *Revista San Gregorio*, 26, 2018.

Chapter 9
Constitutional Justice in Argentina and Brazil

ANNA CIAMMARICONI*

Summary: 1. Introduction. – 2. Constitutional justice in Argentina: background. – 3. Constitutional review in the current Argentinian system: an overview. – 3.1. Types of proceedings. – 3.2. Composition, functions and role of the *Corte Suprema da Justicia de la Nación*. – 4. Constitutional justice in Brazil: from its origin to the democratic state. – 5. The judicial review in the *Constituição da República Federativa do Brasil* of 1988. – 5.1. The 1999 reforms and the constitutional amendments of 2004. – 6. The *Supremo Tribunal Federal* of Brazil: composition and recent developments. – 7. The conventionality review: outline. – 8. Conclusion.

1. Introduction

The idea of the presence of an authority tasked with the duty to protect the constitution is not new in the Latin-American continent: Simón Bolívar – in his *mensaje al Congreso Constituyente de Bolivia* on May 27, 1826 – re-

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ferred to the advisability of exercising control over public acts so that they were in accordance with the constitution and the treaties. The *Libertador*'s solicitation was therefore formalized in certain constitutional texts of the time, starting from the Bolivian Charter itself, in which the *Cámara de Censores* was contemplated with the tasks, inter alia, of "*1. Velar si el Gobierno cumple y hace cumplir la Constitución, las leyes, y los tratados públicos. 2. Acusar ante el Senado, las infracciones que el Ejecutivo haga de la Constitución, las leyes, y los tratados públicos*" (art. 51, const. 1826). In more recent times, it is possible to say that those prodromal experiences not only took root in the continent but were also affected by a particularly dynamic evolution; bear in mind, in this regard, the circulation of models and the particular hybridization of the systems of constitutional justice tested in Latin America.

Starting from the political control, directly inspired by the French revolution (e.g. the experiences of Chile, Uruguay and Peru), passing through the imitation, during the second half of the nineteenth century, of the American judicial review (in countries such as Bolivia, Ecuador, Honduras, Panama and Uruguay) – to reach, thanks to the interaction with similar experiences of some European-continental Constitutional Courts – the emulation of the centralized type of constitutional review (Ecuador-1945, Guatemala-1965, Chile-1970, Peru-1979) up to, lastly, the current models characterized by heterogeneous solutions and rich in contaminations drawn from abroad.

However, this should not erroneously lead us to believe that in the considered continent they just passively reproduced experiences matured and consolidated in other countries, but rather it is more appropriate to consider Latin America as a real laboratory of original models, resulting from the particular hybridization with foreign experiences and institutes. The original traits are identifiable even in those legal systems – as, for example, in Argentina in relation to the judicial review of US origin – where adherence to the reference ideal type seems to be more marked.

In the following pages, constitutional review systems of Argentina and Brazil will be analysed, although in their main lines; these two countries show many differences but, at the same time, share some profiles, including, just as examples and with specific regard to constitutional justice, the original model taken as a reference (*i.e.* the United States one), the conventionality review and the review for omission.

Nonetheless, autonomous developments are evident: unlike Argentina, the Brazilian legal system is affected by a progressive and

marked opening up to the European-continental model, with the simultaneous increase in the attributions of the *Supremo Tribunal Federal* and a plurality of procedural paths consistent with the particularly analytical nature of the Constitution.

2. Constitutional justice in Argentina: background

The constitutional justice system in Argentina draws inspiration from the American judicial review. Likewise North American federal text, the Argentinian constitution of 1853 says nothing about the organization of the constitutional justice system, restricting itself to attribute the judicial power to the Supreme Court and the federal courts.

However, substantially, the system accepted in this Latin American country progressively frees itself from the original model, experiencing forms of contamination from different experiences of civil law systems. More specifically, the evolutionary path (to which both the federal legislator and, above all, the jurisprudence of the Supreme Court of Justice of the Nation contribute) that has led to the affirmation of the current Argentinian model of constitutional justice began at the end of the nineteenth century, when, with a 1865 sentence, the *Corte Suprema da Justicia* enunciated for the first time the principle according to which it is the duty of each individual judge to verify the conformity of the law to be applied to the specific case with the Constitution.

In 1887, with the so-called *Sojo* case – which may be considered the Argentinian *Marbury v. Madison* – the Supreme Court, ruling that no law should be in contrast with the Constitution, set aside the law submitted to its scrutiny and declared itself incompetent to judge the matter, since the constitution attributed original jurisdiction to the Court only in certain matters, that is in matters relating to foreign ambassadors, ministers, consuls and those in which a province is a party (art. 117 const.). Substantially, the Court reaffirmed the same position in the *Municipalidad v. Elortondo* of 1888. In its sentence, the Supreme Court affirmed that it is the duty of all courts to examine the laws to be applied in specific cases and verify that they comply with the constitutional text. Through cases-law, the aforementioned orientation will be further consolidated up to the definition of traits and characteristics of the current Argentinian constitutional justice system.

3. Constitutional review in the current Argentinian system: an overview

The constitutional justice system developed in Argentina is, as already said, diffused, *reparador y concreto* and operates within the framework of a rigid constitutional system (art. 30). Closely linked to the solution of the concrete case, in the "*de excepción*" review the effects of the judicial body's decision operate exclusively *inter partes*, although, especially in the field of human rights, jurisprudence has come to recognise the *erga omnes* value of the effects of certain pronouncements (e.g. the case of *Halabi, Ernesto v. PEN ley 25.873 y decreto 1563/04 s/amparo,* of 24 February 2009, in which the Supreme Court ruled that a judgment may have *erga omnes* effect in same situations).

The activation of the constitutional control does not take place, as a general rule, *de oficio* but only upon request of the interested party and there are mainly three orders of motivation which have led the Supreme Court to reject the possibility of admitting *ex officio* review. More specifically, the *de oficio* procedure would alter the principle of equilibrium and the division of powers; it would call into question the presumption of legitimacy of the rules and acts of the state; it would lead to a violation of the principle of defence in court if the judge were to intervene in unsolicited matters. However, through the case of *Mill de Pereyra v. Estado de la Provincia de Corrientes* of 2001, the orientation of the Court was partially modified. In that case, moving from the assumption that it is the duty of every judge to protect the Constitution, the Court recognised an extension of the possibilities of an *ex officio* control, which can be exercised in certain circumstances, *i.e.* when the violation of the constitutional norm is so far-reaching as to clearly justify the disapplication of the norm. Even in this case, the review of legitimacy must be carried out within the context of a specific case and with *inter partes* effects.

The introduction of a constitutional review system in Argentina is strictly linked to the concept of "constitution supremacy", enunciated in art. 31 of the *Constitución de la Nación Argentina*, which places a duty on public authorities – both federal and provincial – to comply with constitutional provisions, federal laws and international treaties. The constitutional control is extended to all laws, to the decrees of the executive power and to judgments; however, some fields – which have seen a progressive reduction in number over time, thanks above all to the jurisprudence of the Supreme Court, which has increasingly extended the sphere of intervention of the

Judiciary in its work of protecting the constitution – have been indicated as *no justiciables*. Specifically, these are *cuestiones políticas*, a category to which belong, among others, the acts and statutes adopted in the revolutionary phases experienced by the country and deemed "prevalent" with respect to the Constitution; the war powers of the Head of State; the acts adopted by the executive in which the principle of discretion prevails, or certain acts of the legislative power.

3.1. Types of proceedings

The main activation way of the constitutional review is through an extraordinary federal appeal before the Supreme Court of Justice. Through the *recurso extraordinario*, which is disciplined in the art. 14 of *Ley* 48 of 1863 and in the articles 256-258 of the *Código Procesal Civil y Comercial*, the constitutional review may be proposed in appeal in front of the Supreme Court in the three following cases: "*1° Cuando en el pleito se haya puesto en cuestión la validez de un Tratado, de una ley del Congreso, o de una autoridad ejercida en nombre de la Nación y la decisión haya sido contra su validez. 2° Cuando la validez de una ley, decreto o autoridad de Provincia se haya puesto en cuestión bajo la pretensión de ser repugnante a la Constitución Nacional, a los Tratados o leyes del Congreso, y la decisión haya sido en favor de la validez de la ley o autoridad de provincia. 3° Cuando la inteligencia de alguna cláusula de la Constitución, o de un Tratado o ley del Congreso, o una comisión ejercida en nombre de la autoridad nacional haya sido cuestionada y la decisión sea contra la validez del título, derecho; privilegio o exención que se funda en dicha cláusula y sea materia de litigio*".

The prerequisite for the activation of this appeal is the presence of the so-called *cuestión federal* or *constitucional*, which can be *simple* or *compleja*. The *cuestión federal simple* concerns the interpretation of constitutional norms, federal laws, international treaties and federal acts of the federal government authorities; the *cuestión compleja* concerns contrasts between a norm – federal or local – and the Constitution.

As for the activation of the *recurso extraordinario*, art. 257 of the Code specifies that an appeal must be lodged in writing before the judge or administrative body that adopted the decision. The court decides on the admissibility of the appeal and in the case of a favourable decision refers the matter to the Supreme Court within five days. Only federal matters can be the subject of an extraordinary appeal, with one exception, namely the *recurso*

extraordinario por sentencia arbitraria aimed at correcting flaws in a judicial decision. The *Ley* n. 23.774 of 1990, which modified Arts. 280 and 285 of the Code of Civil and Commercial Procedure, introduced the institution of *certiorari*, inspired by North America, which introduced the possibility for the Court to dismiss the appeal in the event of a lack of sufficient federal relief, i.e. when the issues raised are insubstantial or lack transcendence. In 1994, the "*per saltum*" appeal was introduced, now disciplined by art. 257 of the Code of Civil and Commercial Procedure, which allows direct access to the Court, without going through the court of second instance.

In line with the rest of the South American continent, the Argentine legal system also provides for the institution of the *amparo*, whose *recurso* constitutes a specific mechanism aimed at the judicial protection of fundamental rights and freedoms, as well as the guarantee of the supremacy of the Constitution. The Argentinian *amparo* action – which is unique in the comparative panorama – found gradual affirmation in the country from the second half of the 1950s, when the institution in question was particularly widespread. In 1966, with *Ley* no. 16.986, the *acción de amparo* was codified and, finally, with the constitutional revision of 1994 it was constitutionalised (art. 43 const.). It is, as is well known, an alternative remedy to the *habeas corpus* which is resorted to for the protection of fundamental rights, other than the sphere of personal liberty, against any form of violation or limitation of the same, deriving from the action of public authorities or private subjects. The constitutional provision gives any person – if there is no other more suitable legal remedy – the right to bring an immediate and swift *amparo* action against any act or omission of public authorities or private persons which may limit or threaten rights and guarantees recognised by the Constitution, a Treaty or the law. The court may then declare unconstitutional the rule on which the offending act or omission is based.

The constitutional reform which took place in the early 1990s completely overturned the previous approach, which prohibited the use of *amparo* when its resolution could lead to a rule being declared unconstitutional.

3.2. Composition, functions and role of the Corte Suprema da Justicia de la Nación

In its original version, the 1853 constitutional text attributed the exercise of judicial power to the *Corte Suprema de Justicia de la Nación*, composed by nine judges, and to the lower courts. With the entry of the state of Buenos

Aires into the Argentinian Confederation, the composition of the Supreme Court was changed, increasing, initially, to five (1862), then to seven (*Ley* no. 15,721 of 1960) and finally to nine members (*Ley* no. 23,774 of 1990). In 2006, a further reform changed the composition of the body again, reducing the number of judges to five. The members of the Court are appointed by the President of the Republic participating on a proposal from the Senate, which must decide by a two-thirds majority of the members, during a public session convened for this purpose (art. 99 const.).

With regard to the requirements, lawyers with at least eight years' experience in the legal profession and the same requirements as for election as senator (art. 111 const.) may be appointed as judges of the Supreme Court – i.e. aged 30 or over, having been an Argentina citizen for no less than six years, and enjoying an annual income of at least two thousand silver pesos or another equivalent income (art. 55 const.). Moral integrity and technical competence are also required from judges, together with a commitment to democracy and the defence of human rights. Persons who have been removed from public office may not be appointed as judges, who are forbidden to simultaneously perform other functions, except for teaching. Decree no. 222/2003 of the *Poder Ejecutivo* establishes the parameters to be considered in the selection of candidates: it is obligatory to publish the name of candidates and their antecedents in the *Boletín Oficial* – and in at least two national newspapers – within thirty days from the beginning of the vacancy.

Judges remain in office for life, *mientras dure su buena conducta* (art. 110 const.); this principle was supplemented, with the 1994 constitutional reform, by a clause placing an age limit on the non-removability of judges, set at 75 years; consequently, all magistrates whose age exceeds the maximum limit must be confirmed every five years. There are three causes of early termination of office: death, resignation and removal from office. Regarding the removal from office, the Chamber of Deputies has the power to indict before the Senate members of the Supreme Court for poor performance, offences committed in the performance of their duties or common offences. The Senate judges the accused in a public trial.

The *Corte Suprema de Justicia* has original and exclusive jurisdiction in matters concerning foreign ambassadors, ministers and consuls and in circumstances in which a Province is a party (art. 117 const.); in all other matters the Court intervenes on appeal.

As regards constitutional review, formally Argentina does not have a mechanism that allows the unity of the jurisprudence produced at federal level: although, as mentioned above, the US system is taken as a refer-

ence model, the principle of *stare decisis* has not been applied in the Latin American country. The decisions taken by the Supreme Court on the unconstitutionality of a rule are not binding for the lower judges, who have only the "moral" or institutional duty, and not the legal obligation, to respect the guidelines adopted by the top of the Judiciary.

The Supreme Court of Justice and the Argentine constitutional justice system as a whole have been and continue to be the subject of a never-ending debate on the advisability of intervening to strengthen the judiciary specialised in *fuero constitucional* through the creation of a Constitutional Tribunal, placed outside the judiciary body and identified as the only body competent in matters of constitutional justice, abandoning *de facto* the diffuse model of constitutional review to adhere to a centralised model. The crisis of confidence in the judiciary, and in the Supreme Court of Justice, was mainly due to doubts about its actual independence from governmental actors. This doubt has been fuelled by the positions taken by the Court itself regarding the numerous *coups d'état* that have taken place in Latin America. In fact, the Supreme Court has almost always endorsed governments formed as a result of coups, starting in 1930, when it recognised the legitimacy of the coup government as that of legally constituted executives. The Court was on the same wavelength in 1943, 1955 and 1976. As a result, there has been a debate as to whether a Constitutional Court should be established or whether its internal structure and composition should be reformed.

Contrary to the orientation adopted in the past, in 2013 the Supreme Court, seized by the Government through the *per saltum* procedure, declared "unconstitutional" the reform of the Superior Council of Judiciary wanted by the executive, censuring the new mechanism for the selection of the members of the Council, considered contrary to the provisions of art. 114 of the constitution because it violates the principle of balance between the elected and representative components of the professional categories of judges and lawyers. The censured provision altered the mixed composition of the body by providing for a popular vote for the election of the members representing the technicians, *i.e.* judges, lawyers and academics, who thus became an expression of the party-political system. The speed with which the Supreme Court intervened on the issue shows that any attempt to reduce the principle of self-government of the Judiciary is seen as an attack on its role as guardian of the constitution and the normative value accorded to every judge.

4. Constitutional justice in Brazil: from its origin to the democratic state

Although the constitutionality control has been affirmed in Brazil since the first republican constitution of 1891, in which the influence of the American system is marked, the idea of the supremacy and rigidity of the constitution already appears in the monarchical and imperial Charter of 1824, a text which includes some provisions that cannot be overcome by the ordinary legislative process (the constitution is in fact semi-rigid). In the same Charter, however, the Judiciary or any other power was not recognised as having the power to declare the unconstitutionality of normative acts contrary to the Constitution; the Council of State (the Emperor's advisory body) could "recommend" to the *Assembléia Geral* the annulment of an act (under art. 143, in particular, the members of the Council of State were liable "*pelos conselhos que derem, opostos às leis, e ao interesse do Estado, manifestamente dolosos*").

Therefore, it is only with the beginning of the Republican era that the constitutional review has taken place in Brazil. Even before the constitutional text, it was the *Decreto* No. 510 of 22 June 1890 that gave the *Supremo Tribunal Federal* the power to rule as a last resort on the decisions of the lower courts, in cases where the validity or applicability of treaties and federal laws, or the conformity of laws and acts of state governments in conflict with the constitution or federal laws, were contested (art. 58.III.1). The subsequent *Decreto* No. 848 of 11 October 1890, in regulating the federal judiciary, contained further specifications concerning the powers of the *Supremo Tribunal Federal* (STF), which included, on appeal, the power to decide in certain circumstances, such as when a law or act of any member state was contrary to the Constitution, treaties and federal laws or when the interpretation of a constitutional or federal provision, or of a clause of a treaty or convention, was questioned and the decision rendered was contrary to the recognition of the right or other subjective legal situation (art. 9.II).

In the 1891 constitution the reference model – the federal constitution of the United States – appears very pervasive and affects various profiles, including the federal form of state, the presidential form of government, as well as the dynamics inherent in the judiciary and the review of constitutional legitimacy, which is configured as jurisdictional, diffuse, and incidental, with the effects of *inter partes* decisions. The choice, or rather the orientation towards a solution reflecting the North American model, does not arouse surprise, given the desire to declare a clear break with the past,

characterised, among other things, by monarchical and parliamentary solutions. According to the constitutional text, recourse to the STF by lower state judges is permitted in circumstances where: "*a) "se questionar sobre a validade, ou a aplicação de tratados e leis federais, e a decisão do Tribunal do Estado for contra ela"; b) "se contestar a validade de leis ou de atos dos Governos dos Estados em face da Constituição, ou das leis federais, e a decisão do Tribunal do Estado considerar válidos esses atos, ou essas leis impugnadas*" (art. 59.III, § 1). It must be said, however, that the adherence to the US model found in practice forms of arrest, as in the case of the operation of the principle of *stare decisis*: although the STF was configured as a judge of last resort, its judgments were not compulsorily observed by the lower courts. It was only later constitutional stages that made the system more coherent, including the requirement that the lower courts respect the decisions of the STF.

Among the main changes envisaged during the first half of the twentieth century, what stands out in particular is what was established by the 1934 Constitution, which introduced several novelties: it is up to the Supreme Court to pronounce *em recurso extraordinário* on cases decided by local courts in sole or last instance: (a) when the decision is contrary to a provision of a treaty or a federal law; (b) when the validity or force of a federal law is in doubt with respect to the Constitution, and the local court has denied its application; (c) when the validity of a law or an act of local government, or a federal law, is in doubt, and the local court declares the challenged act or law valid; (d) when there is a multiplicity of interpretations of the federal law (art. 76.2.III).

Furthermore, the constitutional text in question entrusts the Senate with the power to suspend the execution, in whole or in part, of any law or act, resolution or regulation, when it is declared unconstitutional by the courts (art. 91.1.IV); a kind of direct access to control of constitutionality. Among general provisions, the provision that the courts, by an absolute majority of the votes of the judges, may declare a law or an act of public power to be unconstitutional is included (art. 179). This provision anticipates the direct action for unconstitutionality which, introduced in 1934, will be fully employed after the entry into force of the 1946 constitution, a text in which no particular innovations are made in relation to the review of constitutionality, placing itself in this sense on the same wavelength as the previous Charter, i.e. the 1937 Constitution, which maintains the widespread review with an "attenuation" of the effects of the declaration of unconstitutionality. At least until the revocation, which occurred with the *Lei Constitucional* no. 18 of 1945, therefore, the decisions could have been subject to a re-ex-

amination by the Parliament and overcome, if 2/3 of the members of the Chambers had expressed themselves in this sense, effectively making an unconstitutional act effective, but considered – in the opinion of the President of the Republic – necessary "*ao bem-estar do povo or à promoção ou defesa de interesse nacional de alta monta*"; moreover, according to art. 96 of the Constitution, it was established that only by an absolute majority of votes of the judges the courts could declare the unconstitutionality of a law or an act of the President of the Republic.

The three years prior to the approval of the 1967 constitution were particularly dynamic. The *Emenda Constitucional* No. 16 of 1965 ended up recognising the general scope of direct action for unconstitutionality according to the provisions of letter k, art. 2, which rewrote letter k of art. 101, *inc*. I, the application to the STF against the unconstitutionality of any regulatory act, federal or state, would be made by the Attorney General of the Republic. Thus, all laws or acts with normative scope could have been subject to constitutionality review by means of direct appeal; a procedure that was also expressly formulated in the 1967 constitution and in *Emenda Constitucional* No. 1 of 1969. This type of action, thus devised, at least in an initial period, gave rise to numerous debates and polemical aftermaths, as happened in the case concerning the *Movimento Democrático Brasileiro* (MDB), a circumstance which also led to the resignation of a judge of the STF (*Ministro* Cardoso). More specifically, the MDB wanted to submit Decree-Law No. 1.077 of 26 January 1970 (on press censorship) to the judges, through the action of the Attorney General of the Republic, but the Attorney General, not agreeing with the doubts raised by the MDB, decided to file and not to proceed. This gave rise to a dispute, whose question – as Paulo Bonavides effectively recalls – revolved around the issue of whether or not the Attorney General of the Republic was obliged to proceed with a direct action of unconstitutionality when the doubt was raised by a third party: *"(é) o Procurador-Geral da República, ao tomar conhecimento de inconstitucionalidade argüida em representação que lhe seja encaminhada por qualquer interessado, obrigado a apresentá-la perante o Supremo Tribunal Federal, ou poderia deixar de fazê-lo, determinando de plano o seu arquivamento?*". In this regard, the STF expressed a restrictive opinion, with Judge Cardoso voting against, in the *Acórdão* of 10 March 1971; most of the Supreme Court judges, therefore, recognised that only the Attorney General of the Republic had the discretionary power to decide on the direct action of unconstitutionality, even when doubts were raised by third parties. In other and more direct terms, according to

the federal judges, the Attorney General of the Republic would have retained the discretionary power, not being obliged to bring the direct action for unconstitutionality. Certainly, the consequences of this case have paved the way to the hypothesis of an extension of the number of persons entitled to bring direct actions for unconstitutionality.

After the 1965 amendment, it was not until the mid-1970s that another incisive reform of Brazil's constitutional justice system took place. It is in fact in 1977, with the constitutional amendment no. 7 to the constitution of 1967, that the Attorney General of Justice was given the power to bring before the state Court of Justice a petition on the constitutionality of laws or acts of the City Council deemed not to be in conformity with the state constitution, and the Attorney General of the Republic the power to promote the *representação interpretativa*, through which to ask the STF what was the appropriate constitutional interpretation of a rule of law. Such an interpretation was then binding on all the other organs of the Judiciary (the EC no. 7 of 1977 would later be abolished by the *Constituição da República Federativa do Brasil* – in short CRFB).

In a nutshell, the constitutional stages mentioned above show how, even at the dawn of the adoption of the constitution of 5 October 1988, the system of constitutional justice responded to the need to ensure the coexistence of diffuse and centralised control. Not only that. The problematic and/or contradictory profiles of the system of review of constitutionality experienced up to that time were already well known, to the point that the 1988 constitution already provided in its original text for the overcoming of some of them.

5. Judicial review in the *Constituição da República Federativa do Brasil* of 1988

The constitutional text promulgated on 5 October 1988 marked a clear break with the previous order, decreeing the start of the democratic and pluralist system; a radical paradigm shift compared to the recent past marked by a long period of military dictatorship, which extended between 1964 and 1985. From the specific perspective of the review of constitutional legitimacy, the solutions adopted by the Constituent placed themselves within a line of substantial continuity with respect to previous constitutional experiences, with the forecast of a combination – within the framework of the CRFB of 1988 – between the characteristics of the model of diffuse-incidental review and those of the centralised-principal one (with the latter, in particu-

lar, being affected by subsequent interventions and modifications). Among the main innovations introduced, the extension – already in the original version of the CRFB text – of the subjects entitled to bring direct action for unconstitutionality stands out. No longer, therefore, only the Attorney General of the Republic but, under art. 103 CRFB, also the Presidency of the Federal Senate and Chamber of Deputies, the Presidency of the Legislative Assembly, the state Governor, the Council of the Brazilian Bar Association, the political parties with representation in the National Congress, the trade union confederation and the *entidade de classe* on a national scale. It must be said that the STF's orientation has been to interpret in a restrictive manner the persons entitled to bring the action in question; an example of this is what has been stated in relation to the *entidade de classe*, defined as an "association of professional associations", which could bring a direct action only if the subject-matter at issue was relevant and consistent with the promoter of the action (art. 103, § 9, CRFB). The restrictive approach also concerned municipal acts, which were excluded from the type of review in question; the application should have concerned only federal and state acts.

This type of action would have produced a ruling with *erga omnes* effect, although not binding. From the procedural point of view, in relation to the direct action for unconstitutionality, it should be pointed out that those entitled to participate in the proceedings were also the body author of the act, in order to defend its constitutional legitimacy, and the Attorney General of the Republic, called upon to give his opinion. The Charter also limits the intervention of the STF to constitutional matters only (art. 102.III CRFB), while it entrusts the states with the control of legitimacy against laws and state and municipal acts in contrast with the state constitution.

Among the other new elements introduced in the 1988 text there is the provision of review by omission (art. 103, §2), in relation to which the influence of the Portuguese constitution is evident, even though, especially in the European country, the institution has proved to be of very little application: since 1982, the year in which the Portuguese Constitutional Tribunal came into operation, it has been used on only eight occasions; on the other hand, it seems to have been quite successful in Brazil (especially the *Ação Direta de Inconstitucionalidade – ADI – por omissão*). The underlying *ratio* is to attempt to curb the inertia of the legislature and, equally, to implement the many programmatic norms and the extensive catalogue of social rights present in the constitutional text. In addition, in the chapter dedicated to individual and collective rights and duties, the *Mandado de Injunção* and *Habeas Data* are foreseen: the first one (art. 5,

inciso LXXI, CRFB) has an effect similar to the union by omission and is admitted when the lack of a norm prevents the exercise of constitutional rights and freedoms, as well as the prerogatives inherent to nationality, sovereignty and citizenship; the second one (art. 5, clause LXXII, CRFB) has an effect similar to the union by omission. The second (art. 5, paragraph LXXII, CRFB) is allowed in order to ensure the knowledge of information in the archives or databases of governmental and public bodies regarding the person concerned (sub-paragraph a) or for the rectification of data where there is no intention to initiate other judicial or administrative proceedings (sub-paragraph b).

A turning point is marked by the reform introduced by the constitutional amendment no. 3/1993, through which the action of declaring a law to be constitutional (*alínea a* of section I, art. 102 and § 4 to art. 103) is introduced, which makes it possible to request the STF to pronounce on the compatibility of a law with the constitution when the law is the subject of a significant dispute as to its constitutionality. The effect of the decision is binding towards the Judiciary and the Public Administration: this aspect, especially the day after the approval of the reform in question, has aroused a debate due to the fear that it could create a *vulnus* to the autonomy of the judge. In case of non-adherence to the decision rendered by the STF, the procedure under art. 102, al. l, would be activated, i.e. the institution of *reclamação*, already provided for in the system but not actionable in relation to disobedience of the binding order, which until then did not occur with the simple effect "*erga omnes*". The President of the Republic, the President of the Senate and the President of the Chamber of Deputies and the Attorney General of the Republic are entitled to bring the petition; practice has progressively seen the role of the Supreme extended.

The following are subject to centralised constitutionality review by the STF: state constitutions, amendments to the CRFB, laws, decree-laws, *medidas provisórias* or federal or state decrees, resolutions and any federal or state regulatory act as well as those of direct or indirect administration authorities. On the other hand, amendments to the state constitution and other municipal acts, excluding those subjects to the control of the STF, may be submitted to the state Court of Justice. In this last regard, it should be noted that a symmetrical system of action for unconstitutionality is reproduced at state level, with the *Tribunal de Justiça do Estado* (art. 125 CRFB) competent to decide.

5.1. The 1999 reforms and the constitutional amendments of 2004

1999 was a particularly eventful year for the discipline of constitutionality review in Brazil. There were two legislative interventions which mainly concerned centralised control. Law No. 9.868 concerned the process relating to the direct action for unconstitutionality and the declaratory action for constitutionality before the STF, with the provision of some important new elements, including: the discretionary power of the STF to decide on the issues on which to rule (on the basis, for example, of public interest or urgency), as well as the time limits within which the decision must be issued (art. 12). In practice, this reform has helped to expand the role played by the *Ministro*-Rapporteur. Moreover, art. 27 of the same Act formalised an aspect on which the Supreme Court had already pronounced: for reasons of legal certainty and exceptional public interest, the STF, by a two-thirds majority of its members, could limit the effects of the declaration of unconstitutionality or decide the time from which it would take effect.

Law No. 9.882 (*Lei da Arguição de Descumprimento de Preceito Fundamental*) introduced the appeal against the violation of a fundamental precept, an institution which has become *de facto* a direct action for the unconstitutionality of all acts against which it is not possible to bring either a direct action for constitutionality or a declaratory action for constitutionality, with the consequence of bringing before the STF various types of acts, including municipal laws, decrees of a regulatory nature and even judicial decisions. It is not specified what is meant by the expression "*preceito fundamental*" nor what the type of *vulnus* should be, thus leaving the STF the discretion to decide on the merits. Certain aspects provided for in Law No. 9.868 are replicated in the text in question and refer to the Judiciary instead of the law for the determination of certain notions, with the consequence of having contributed, even in this case, to expand the role and powers of the STF, although – it should be remembered – the method of selection of judges remained unchanged. This has contributed to fuel heated debates in the public opinion on the contents of the STF decisions and to open a way to the live television broadcasting of the trial debates (Arts. 13, XVII and 21, XVII; art. 154 and 155 STF Rules of Procedure). Among the most "popular" issues, it is worth mentioning at least those concerning the legitimacy of the amnesty laws (against which ADPF 153 was brought), the provision of quotas reserved for Afro-descendants in access to universities (quotas considered legitimate by the STF on the basis

of reasons related to the inclusion of these groups: ADPF 186-DF), on same-sex marriage, as well as, more recently, on the burning *lava jato* affair, i.e. Brazil's "tangentopoli".

In 2004, following the approval of Constitutional Amendment No. 45, art. 103-A was introduced, concerning the so-called *súmula vinculante*. This provides for the possibility, for the STF, of approving, by a majority of two thirds of its members and after repeated decisions on a matter of constitutional relevance, a *súmula* having binding effect *vis-à-vis* the Judiciary and the public administration, both direct and indirect, at federal, state, and municipal level; the effects of the *súmula* do not extend to the Legislature. In any case, the STF can always revise and thus annul the binding nature of the *súmula*. More specifically, in the course of time and in the light of practical application, progressive specifications have been made regarding the use of this institution. In this regard, it is worth mentioning the *Lei* No. 11.427-206, by which it was established that the *súmula* has immediate effect, but the STF may, by a two-thirds majority, limit its binding force or decide that it has deferred effect for reasons of exceptional public interest. Finally, it should be stressed that the use of the *súmula* meets the need to guarantee legal certainty and the need to stem the phenomenon of the multiplication of proceedings on the same issue (with repercussions also on the reasonable duration of trials).

6. The *Supremo Tribunal Federal* of Brazil: composition and recent developments

As guardian of the constitution (art. 102 CRFB), the *Supremo Tribunal Federal* has progressively seen its role and functions grow, becoming an authentic fulcrum of the Brazilian constitutional system. This has not spared the body from controversies concerning, in particular, the legitimacy of its members (not by chance, the debate on the advisability of reforming the STF is repeated, especially with regard to the method of selecting judges). It is composed of eleven judges, called *Ministros*, chosen – according to art. 101 CRFB – among citizens, aged between thirty-five and sixty-five, of proven legal competence and irreproachable conduct, appointed by the President of the Republic, with the approval of the absolute majority of the Federal Senate (art. 101, *parágrafo único*, CRFB). The President of the STF also holds the position of President of the *Conselho Nacional de Justiça* (art. 103-B, inc. I, CRFB, following Constitutional Amendment

No. 61 of 2009) and is elected, together with the Vice-President, by the *Plenário*, among the *Ministros* themselves, for a term of two years. This body can operate either in plenary session (*Plenário*) or through two sections (called *Turmas*), consisting of five *Ministros* including the President, whose term of office is one year (art. 4, § 1, STF/1980 Rules of Procedure).

At the time of the first Republican Constitution, it had fifteen members, which were reduced to eleven by the 1934 constitution (when the body in question was renamed as Supreme Court) and increased to sixteen by the 1967 Federal Charter, to reach its current composition of eleven members. Even the seat has not always been the same, namely the city of Brasilia, having operated, until 1960, in Rio de Janeiro, the former federal capital.

Among the news that has affected the composition of the STF, a significant milestone coincides with the year 2000, when for the first time a woman was appointed as a judge within the body, by the then President of the Republic Fernando Henrique Cardoso: Minister Ellen Gracie Northfleet; it was a decisive break with tradition and an act, also on a symbolic level, very important in view of overcoming anachronistic and discriminatory cultural resistance. The second woman to be appointed judge is the constitutionalist *Ministra* Cármen Lúcia, in 2006, and then *Ministra* Rosa Weber, in 2011. Among other peculiar events concerning the members of the STF, it is also worth mentioning the recent circumstance that has seen the President, *Ministro* Ricardo Lewandowsky, assume the functions of the Presidency of the Republic, in 2014, following the impeachment of President Dilma Rouseff.

As partly mentioned, one of the factors that probably contributed to the popularity of the body in question and, equally, to the positioning of judicial events in the arena of public debate, is undoubtedly the provision of live television broadcasts of the hearings, nowadays transmitted by TV *Justiça*. The first live broadcast, followed by the entire country, took place in 1992 and concerned the debate between the then President of the Republic, Fernando Collor de Mello (subject to impeachment proceedings and subsequently suspended from office) and the President of the House of Representatives.

7. Conventionality review: outline

The adhesion of both countries to the American Convention on Human Rights (*Pacto de San José de Costa Rica*) has led to the development of the control of conventionality with the aim of verifying the compatibility of

domestic law with international treaties. In a nutshell, from an operational point of view, there are two types of control: primary and secondary. The primary control takes place at the domestic level, is widespread and therefore exercised by each judge, within the countries that make up the regional human rights system; the secondary control is the responsibility of the competent regional court (in this case, the Inter-American Court of Human Rights). According to the letter of articles 1.2 and 2 of the Convention, the states parties to the Convention undertake to respect the rights and freedoms recognised therein and to ensure to all persons subject to their jurisdiction free and full exercise of such rights and freedoms and, in the event that such rights are not recognised, to adopt, in accordance with their constitutional processes and the provisions of the Convention, legislative or other measures necessary to give effect to the *Pacto*. In other and more direct terms, states have a duty to exercise control of conventionality.

In Argentina, the path that led to the establishment of the conventionality review began in the early 1990s. As early as 1992, the Supreme Court of Justice recognised that the interpretation of the Convention by national judges had to be "guided" by the jurisprudence of the Inter-American Court, the body which has the final and definitive say on the interpretation of the text of the Convention. The 1994 constitutional reform gave international human rights treaties the same hierarchy as the Constitution, although the Inter-American Court's rulings were not yet recognised as binding. This orientation changed with the new composition of the Court, starting in 2004, when the *Espósito* case gave recognition to international jurisprudence, which was confirmed in subsequent Supreme Court rulings. In the *Mazzeo* case, the Court reiterated, in fact, that "*el Poder Judicial debe ejercer una especie de 'control de convencionalidad' entre las normas jurídicas internas que aplican en los casos concretos y la Convención Americana sobre Derechos Humanos*". The review of conventionality is comparable to the review of constitutionality: it is diffuse in nature and is carried out in the course of a concrete procedure, with effect *inter partes* of the decision.

Brazil's accession to the Convention took place by means of *Decreto* No. 678 of 6 November 1992. As in the case of Argentina, in Brazil the international treaties concerning the protection of human rights have constitutional status; as regards the control of conventionality, it should be recalled that this is not limited to guaranteeing the primacy of the *Pacto de San José de Costa Rica*, but also of all the human rights treaties ratified by the state (it is not by chance that the doctrine uses the formula of 'block' of conventionality). As regards the types of control and along the lines of what

happens in the review of constitutionality, the *controle de convencionalidade* can be both abstract and concrete and operate, therefore, in terms of a centralised and diffuse review.

8. Conclusion

The idea of describing, albeit briefly, the systems of constitutional justice in two systems such as Argentina and Brazil, favouring a diachronic perspective, allows us to identify common trends and to come to some conclusive reflections. First of all, it is worth noting the tendency, from the very beginning of the practical operation of the review of constitutionality in the Latin American countries in question, to break away from the reference model constituted by the diffused control of the US matrix (which in the Argentine context does not produce any legal obligation for judges, but only a moral one, to comply with the decisions of the higher courts, although the practice shows the tendency of the lower courts to align themselves with the jurisprudence of those hierarchically superior). Moreover, the openness to solutions that can be traced back to centralised control of constitutionality appears to be anything but secondary. This is particularly incisive in the Brazilian system where, even before the adoption of the 1988 Constitution, the system can already be said to be mixed and particularly complex, in which the role of the *Supremo Tribunal Federal*, which can be assimilated to a Constitutional Court, becomes more and more important. In both experiences, the particular role played both by direct action institutions (for example, in the Argentinean context, the *Amparo* institution, which has found constitutional codification after a wide-ranging and heated doctrinal and jurisprudential debate) and by the control of conventionality, as a result of the accession of the two Latin American countries to the *Pacto de San José de Costa Rica*, is also relevant.

In other and more direct terms, the experience of both Argentina and Brazil do not deny the fact that the Latin American area, although attracted by the legal solutions experimented in the United States, is particularly permeable to forms of hybridisation as well as inclined to autonomous developments with respect to the original model of reference, developments often combined with institutions and practices typical of Civil Law systems. And if this trend is not particularly surprising, given the inevitable influence of colonial events and constitutional history, it is accompanied by some knots (still) to be unravelled. Among these, the themes of the modality of

choice of the highest organs of the Judiciary stand out (a recurring theme in the debates, not only specialised, both in Argentina and Brazil, in which the question of the excessive politicisation of the judges of the Supreme Courts cyclically resurfaces) or the hypothesis of placing specialised magistracies alongside the High Courts, that is, real Constitutional Courts considered as the only organs competent in matters of constitutional justice. In this last regard, however, it seems that the reforms are destined to remain mere hypotheses for the time being, since the current system seems so entrenched that it cannot be easily dismantled. In fact, while in Argentina the majority doctrine continues to defend the model of diffuse review as a more effective system than the centralised one, setting aside (at least at present) the transition to a Kelsen-type review of constitutionality, in Brazil, the STF, in fact operating (also) as a Constitutional Court, continues to be concerned only at the level of doctrinal and political debate by the criticism of the excessive politicisation of the body, due to the way in which judges are appointed. No concrete reform is on the horizon, not even after the uproar caused by the well-known *Lava Jato* investigation (the Brazilian "Kickback city"), and by the daily practice of live television broadcasting of the work of the body in question.

REFERENCES

AA.VV.
Estructura y atribuciones de los Tribunales y Salas constitucionales de Iberoamérica, VII Conferencia Iberoamericana de Justicia Constitucional, Suprema Corte de Justicia de la Nación, México, 2009.

Afonso da Silva J.
O controle de constitucionalidade das leis no Brasil, in D. Garcia Belaunde, F. Fernandez Segado (coord.), *La Jurisdiccion Constitucional en Iberoamerica*, Madrid, 1997.

Araujo L.A.D.
O papel do Supremo Tribunal Federal na defesa dos direitos fundamentais e a Constituição da República Federativa do Brasil de 1988, in *Federalismi.it*, 2014.

Araújo Lima A.E.
O controle de constitucionalidade na Argentina, in A. Ramos Tavares (coord.), *Justiça constitucional e democracia na América Latina*, Belo Horizonte, 2008.

Barroso L.R.
O controle de constitucionalidade no sistema brasileiro, São Paulo, 2011.

Bonavides P.
Curso de Direito Constitucional, XV ed., São Paulo, 2005.

Dalla Via A.R.
La justicia constitucional en Argentina, in *Anuario Iberoamericano de Justicia Constitucional*, Madrid, 1997.

De Gaetano A.M.
Nuevas perspectivas sobre la mutación del sistema de control de constitucionalidad en Argentina, in *Revista Derecho Constitucional*, 1, 2019.

Ferrer MacGregor E.
Los tribunales constitucionales en Iberoamérica, México, 2002.

Figueiredo M.
O Controle de Constitucionalidade e de Convencionalidade no Brasil, São Paulo, 2016.

Frosina L.
L'Acción del amparo nell'esperienza costituzionale argentina, in *Federalismi.it*, 2014.

Hitters J.C.
La Jurisdiccion Constitucional en Argentina, in D. Garcia Belaunde, F. Fernandez Segado (coord.), *La Jurisdiccion Constitucional en Iberoamerica*, Madrid, 1997.

Lanni S.
Il diritto nell'America Latina, Napoli, 2017.

Mendes G.F.
Jurisdição Constitucional, São Paulo, 1996.

Pegoraro L.
Sistemi di giustizia costituzionale, Torino, 2019.

Pinto Ferreira L.
Os Instrumentos Processuais Protetores dos Direitos Humanos no Brasil, in D. Garcia Belaunde, F. Fernandez Segado (coord.), *La Jurisdiccion Constitucional en Iberoamerica*, Madrid, 1997.

Ramos Tavares A.
Sistemi e modelli di giustizia costituzionale (con particolare riferimento agli ordinamenti latinoamericani, in S. Bagni (a cura di), *Giustizia costituzionale comparata. Proposte classificatorie a confronto*, Bologna, 2013.

Rolla G.
La tutela diretta dei diritti fondamentali da parte dei Tribunali costituzionali in America Latina, in G.F. Ferrari, A. Gambaro (a cura di), *Corti nazionali e comparazione giuridica*, Napoli, 2006.

Sagüés M.S.
Diálogo jurisprudencial y Control de Convencionalidad a la luz de la experiencia en el caso argentino, in H. Viñas, V. Morales Antoniazzi (coord.), *Control de Convencionalidad: un balance a 10 años de Almonacid Arellano vs Chile*", Santiago de Chile, 2017.

Streck L.L., Mont'Alverne Barreto Lima M., Andrade Cattoni de Oliveira M.
A Nova Perspectiva do Supremo Tribunal Federal sobre o Controle Difuso: Mutação constitucional e Limites da Legitimidade da Jurisdição Constitucional, in *Revista do Programa de Mestrado em Ciência Jurídica da Fundinopi*, 2008.

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