

PLURALISM AS A KEY CATEGORY
IN LATIN AMERICAN CONSTITUTIONALISM:
SOME REMARKS FROM A COMPARATIVE PERSPECTIVE

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The paper focuses on the recognition of “pluralism” in Latin American constitutionalism as a key topic for those comparative constitutional law scholars interested in deepening the constitutional dimension of the growing social and cultural complexity of contemporary societies. What seems especially stimulating in the Latin American constitutional experiences is the “interaction” – in terms of both “conflict” and “integration” – between, on the one hand, the strong social pluralism and, on the other hand, the institutions and principles of Western liberal democratic constitutionalism which have migrated into Latin American constitutions. Some recent trends in comparative legal research prove to be particularly sensitive to the original and “alternative” solutions elaborated within the framework of Latin American constitutionalism, regarded as innovative perspectives on the relationship between law, nature, culture and society.

I. INTRODUCTORY REMARKS

The reflections on premises, characteristics and perspectives of the growing social, ethno-cultural, and religious complexity of contemporary legal orders are now central to the debate on the Western legal tradition. Many works have been devoted to this issue, aiming to analyse both the structures and the dynamics of law in an age of globalization and to detect the crisis of the nation-state paradigm with regard to global phenomena such as economic globalization, transnational migrations, the consolidation of international human rights law.

In this context, comparative constitutional lawyers are increasingly challenging the transformations of democratic constitutional states triggered by the tension between “uniformity” and “diversity”, especially by calling into question the “methodological nationalism” implied by constitutionalism as a state-centric ideology¹. However, if social,

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¹ U. Beck, “The Analysis of Global Inequality: From National to Cosmopolitan Perspective”, in H. Anheier, M. Glasius, M. Kaldor (eds.), “The Yearbook of Global Civil Society”, Oxford: Oxford University Press, 2003, 45-46, who conceived “methodological nationalism” as the outcome of the «belief that ‘modern society’ and ‘modern politics’ are to be understood as nation-state organized society and nation-state organized politics». On “methodological nationalism” see also A. Wimmer, N.

cultural, and religious complexity has been emerging as a major topic in legal research and a crucial key to the interpretation of Western law, it can nevertheless give a great stimulus to the study of other legal experiences, notably marked by the tension “uniformity/diversity” in their constitutional development. Among these experiences, the case of that “Other West” – as Latin America has been suggestively defined² – is extremely interesting from a comparative perspective.

The reasons that make Latin America a formidable observatory on “pluralism” – as a fact and as a paradigm to legally acknowledge the many diversities that cut across society – are well known³.

On the other hand, Latin America has increasingly been studied not only as an observatory, but also as a laboratory for “alternative” legal and political solutions to be thinkable and achievable, in relation to several issues perceived as crucial to “sustainable”⁴ contemporary societies, such as environmental protection, democratization of the economic system, citizens’ participation to political and

Glick Schiller, “Methodological Nationalism and Beyond: Nation-State Building, Migration and the Social Sciences”, in *Global Networks*, 2, 2002, 301-334.

² M. Carmagnani, “L’altro Occidente. L’America Latina dall’invasione europea al nuovo millennio”, Torino: Einaudi, 2003.

³ E. Galeano, “América Latina está exorcizando la cultura de la impotencia”, in *Público*, 3.1.2010, briefly sketched the complexity of Latin American societies by observing that «[América Latina] es una tierra de encuentros de muchas diversidades: de cultura, religiones, tradiciones, y también de miedos e impotencia. Somos diversos en la esperanza y en la desesperación [...] En estos últimos años hay un proceso de renacimiento latinoamericano en el que estas tierras del mundo comienzan a descubrirse a sí mismas en toda su diversidad. El llamado descubrimiento de América fue, en realidad, un encubrimiento de la realidad diversa. Este es el arcoiris terrestre, que ha sido mutilado por unos cuantos siglos de racismo, de machismo y de militarismo. Nos han dejado ciegos de nosotros mismos».

⁴ The principle of “sustainability” has been internationally codified by the 1992 UN Rio Declaration of Environment and Development, which adopted the notion of “sustainable development” as coined by the 1987 Brundtland Commission (formally known as the World Commission on Environment and Development), namely considering ecological, economic and socio-cultural aspects in any development policy. On the legal concept of sustainability in comparative perspective, with particular reference to the Latin American experiences see F. Ost, “Naturaleza y Derecho. Para un debate ecológico en profundidad”, Bilbao: Mensajero, 1996, 104; B. Pozzo, “La tutela dell’ambiente nelle costituzioni: profili di diritto comparato alla luce dei nuovi principi introdotti dalla Carta di Nizza”, in B. Pozzo, M. Renna (cur.), “L’ambiente nel nuovo Titolo V della Costituzione”, Milano: Giuffrè, 2004, 3-26; E. Gudynas, “Ciudadanía ambiental y meta-ciudadanías ecológicas: revisión y alternativas en America Latina”, in *Desenvolvimento e Meio Ambiente*, 19, 2009, 53-72; G. Cordini, “Tutela dell’ambiente e sostenibilità nella comparazione degli ordinamenti costituzionali”, in *Italian Journal of Forest and Mountain Environments*, 67, mar. 2012, 6-43; S. Baldin, M. Zago (eds.), “Le sfide della sostenibilità. Il buen vivir andino dalla prospettiva europea”, Bologna: Filodiritto, 2014.

administrative decisions, intercultural relations between the various groups within the national community⁵.

The sociologist Boaventura de Sousa Santos pointed out that the challenge posed by Latin America, as well as by other non-Western political and legal systems, has to be understood primarily at an epistemological level, with regard to the need of recognizing the epistemological diversity of the world. According to Santos, only taking into account the different “cosmologies” of non-Western legal and political cultures the alternative proposals envisaged by the Latin American political laboratory will be really feasible: in particular, both «the proposals for radicalizing democracy – which point towards post-capitalist horizons – and the proposals for de-colonizing knowledge and power – which point towards post-colonial horizons»⁶. This political and legal reframing process especially involves those pairs of concepts which have traditionally shaped social complexity, such as “civil society/community” and “State/nation”; to these concepts, the challenges of “post-capitalism” and “post-colonialism” actually represent «las corrientes de larga duración, las aguas profundas del continente que ahora afloran a la superficie de la agenda política debido al papel protagónico de los movimientos indígenas, campesinos, afrodescendientes y feministas en las tres últimas décadas»⁷.

The interest to look *from Europe to Latin America*, although relatively recent, has become a significant trend in European comparative legal research⁸; such an interest, however, should not be read in terms of a “practical” function of comparative law – in relation, for example, to the transplant of constitutional devices designed to manage ethno-cultural diversity⁹. What seems rather challenging to comparative lawyers is deepening some critical aspects of the relationship between law and complexity in Latin

⁵ On Latin America as a “political laboratory” for the West see G. Couffignal, “La nouvelle Amérique Latine. Laboratoire politique de l'Occident”, Paris: Presses de Sciences Po, 2013.

⁶ B. De Sousa Santos, J. Arriscado Nunes, M.P. Meneses, “Introduction. Opening Up the Canon of Knowledge and Recognition of Difference”, in B. De Sousa Santos (ed.), “Another knowledge is possible: beyond Northern Epistemologies”, London: Verso, 2008, p xxi.

⁷ B. De Sousa Santos, “Refundación del Estado en América Latina. Perspectivas desde una epistemología del Sur”, Lima: Instituto Internacional de Derecho y Sociedad, 2010, 9.

⁸ An updated and documented overview of comparative legal scholarship on Latin American legal systems can be found in S. Lanni, “Sistema giuridico latinoamericano”, in *Dig. Disc. Priv. - Sezione Civile*, X agg., Torino: UTET giuridica, 2016.

⁹ On the distinction between “theoretical” and “practical” functions of comparative law comparison see L.-J., Costantinesco, “Il metodo comparativo”, Torino: Giappichelli, 2000, 60 (or. ed. 1974) e L. Pegoraro, “Il metodo comparatistico nel diritto pubblico. Obiettivi scientifici e funzioni pratiche”, in R. Scarciglia, F. Padovini, (a cura di), “Diritto e Università. Comparazione e formazione del giurista nella prospettiva europea”, Padova: Cedam, 2003, 15.

America: by highlighting similarities and differences in the dynamic relationship between law, culture and society in both Latin American and Western legal systems, comparative law may prove to be crucial in clarifying the assumptions and implications of the “new” pluralism in Western societies as well.

The Latin American case is especially stimulating since it allows comparative lawyers to study the “interaction” – in terms of both “conflict” and “integration” – between, on the one hand, the strong social pluralism and, on the other hand, the institutions and principles of Western liberal democratic constitutionalism which have migrated into Latin American constitutions. It is only by identifying the shortcomings of the circulation of Western legal models that it is possible to highlight the originality of Latin American law, whose “hybrid” character is related to the irreducible tendency of Latin American legal culture towards horizontal dialogues with different legal and cultural traditions.

II. COMPARATIVE LAW AND THE COMPLEXITY OF CONTEMPORARY LEGAL ORDER

The growing awareness of law as a transnational phenomenon, with the related overcoming of the limits of statist positivism, refers to both the supranational legal dimension and the internal pluralistic articulation of national legal orders: the first aspect concerns, for example, the increasing interconnection and reciprocal “fertilization” between national and international legal orders, with the consequent overlapping of different legal systems in time and space¹⁰; the second aspect is fostered, *inter alia*, by the complex relationship between ethnic, cultural, religious pluralism and the production and interpretation of legal norms.

The reality of Western law as marked by a political and legal fragmentation *beyond* the State inevitably affects comparative law’s functions and methods. In fact, the legal pluralism of contemporary societies – in so far as it implies the identification, by the many social actors, of multiple legal orders within a given social context – ends up creating a link with comparative law, which aims at studying not only those norms that

¹⁰ On the erosion of the constitutional dimension of the nation state see P. Zumbansen, “Carving out Typologies and Accounting for Difference across Systems: Towards a Methodology of Transnational Constitutionalism”, in M. Rosenfeld, A. Sajó (eds.), “The Oxford Handbook of Comparative Constitutional Law”, Oxford: Oxford University Press, 2012, 84-92. On the plural and polycentric nature of contemporary constitutionalism see also N. Walker, “The Idea of Constitutional Pluralism”, in *Modern Law Review*, 65, 2002, 317, and N. Walker, “Late Sovereignty in the European Union”, in N. Walker (ed.), “Sovereignty in Transition”, Oxford: Hart Publishing, 2003, 3-4.

can be qualified as “legal” from an “internal” point of view, but also those ones labelled as “social”, “cultural” or “religious”, but that are, however, suitable to orient individuals’ behaviour and their belonging to different groups¹¹.

In this fragmented and polycentric scenario comparative law may play a crucial role, provided, however, that it succeeds in “regenerating”, so as to definitively overcome the flaws related to its original scope¹². Indeed, if comparative law was originally intended to facilitate European transnational trade by comparing legal rules and promoting their convergence, with a positivist perspective largely focused on inter-state differences, today new challenges are urging on comparative legal scholars, who have been called to play a part, for example, in the mediation of cultural and legal conflicts related to transnational human mobility¹³.

Understood in this wider context, the “regeneration” of comparative law will be necessarily oriented to enhancing differences, with comparative legal scholars fostering that interdisciplinary attitude (with special regard to the relation between law and the other social sciences) that is already an essential methodological skill of those lawyers who aim at understanding social, cultural, historical, economic and political factors that interact with law and legal institutions¹⁴. A further qualifying aspect of the regeneration is related to the recovery of the “objective” dimension of law as an *order*, which, in the same way as language, must be firstly understood from a bottom-up perspective, recognizing the limits of the top-down ability to plan and design the social order¹⁵.

¹¹ A. Somma, *Introduzione al diritto comparato*, Roma-Bari: Laterza, 2014, 13-17.

¹² N. Demleitner, “Combating Legal Ethnocentrism: Comparative Law Sets Boundaries”, in *Arizona State Law Journal*, 31, 1999, 745, calls for this “regeneration”, by highlighting that «comparative law can reveal how another person perceives the world, and how law contributes to and reflects the culture of a country».

¹³ M.C. Locchi, “Pluralismo giuridico e diritto comparato nelle società occidentali di immigrazione”, in S. Bagni (a cura di), “Lo Stato interculturale: una nuova eutopia?”, Bologna: Dipartimento di Scienze Giuridiche, 2017, 99-119.

¹⁴ Interdisciplinary dialogue, for example, proves to be particularly fruitful between comparative law and legal anthropology – a discipline that, as comparative law itself, was born at the beginning of the 20th century with the aim of deepening rules, practices, and legally relevant facts of remote populations, characterized by an oral culture and a relatively simple social organization, see L. Mancini, “Introduzione all’antropologia giuridica”, Torino: Giappichelli, 2015, 5). Today – as R. Sacco, “Antropologia giuridica”, Bologna: il Mulino, 2007, p. 23, pointed out – legal anthropology, more and more often, also deals with the cultural, social, and legal processes within Western societies. Comparative law can benefit as well from the dialogue with all those approaches oriented to a different conceptualization of law and its role in society, such as Law and Economics, the Feminist legal theory, the Critical race theory.

¹⁵ From this perspective, the idea of omnipotent legislators clearly becomes a sort of “myth”, see G. Smorto, “Diritto comparato e pluralismo giuridico”, in P. Cerami, M. Serio (a cura di), “Scritti di

Identifying and assessing differences and variations of legal systems have now become key factors within the framework of this post-modern comparative law, while the traditional conceptions of legal comparison as focused on enhancing similarities have undergone critical scrutiny¹⁶. Some comparative legal scholars have been contesting the homogenizing attitude of legal comparison, by promoting collective and individual identities and pluralism as a fundamental principle and value; these authors, in particular, are mostly interested in understanding legal systems' internally pluralistic articulation in terms of the coexistence of multiple legal cultures within the same legal system¹⁷. This is not to deny the importance of a comparative law mainly committed to enhancing common elements between the different legal cultures, in order, for example, to promote dialogue and exchange between legal systems; such an approach, on the other hand, is likely to neutralize the potential of comparative law as a tool for deciphering the peculiarities of human expressions, including those «irreducible differences» which need to be investigated¹⁸.

A last aspect to be pointed out – and that may receive a major contribution from the study of Latin American legal experiences – is the post-colonial perspective on comparative law¹⁹. The “colonial project”, in fact, proves to be relevant in at least two respects. The first one relates to the historical and factual dimension of colonies, whose legal reality enables comparatists to study the multiplicity and stratification of legal systems and legal sources, as well as the different forms of local resistance in terms of surviving of legal rules and institutions, even though unofficial. The second one refers to the centrality of the colonial project to the framing of the fundamental categories of Western modernity²⁰. Some scholarly works in the former colonies have effectively questioned, if not radically refused, the conceptual “baggage” of Eurocentric universalist modernity, whose hegemonic imprint is linked to a logical-instrumental and institutional

comparazione e storia giuridica”, Torino: Giappichelli, 2013, 107-108. The reference is obviously to Paolo Grossi's idea of law as a “spontaneous order” (P. Grossi, “Ordinamento”, in *Jus*, Vol. LIII, n. 1, 2006, 1-12) and to his notion of “legal mythologies” (P. Grossi, “Mitologie giuridiche della modernità”, Milano: Giuffrè, 2007).

¹⁶ M. Siems, “Comparative Law”, Cambridge: Cambridge University Press, 2014, 107 and A. Somma, “Introduzione al diritto comparato”, *supra*, 65.

¹⁷ See, for example, P. Legrand, “European Legal Systems Are Not Converging”, in *The International and Comparative Law Quarterly*, 1, 1996, 54.

¹⁸ V. Curran, “Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives”, in *American Journal of Comparative Law*, 46, 1998, 666-667.

¹⁹ See, for example, T. Ruskola, “Legal Orientalism”, in *Michigan Law Review*, 2002, 101.

²⁰ See T. Todorov, “La conquista dell'America. Il problema dell'altro”, Torino: Einaudi, 2014 (or. ed. 1984) and R. Guha, G. Spivak (a cura di), “Subaltern Studies. Modernità e (post)colonialismo”, Verona: ombre corte, 2002.

conception of law production and legal knowledge. According to this scholarship, in particular, it is necessary to elaborate a “decolonial and insurgent thought in the field of critical-emancipatory legal theory and practice” («pensamento descolonizado e insurgente no campo da teoria e prática crítico-emancipadora do Direito»)²¹, a thought that aims at recovering and developing epistemological, historical, political, social and cultural foundations which are authentically oriented to the conceptions of law and legal reality of Latin American peoples.

III. THE LATIN AMERICAN “LABORATORY” FROM A COMPARATIVE PERSPECTIVE

Over the last two decades, comparative lawyers have undertaken a process of deconstruction with a view to overcoming the categories traditionally used to classify Latin American legal experiences. If, at a first stage, the “Latin Republics of Central and Southern America” were simply included in the “Latin group” (together with France, Belgium, Italy, Spain, Portugal and Romania)²², afterwards the prevailing trend was to consider the Latin American legal experience as a “deviation” from the original Western models, while acknowledging its peculiarities and autonomy. The approach based on the idea of a deviation, although internally diversified, has been based on the idea of Latin American law as a “peripheral” outcome of the circulation of legal models designed by the “centre” – with particular reference, on the private law side, to the French codification (which had also had an impact on Spanish and Portuguese legal systems) and, on the public law side, to US presidential government and federalism.

This approach has been questioned for some time, and different taxonomies, more respectful of Latin American law’s originality and identity, have been proposed.

Within the Italian legal scholarship, Mario Losano gave a major contribution by paying great attention to “Southern American law” in his work on the main legal

²¹ A. C. Wolkmer, “Introdução”, in A. C. Wolkmer, I. Lixa (orgs.), *Constitucionalismo, descolonización y pluralismo jurídico en América Latina*, Florianópolis: Centro de Estudios Jurídicos y Sociales Mispal, UFSC, 2015, 9. On the concepts of “post-colonial” and “decolonial” see I. Lixa, “Teoria crítica e pluralismo: elementos constitutivos de uma nova hermenêutica jurídica latino-americana”, in A. C. Wolkmer, I. Lixa (orgs.), “Constitucionalismo, descolonización y pluralismo jurídico en América Latina”, *supra*.

²² The reference is to what emerged during the First International Congress of Comparative Law, held in Paris in 1900, with the inclusion of Latin American legal systems within the “Latin group”, considered to be one of the “original law systems”, together with the “Germanic group”, the “Anglo-Saxon group” and, lastly, the “Slavic group”, see A. Esmein, “Le droit comparé et l’enseignement du droit”, in *Nouvelle Revue historique de droit français et étranger*, 24, 1900, 495

systems²³. According to Losano, the systemological autonomy of Latin American law is based on three assumptions. First of all, it is of great importance that European law started to circulate in those areas since the 16th century, long before the 19th century colonization; this means that foreign law migration occurred by way of political conceptions and technical tools which were completely different from those that framed the imposition of European law, for example, in India or in the Southern Mediterranean Arab countries. Secondly, Losano points out the difference, still in the 18th and 19th centuries, of the conflicts between motherland and colonies in Latin America, compared to those in North Africa or India: in fact, on the one hand, Latin American legal history hasn't been characterized by the stratification of different "strong" legal systems, as Islamic law and French metropolitan law in Algeria or Tunisia, or Brahminic, Islamic, and English law in India; on the other hand, in Latin America conflicts between colonies and motherland took place for reasons generally related to political or economic freedom and mainly involved people of the same culture and the same race. Lastly, the Author highlights the importance and peculiarity of the historical events that led to the almost simultaneous independence of South American colonies, resulting in an original equilibrium, especially in the period right after independence, between the application of "colonial law" and the reception of Western models.

Recently, Sabrina Lanni has also proposed to autonomously consider the "Latin American legal system", by identifying some features common to Latin American legal orders on both private and public law sides. With respect to private law, for example, Lanni mentions the systematic unity of civil codes, the reference to the general principles of law, the centrality of the "person" in civil law, the role of the single formants, the receptivity towards indigenous law. In relation to public law, the relevant aspects of Latin American constitutionalism outlined by the author are the great attention to the substantive and procedural protection of the person, the new conceptions of democracy and participation, the ability to combine old and new constitutional models²⁴.

The Canadian legal scholar Patrick Glenn, trying to give an account of the ways of conceptualising and producing law other than statist positivism, coined the term "Chthonic legal tradition", which is meant to label the law of all those peoples commonly

²³ M. Losano, "I grandi sistemi giuridici. Introduzione ai diritti europei ed extraeuropei", Roma-Bari: Laterza, 2000, 175-176.

²⁴ S. Lanni, "Sistema giuridico latinoamericano", *supra*, 715-716.

referred to by using categories largely affected by the colonial domination, as “aboriginal”, “indigenous”, “natives”. The concept of “chthonic”, derived from the Greek word *khthon* (earth), refers to the idea of an “ecological life” as lived in harmony with nature. What Glenn has tried to do is to describe a legal tradition by means of its own internal criteria, to study it from a spatial and temporal perspective which is not affected by the colonial experience in terms of language and perception. Although chthonic peoples are highly heterogeneous, Glenn identifies some distinctive aspects of an autonomous legal tradition, such as orality, to which a specific institutional system is often associated (for example, councils of elders are quite common); informal resolution of disputes; lack of institutional control over marriage, divorce and adoption; an idea of property closely related to what a person uses in everyday life. Therefore, what emerges from the representation of Chthonic law is that «law is [...] not command or decision, and can only be found in the bran-thub of information that guides all forms of action in the chthonic community»²⁵.

The need to reject the idea of Latin American legal experience as “inadequate” with respect to the original models implies the overcoming of the traditional dichotomy centre/periphery, as well as the *law and development* paradigm²⁶.

In relation to the dichotomy centre/periphery, several authors, in the historiographical field as well, have highlighted that Latin America’s westernization cannot be conceived as a linear and unidirectional process²⁷, thus supporting those

²⁵ P. Glenn, “Legal Traditions of the World. Sustainable Diversity in Law”, Oxford: Oxford University Press, 5th edition, 2014, 72.

²⁶ A. Somma, “Introduzione al diritto comparato”, *supra*, 14. On the other hand, Somma observes that the proposals alternative to the traditional classification of national law in “legal families” (such as the one advanced by Ugo Mattei, based on the concept of social incentives, or social constraints) also end up qualifying the Latin American legal experience as the “centre” of a different model perceived as “peripheral” insofar it is conceptualised as “underdeveloped” compared to Western experiences, see A. Somma, “Le parole della modernizzazione latinoamericana. Centro, periferia, individuo e ordine”, Frankfurt am Main: Max Planck Institute for European Legal History, *Research paper series*, 5-2012, 4. In Mattei’s classification, in fact, Latin American countries are included in the “rule of political law”, which temporarily groups those legal systems involved in a transition process and where «the political process and the legal process cannot be separated, in the sense of having achieved autonomous fields of operation», U. Mattei, “Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems”, in *American Journal of Comparative Law*, 45, 1997, 28.

²⁷ M. Carmagnani, “L’Altro Occidente”, *supra*.

comparative legal scholars who have been refusing for a long time a simplified image of the Other as passively subject to the Centre's constraining power²⁸.

As for the *law and development* approach, the weakness of an instrumental conception of law, as that promoted by some North American legal scholars from the 1960s to the early 1970s, has long been underlined²⁹; in particular, the main point of criticism has been brought against the project of domination and legal imperialism inherent in the idea of exporting American legal models, concepts and values to other contexts³⁰.

What seems disputable is the simplifying stereotype of the “failure” of law as a social regulation tool in Latin American societies. The question is far more complex and, in some ways, paradoxical: in fact, on the one hand, in Latin America law is somehow “fetishized”, to the extent that political and social life is increasingly marked by the confident recourse to both the language and the procedures of law, with the aim to build a more “just” order; on the other hand, in some contexts a sort of “(un)rule of law” is ruling, with corruption and violence prevailing on weak state institutions. This ambiguous situation contributes to making Latin America a crucial area for theoretical reflection about law and the judicialization of social and political life³¹.

Within comparative constitutional law scholarship, the shortcomings of traditional classifications are especially stressed in relation to controversial categories such as “developing States” or “Third World States”, to which Latin American countries have been often ascribed to. Such categories, nevertheless, have always been problematic,

²⁸ See G. Marini, “La costruzione delle tradizioni giuridiche ed il diritto latinoamericano”, in *Rivista Critica del Diritto Privato*, 2, 2011, 189, who rather suggests that the “periphery” (explicitly or implicitly) exploits the “centre”, by establishing with it a complex relationship that results in a hybridization. See also D. López Medina, “La teoria impura del diritto: la trasformazione della cultura giuridica latino-americana”, in *Rivista Critica del Diritto Privato*, 2, 2011, 213; D. Chakrabarty, “Provincializzare l'Europa”, Roma: Meltemi, 2004 (or ed. 2000). Already in 1960 the political philosopher J. P. Plamenatz, “On Alien Rule and Self-Government”, London: Longmans, 1960, 18, highlighted the role played by Western liberal values in the claim to self-determination of colonized peoples.

²⁹ J. L. Esquirol, “Continuing Fictions of Latin American Law”, in *Florida Law Review*, 55, 2003, 46, who analyses the particular legacy of the earlier variety of developmentalist literature and the reactions it provoked in Latin America.

³⁰ L. Pes, “Teorie dello sviluppo giuridico. Dal movimento di *law and development* all'esperienza neoliberale”, Trento: Tangram edizioni scientifiche, 2012.

³¹ J. Comaroff, J. Comaroff, “Law and Disorder in the Postcolony: An Introduction”, in J. Comaroff, J. Comaroff (eds.), “Law and Disorder in the Postcolony”, Chicago: University of Chicago Press, 2006, 42.

insofar as they lack poignancy and heuristic potential in relation to the complexity of legal experiences.

The “developing”, or “Third World”, form of State is identified by some relevant aspects, such as the colonial past and, therefore, the experience of decolonization; the lack of constitutional original solutions with respect to the imported Western models; frequent deviations from the original model in terms of its “rejection”³². The “developing” form of State, therefore, is necessarily conceived as a residual category and the highly heterogeneous political and constitutional experiences attributed to it are viewed as a unit in the light of some common problems, such as the colonial experience, socio-economic underdevelopment, a weak national identity³³. The latter aspect, in particular, is related to the problematic constitutional recognition of ethno-cultural and social pluralism, to the extent that strong pluralism urge the ruling classes of developing countries to assume an ultranationalist ideology, which is, at a first stage, opposed to colonial domination, and, then, positively promoted in terms of rediscovering the ties with ancient traditions and achieving national unity. Nationalist ideologies, nevertheless, are often exploited as an ideological justification for the power of one leader, or one ethnic or religious group, or a single party³⁴.

Latin American states are usually included in the category of “developing States”: in fact, despite the fact that they gained independence already in the 19th century and went through liberal-democratic constitutional phases, they share some shortcomings of socio-economic and institutional structures with other “Third World” countries. While taking into account the peculiarities of the recent trends of Latin American constitutionalism, some comparative legal scholars have recently reaffirmed that the form of State envisaged by Latin American constitutions can be depicted as “liberal”, but, at the same time, it is marked by aims and objectives typical of the “Modernizing State”, in terms of the constitutionalization of the wish for institutional, economic and social development³⁵.

³² G. De Vergottini, “Diritto costituzionale comparato”, Padova: Cedam, IX ed., 2015, 184.

³³ M. Volpi, Mauro, “Le forme di Stato”, in G. Morbidelli, L. Pegoraro, A. Rinella, M. Volpi, “Diritto pubblico comparato”, Torino: Giappichelli, 2016, 295.

³⁴ M. Volpi, “Le forme di Stato”, *supra*, 296.

³⁵ L. Mezzetti, “L’America Latina”, in P. Carrozza, A. Di Giovine, G. F. Ferrari (a cura di), “Diritto costituzionale comparato”, Tomo I. Roma-Bari: Laterza, 2014, 463.

Some of the latest and most interesting comparative legal research on Latin American constitutionalism has been focusing on the “pluralistic horizon” of the *nuevo constitucionalismo*³⁶ and it seems more oriented to appreciate the original solution developed within that context. It has been, for instance, underlined that new Latin American constitutions, adopted between the end of 20th and the beginning of 21st century, have marked the transition from a “negative constitutionalism” (aiming at protecting individual rights and limiting the intrusion of the state into the full realization of those rights) to a “proactive constitutionalism” (aiming at both enhancing the role of the state in the economic development and re-contextualising it towards commons-oriented and multicultural policies)³⁷. The influence of the chthonic tradition at the constitutional level has also been read in terms of strengthening democracy at the expense of capitalism (as both poles of Western modernity), with the aim of imagining “alternative”, “parallel” and “multiple” modernities³⁸. Some taxonomic efforts aimed at overcoming exhausted traditional categories have been made and new classifications have been proposed, such as those of “Caring State” and “Intercultural State”: while the “Caring State” focuses on the transition from individual rights to collective rights based on communitarian belonging, a new harmony-oriented relationship between man and nature and a new economic model (which includes development indices based on a holistic conception of human life alternative to the Western view of wellbeing), the “Intercultural State” is characterized by a participatory constitutional process, the constitutional incorporation of some of the indigenous cosmovisions’s values, the constitutional relevance of “culture”, with its multiple meanings, and interculturality as both an interpretative criterion for many constitutional rights and an ultimate goal of democracy³⁹.

³⁶ R. Irigoyen Fajardo, “El pluralismo jurídico en la historia constitucional latinoamericana: de la sujeción a la descolonización”, Lima: Instituto Internacional de Derecho y Sociedad, 2009, 2; R. Viciano Pastor (ed.), “Estudios sobre el nuevo constitucionalismo latinoamericano”, Valencia: Tirant lo Blanch, 2012; S. Bagni, “Dal *Welfare State* al *Caring State*?”, in S. Bagni, (a cura di), “Dallo Stato del *bienestar* allo Stato del *buen vivir*. Innovazione e tradizione nel costituzionalismo latino-americano”, Bologna: Filodiritto, 2013.

³⁷ S. Lanni, “Sistema giuridico latinoamericano”, *supra*, 735.

³⁸ D. P. Gaonkar, “On Alternative Modernities”, in *Public Culture* 11, 1999, 1, 1; S. Ann Wells, “Parallel Modernities?: The First Reception of Soviet Cinema in Latin America”, in R. Navitski, N. Poppe (eds.), “Cosmopolitan Film Cultures in Latin America 1896-1960”, Bloomington: Indiana University Press, 2017, 151-175; S. N. Eisenstadt, “Multiple Modernities”, in S. N. Eisenstadt (ed.), “Multiple Modernities”, New Brunswick N.J.: Transaction Publishers, 2002, 1.

³⁹ S. Bagni, “Dal *Welfare State* al *Caring State*?”, *supra*, 19, and S. Bagni, “Lo Stato interculturale: primi tentativi di costruzione prescrittiva della categoria”, (not yet published). The author includes into

IV. CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF PLURALISM

A “regenerated” and pluralistic-oriented comparative law can have a big role in the constitutional law domain, by revealing the gap between, on the one hand, constitutional categories and institutions of Western origin which have been transplanted into Latin American social, legal and cultural realities, and, on the other hand, the complexity of those realities, historically marked by spontaneous asymmetrical relations between the many social actors along the lines of colour, ethnic belonging, and social status. In fact, even if the plurality of Latin American societies has historically implicated a certain degree of diversification and mobility with respect to motherland’s social articulation, the penetration of Western conceptual categories and political and legal institutions, especially those related to liberal-democratic constitutionalism, has been characterized in terms of reducing and silencing the ethnic, cultural and social pluralism of those societies.

The “multicultural turn” of Latin American constitutionalism since the late 20th century – which some authors refer to as a “multicultural constitutionalism”⁴⁰ – nevertheless demonstrates that those social actors, who have for centuries been denied both epistemological and constitutional recognition, have found the means to express their complex social, anthropological, cultural and legal identities. In this regard, it is useful to remember that, since the end of the 17th century, and, therefore, during the pre-independence phase, the contacts between Europe and Latin America have occurred under the cultural influence of the Enlightenment: the very 1812 Constitution of Cádiz – that stood out as a model not only to Spain and Portugal, but, more generally, to European liberals of the 1920s – strongly influenced Latin American political and constitutional events far beyond the limited period of time during which it remained in force, as a first contact with the principles of moderate liberal constitutionalism⁴¹. The

the “Caring State” category the constitutional experiences of Ecuador, Bolivia, South Africa and Buthan, while Ecuador and Bolivia can be also labelled as “Intercultural States”.

⁴⁰ D. Lee Van Cott, “The Friendly Liquidation of the Past. The Politics of Diversity in Latin America”, Pittsburgh: University of Pittsburgh Press, 2000, 257.

⁴¹ G. Rolla, “L’evoluzione del costituzionalismo in America Latina e l’originalità delle esperienze di giustizia costituzionale”, in *Studi Urbinati, A - Scienze giuridiche, politiche ed economiche*, 4, 2010, 576, who remarks that the influence of the Cádiz Constitution on Latin American constitutionalism was not only based on the political dependence on Spain, but also on the choice to involve in the constituent process some representatives of that area, who gave a peculiar, nearly “Americanist”, vocation to the text. On the role and meaning of the Cádiz Constitution as a case of “constitutional transfer”, see G. Frankenberg, “Constitutional transfers and experiments in the nineteenth century”, in G. Frankenberg

political and constitutional denial of social, ethnic and cultural pluralism has therefore marked the process of independence in Latin America from the earlier stages, with Latin American elites considering themselves as the heirs of the European political and intellectual tradition since the dawn of colonization in the 15th century; the moderate orientation of the elites, guaranteeing the continuity with Europe in terms of political culture, religion and institutions, has, after all, allowed the new Latin American states to get international recognition.

The first cycle of Latin American constitutionalism (1850-around 1910) corresponds to the “founding period” after independence⁴², characterized by a liberal-conservative political ideology; the constitutions adopted during this period were the outcome of the political compromise between conservative forces (oriented towards Iberian and Catholic traditional values as legitimating the new state entities) and liberal forces (aimed at building a secular republican order inspired by the principles and institutions of European liberal constitutionalism)⁴³. These constitutions reflect the image of a mono-class State, by excluding social constitutional provisions or the constitutional recognition of the right to political participation of subaltern classes. The exclusionary nature of liberal constitutions, in terms of the constitutional invisibility of ethnic and social pluralism, was also related to a racial exclusion, in line with the colonial domination; in this perspective, the persistence of the “racist matrix” of colonial political structures has been underlined, even though important transformations of the relations of social production have occurred over time⁴⁴. The ideas of “nation” and “nation state”, which took shape within the liberal constitutions of the first cycle, were amputated of the Native American component of the population. On the ideological level, the issue of race was also central to the European public law doctrine at the end of the 19th century, but it undoubtedly gained much more resonance in the Latin American context, where “metissage” was regarded by many as a “vice” which would have compromised the

(ed.), “Order from Transfer. Comparative Constitutional Design and Legal Culture”, Cheltenham: Edward Elgar, 2013, 286.

⁴² R. Gargarella, “Latin American Constitutionalism, 1810-2010. The Engine Room of the Constitution”, Oxford: Oxford University Press, 2013, and R. Gargarella, “Latin American constitutionalism. Social Rights and the “Engine Room” of the Constitution”, in C. Rodriguez-Garavito, “Law and Society in Latin America”, Abingdon: Routledge, 2015, 83.

⁴³ For example, 1853 Argentinian Const., 1857 Mexican Const., 1886 Colombian Const.

⁴⁴ According to G. Ascione, “A sud di nessun Sud. Postcolonialismo, movimenti antisistemici e studi decoloniali”, Bologna: I libri di Emil, 2009, 141, this is an important difference with the 18th century European revolutions, which went through a complex political transition closely linked to long-term socio-economic transformations.

future of Latin American peoples and states. It was in this cultural environment, between the end of 19th and the early 20th century, that European colonization was identified as a possible solution, in order to achieve the “whitening” (*blanqueo*, in Portuguese) of the population⁴⁵ and the consolidation of national unity⁴⁶. At the beginning of the 20th century the US intervention in the Cuban War of Independence contributed to fuelling an anti-imperialist orientation which marked Latin American nationalism afterwards, in contrast to the positivist grounded scientific racism: in this regard, the “*latinidad*” evoked in the work *El Ariel* was the attempt to newly conceptualize race, so as to magnify the “legacy of race”, the “great ethnic tradition to be maintained”⁴⁷. In the same period, the issue of the consistency between the nation-building project and the regional (in terms of “continental”) dimension engaged many intellectuals and politicians in several Latin American countries, often connecting with the already mentioned aspect of ethnic and cultural pluralism. In Mexico, for example, the work by the philosopher and politician José Vasconcelos, *La raza cósmica*, must be mentioned in this regard, to the extent that it envisages the métissage (*mestizaje*) “of two or three races as for the blood and of all cultures as for the spirit” as the very identity marker of belonging to Latin American communities⁴⁸.

A second constitutional cycle – from the beginning of the 20th century (in particular, from the 1910 Mexican Revolution) up to the middle of the century – was characterized by the constitutional sanction of social pluralism, with the incorporation of the working class as a political and economic subject within the constitutional order⁴⁹. The profound socio-economic inequalities and the authoritarianism of the previous constitutional cycle had fostered widespread discontent among the more and more numerous and politically organized popular and middle classes, that challenged the inability of political oligarchies to address pressing social demands; in addition, those

⁴⁵ On the Brazilian experience see M. Velasco Molina, “Políticas raciales en Brasil: 1862-1933”, in *Latinoamérica. Revista de Estudios Latinoamericanos*, 61, 2015, 34.

⁴⁶ In relation to the alleged “superiority” of the Argentinian nation because of the low presence of blacks and *indios*, see the J. Ingenieros, “Formación de una raza argentina”, in *Revista de filosofía*, 1915.

⁴⁷ See J. E. Rodó, “El Ariel”, Montevideo: Dornaleche y Reyes, 1900. By re-elaborating themes and characters of *The Tempest* by William Shakespeare, the Uruguayan Rodó identified Latin American idealism and spirituality with *Ariel*, as opposed to the materialism of Anglo-Saxon America (*Caliban*).

⁴⁸ J. Vasconcelos, “La raza cósmica. Misión de la raza iberoamericana. Notas de viaje a la América del Sur”, Barcelona: Agencia Mundial de Librería, 1925.

⁴⁹ For example, 1917 Mexican Const., 1937 Brazilian Const., 1938 Bolivian Const., 1940 Cuban Const., 1942 Uruguayan Const., 1945 Ecuadorian and Guatemalan Const., 1949 Argentinian and Costa Rican Const.

liberal oligarchies were weakened by the economic crisis resulting from the First World War.

The 1910 Mexican revolution, as has been said above, marked the beginning of this second cycle of “social constitutionalism”, with the adoption, in 1917, of a constitution that was, on the one hand, in continuity with the previous one (adopted in 1857) with regard to the constitutional guarantees of liberal principles and rights, but, on the other hand, encompassed some new principles and rights claimed by revolutionary forces, such as social rights, the foundation of the land reform, a new conception of property rights on land and land resources. With the 1917 Mexican constitution, which predated the Weimar Constitution by two years, social rights were constitutionalized for the first time⁵⁰ and the Mexican case undoubtedly inspired other European and Latin American countries as regards the constitutionalization of the social function of property⁵¹.

Between 1910 and 1930 Latin American countries experienced “liberal-democratic” political movements and regimes, with the election of the members of the new radical, catholic and socialist parties as representatives; legislative bodies and presidents, on the other hand, were largely the expression of political oligarchies, also because of the lack of transparency and democracy of electoral processes. From the 1920s onwards, and for the following two decades, many Latin American countries also experienced a peculiar reaction to the liberal order, that had exploded, by that time, as a consequence of the growing social complexity and of the tensions caused by the economic crisis: namely, “classic” populist regimes⁵². Such experiences⁵³ were somewhat

⁵⁰ The sixth Title of the 1917 Constitution, “On labour and social security”, recognized, for the first time in history, an extensive catalogue of social rights of “workers, day labourers, domestic servants, artisans” (art. 123), such as 8 hours as the maximum duration of the working day, the prohibition of child labour under 15 years of age, the guarantee of one weekly day of rest, the protection of pregnant women three months before and one month after childbirth, the minimum wage to ensure a standard of living and the prohibition of discrimination on the basis of sex. In addition, the collective right to associate in a trade union and the right to strike were also constitutionalized.

⁵¹ T. Ankersen, T. Ruppert, “*Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America*”, in *Tulane Environmental Law Journal*, 19, 2006, 96. The main references, in particular, are to the already mentioned Weimar Constitution and to the 1931 Spanish Constitution.

⁵² The term “classic” aims at distinguishing the political-constitutional experiences of the first half of the 20th century from the revival of populism which occurred, in some Latin American countries, during the democratization phase of the 1980s. On Latin American populist regimes see, among others, L. Garruccio, “Momenti dell’esperienza politica latino-americana. Tre saggi su populismo e militari in America latina”, Bologna: il Mulino, 1974; D. Quattrocchi-Woisson, “Les populismes latino-américains à l’épreuve des modèles d’interprétation européens”, in *Vingtième siècle*, 56, 1997, 180; M.

functional to the integration of those social classes that had been so far excluded from political participation; in fact, although the corporatist organization ended up giving the political system an exclusionary imprint by repressing dissent, an extension of social rights and popular participation must nevertheless be recorded⁵⁴. If the debate is still open as to the ambivalence between authoritarian or democratic character of populist regimes, the relevant aspect, in the present context, concerns the use of an idea of “people” abstractly conceptualised through invention processes fuelled by a latent and “ancient” social imaginary: in this way, the “people” ends up being conceived as an undifferentiated unity, mostly based on cultural, ethnic or religious ties, dominating individuals⁵⁵. It is, therefore, evident that populist political projects are anti-pluralist, being based on an organicist conception of the community generally hostile to the legal recognition of cultural, ethnic and political plurality.

The legal and constitutional recognition of ethnic and cultural pluralism therefore represents a controversial issue in the second constitutional cycle. Compared to the liberal phase, pluralism has become a strong identity factor of the new conception of the “Latin American nation”: in this respect, “indigenism”, as a cultural and political project focused on the valorisation of the *indio* and his native culture in the construction of national identity, is worth mentioning. On the other hand, the image of the *indio* that gained most attention was an abstractly constructed incarnation of the spirit and virtues of pre-Hispanic progenitors, very distant from the real historical subjects living in rural districts or in the suburbs⁵⁶.

Losano, “Peronismo e giustizialismo: significati diversi in Italia e in Sudamerica”, in *Teoria politica*, n.1, 2003, 1.

⁵³ For example, those of Getúlio Vargas in Brazil, Lázaro Cárdenas in Mexico, Juan Domingo Perón in Argentina.

⁵⁴ Populism can be referred to in both its economic dimension and its political-ideological dimension; for an overview of the different theories on populism see L. Zanatta, “Il populismo come concetto e come categoria storiografica”, in A. Giovagnoli, G. Del Zanna (a cura di), “Il mondo visto dall’Italia”, Milano: Guerini e Associati, 2004, 195-207. Despite the concept of populism proves to be polymorphous and internally articulated, one may attempt to identify some common ideological features of the various populist experiences, such as the direct appeal to the people as a source of sovereignty and the relationship between a charismatic leader and the masses.

⁵⁵ According to some authors, populism must be conceived as an “inevitable infantile disease” affecting constitutional democracy and an insidious form of corruption within the democratic process, see A. Spadaro, “Costituzionalismo *versus* populismo (Sulla c.d. deriva populistico-plebiscitaria delle democrazie costituzionali contemporanee)”, in G. Brunelli, A. Pugiotto, P. Veronesi (a cura di), “Scritti in onore di Lorenza Carlassare, Il diritto costituzione come regola e limite al potere”, Napoli: Jovene, 2009, 2007.

⁵⁶ R. Earle, “The Return of the Native. Indians and Myth-making in Spanish America, 1810-1930”, Durham and London: Duke University Press, 2007, 184.

In any case, even in this second cycle, nationalism still represented a questionable issue, able to challenge the traditional rigid classifications of political regimes and forms of state. “Social” (in terms of corporatist, anti-capitalist and anti-liberal) arguments and rhetoric, in fact, marked the nationalist projects of political regimes and leaders who were very different from one another (such as, on the one hand, Péron in Argentina and Vargas in Brazil and, on the other hand, Cardénas in Mexico). In Mexico, in particular, social thought, nationalist ideologies and indigenism formed a very interesting link: although the 1917 Constitution does not refer to “Indians” or “indigenous” peoples, post-revolutionary legislation recognized some forms of collective property (such as the *ejido* and the *comunidad agraria*), presented as a “restoration” of pre-Columbian social structures.

The third constitutional cycle, which is still ongoing, is considered to have started in the second half of the 20th and the early years of the 21st century, with the adoption of constitutional texts strongly marked by the recognition of multiculturalism and human rights⁵⁷. According to Duncan Kennedy’s periodization, this is the third and last globalization of law and legal culture, characterized, inter alia, by the centrality of plural and cross-cutting identities. In fact, in the context of contemporary globalized legal consciousness, identity represents, at once, «an extension of and a total transformation of the categories – social class and ethnicity – through which the social jurists disintegrated the Savignian “people” », serving as a basis for claims by historically oppressed, minority or persecuted groups against the “majority” or the “dominant culture”⁵⁸.

The engine of the third cycle of democratic and pluralistic constitutions has two main aspects to be considered.

⁵⁷ For example, 1988 Brazilian Const., 1991 Colombian Const., 1994 Argentinian Const., 1999 Venezuelan Const., 2008 Ecuadorian Const., 2009 Bolivian Const., 2011 Mexican Const.

⁵⁸ D. Kennedy, “Two Globalizations of Law & Legal Thought: 1850-1968”, in *Suffolk University Law Review*, XXXVI, 2003, 677. The first of the three globalizations of law and legal culture (1850-1914) is that of “classical legal thought” (CLT) as a conception of law as a “system of spheres of autonomy for private and public actors”; the beginning of the 20th century marks the beginning of the “second globalization”, focused on “social thought”, especially of German and French origin, as a critique of the first globalization’s individualizing abstraction and as a “reconstruction project”. A third globalization (1945-2000) is depicted by Kennedy in terms of an «unsynthesized coexistence of transformed elements of CLT with transformed elements of The Social»: while the classical legal thought element is “neo-formalism”, especially in public and family law domains, the key transformed element of The Social is «policy analysis, but based on “conflicting considerations” (also called balancing or proportionality) ». On the third globalization see also, for a more detailed analysis, D. Kennedy, “Three Globalizations of Law and Legal Thought: 1850-2000”, in D. Trubek, A. Santos (eds.), “The New Law and Economic Development. A Critical Appraisal”, Cambridge: Oxford University Press, 2006, 63-71.

A first one is the end of the authoritarian regimes established in many Latin American countries in the second half of the 20th century, with the slow and difficult return to democracy. Comparative legal scholars, in this regard, have focused on the ways and outcomes of constitutional transitions since the mid-1980s, concluding that – despite the fragility and the tensions of the new democratic regimes, often characterized by a controversial continuity with authoritarian and military governments – none of the current Latin American countries is likely to be confined within the “limbo of pre-democratic systems” and all of them have engaged in processes of democratic consolidation⁵⁹.

A second one concerns the structural adjustment programs imposed to Latin American countries by the International Monetary Fund’s neoliberal policies in the 1990s, with the consequent adoption of restrictive economic policies – in terms of cuts in public spending, especially on social services – by post-authoritarian democratic governments. The severe economic and social crisis induced by restrictive policies has ended up in a significant social mobilization in many Latin American countries, with people claiming the effective protection of those fundamental rights, especially in the socio-economic domain, that yet are formally recognized by constitutions⁶⁰.

Constitutional reforms adopted between the end of the last century and the beginning of the new one therefore put a strong emphasis on a wide range of civil, social and cultural rights and on more effective mechanisms of constitutional protection and democratic participation, with a view to enhance pluralism as a basic value of a democratic and social constitutional state.

Within this third cycle, on the other hand, significant differences between the various constitutional systems can be observed. In particular, according to many authors, those experiences considered to have inaugurated a *nuevo constitucionalismo* (new constitutionalism), such as Venezuela, Bolivia, Ecuador, are worth identifying an autonomous model within the broader trend towards the recognition of social and

⁵⁹ L. Mezzetti, “L’America Latina”, *supra*, 462.

⁶⁰ For example, the uprising of the Zapatista National Liberation Army in Mexico, the *Sem Terra* movement in Brazil, the “Water and Gas War” in Bolivia, the Argentinian *piqueteros*. On these phenomena see R. Stahler-Sholk, H. E. Vanden, M. Becker (eds.), “Rethinking Latin American Social Movements. Radical Action from Below”, Lanham: Rowman and Littlefield, 2014, who points out that the struggle of popular classes against restrictive government policies has been a constant feature of Latin American societies since the colonial era.

cultural pluralism and fundamental rights protection, to the extent that they cannot be ascribed to the canons of western liberal-democratic constitutionalism, nor to the paradigm of “neo-constitutionalism” of North American and European origin⁶¹.

One of the most relevant and distinguishing aspect in the discourse of the *nuevo constitucionalismo*, since the early 2000s, is precisely the critique of the pitfalls inherent in the incorporation of those principles and norms aimed at protecting and promoting multiculturalism and ethnic pluralism within the third cycle constitutions, which, however, would turn out to express a “neoliberal multiculturalism”⁶². Criticism, in particular, has focused on the inadequacy of a model that, while constitutionally recognizing cultural differences, is still informed by economic policies that damage indigenous peoples’ lifestyle and cultural heritage (with particular reference to the exploitation of natural resources, even within “multicultural” constitutions and policies).

The careful consideration of the significant differences between the various constitutional experiences does not, however, prevent the identification of the common features of contemporary constitutionalism in Latin America, with special regard to the aspect of fundamental principles and rights.

A first feature is related to the increasing protection of fundamental rights, both in terms of extending the constitutional catalogue and interconnecting the constitutional dimension to international humanitarian law⁶³; the latter aspect, according to some scholars, is able to mark a “*Ius Constitutionale Commune*”, described as «a new approach to constitutionalism in the region» referring to both positive law (with regard to «the American Convention on Human Rights and other inter-American legal instruments, the concordant guarantees of national constitutions, the constitutional clauses opening up the domestic legal order to international law as well as pertinent national and

⁶¹ R. Uprimny, “The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges”, in *Texas Law Review*, 89, 2011, 1587-1609

⁶² See, for example, C. R. Hale, “Does Multiculturalism Menace? Governance, Cultural Rights, and the Politics of Identity in Guatemala”, in *Journal of Latin American Studies*, 34, 2002, 485-524, and P. Richards, “Pobladores, Indigenas, and the State”, Piscataway: Rutgers University Press, 2004.

⁶³ As for the first feature, the new Latin American constitutions broadly recognize first, second and third generation of rights; within the third generation rights, a special attention is dedicated to the right to a healthy environment. As for the second feature, some constitutions explicitly refer to, and therefore “constitutionalize”, international human rights conventions (for example, Argentinian Const., art. 75(22); Colombian Const., art. 11-15, 93; Venezuelan Const., art. 23. 43-129). In addition, many Latin American constitutional courts incorporated international human rights treaties into the “constitutional bloc” (*bloque de constitucionalidad*), with a view to ensuring a wider legal protection of constitutional rights and freedoms, see R. Uprimny, “Bloque de Constitucionalidad, Derechos Umanos y Proceso Penal”, Bogotá: Centro de Estudios de Derecho, Justicia y Sociedad, 2006.

international case law») and the related legal discourse (with an emphasis on «disciplinary combination of national and international legal scholarship, a comparative mindset, and a methodological orientation towards principles»)⁶⁴.

A second feature concerns the effectiveness of those fundamental rights and freedoms protection: what new constitutions have attempted to do, in particular, is to strengthen the constitutional guarantees for fundamental rights, in relation to individual legal action (for example, the *acción de tutela*), the control of constitutionality of legislation and other acts, the various types of *ombudsman* responsible for the promotion and protection of fundamental rights⁶⁵.

A third feature is related to the reconceptualization of national unity, no longer statically and homogeneously conceived, but, on the contrary, regenerated by cultural differences and plural identities: many Latin American constitutions, in this regard, qualify the State as “multicultural” or “multi-ethnic” and identify diversity as a constitutional principle. Such a trend, as already mentioned, is conceivable as an actual “pluralist turn” since the 1980s, although there has certainly been criticism in terms of lack of protection or ineffectiveness of other constitutional rights and liberties⁶⁶.

Three main phases of the “pluralist trend” that has affected Latin American constitutional systems can be observed⁶⁷.

In a first phase, marked by the emergence of the multiculturalist paradigm in the context of constitutional reform processes (for example, Guatemala in 1985 and Nicaragua in 1987), both individual and collective cultural rights of indigenous peoples were constitutionalized, with the recognition of some forms of autonomy as well (e.g. in Nicaragua).

The second phase started in the 1990s, after the adoption of the UN ILO Convention, n. 169, on indigenous and tribal peoples. Compared to the previous phase,

⁶⁴ A. von Bogdandy, *Ius Constitutionale Commune en América Latina: Observations on Transformative Constitutionalism*, in *AJIL Unbound*, 2015, 109.

⁶⁵ R. Yrigoyen Fajardo, “A modo de introducción”, in B. De Sousa Santos, “Refundación del Estado en América Latina”, *supra*, 11.

⁶⁶ On indigenism as a manifestation of the guilty conscience of white people towards the *indios* see H. Favre, “L’indigenisme”, Paris: Presses Universitaires de France, 1996, who underlines that the recent adoption of multicultural policies by Latin American countries has served as an alibi for the dismantling of the Welfare State in favour of neo-liberal orthodoxy.

⁶⁷ R. Yrigoyen Fajardo, “A modo de introducción”, *supra*.

constitutional reforms have been more oriented towards the definition of concepts such as “*nación multiétnica*” or “*estado pluricultural*”, getting to the point of formalizing legal pluralism through the recognition of institutions, customary law and the right of prior consultation and participation of indigenous communities⁶⁸. As already mentioned, however, the constitutionalization of pluralism and rights of indigenous peoples must be seen in the light of the severe social consequences of governments’ neo-liberal policies and privatization programmes, which have encouraged global capital inflows to enter the Latin American region and multinationals to play an enormous role in the economy of the area⁶⁹.

The third and final phase – also connected to the adoption of an international act, the UN Declaration on the Rights of Indigenous Peoples of 2007 – corresponds to the constituent processes in Bolivia and Ecuador.

In conclusion, the ongoing constitutional cycle must be comprehended within an intellectual space that, since the 1980s, has been marked by the definitive assumption of multiplicity and pluralism as key features of historic and political unity in Latin America. The focus on “alternative” and “local” notions of legality, closely connected to particular cultural and social identities, is not unproblematic and it does not necessarily imply more progressive or just social and political projects; in this regard, Jorge Esquirol has stressed that the predominant negative effect of many progressive scholars having devoted their energies to study the legal particularities of the many social groups within Latin American politics, instead of challenging traditionalist legal positions, has been the «abandonment of state law»⁷⁰. Anyway, the adoption of new democratic constitutions and the emergence of political regimes openly oriented to support democratization processes, social policies and regional integration projects (by constitutionalizing the notions of “multi-ethnicity”, “demodiversity” and “new rights”) may still prove to be a major stimulus for

⁶⁸ For example, 1991 Colombian Const., 1992 Mexican Const., 1992 Paraguayan Const., 1993 Peruvian Const., 1994 Bolivian Const., 1994 Argentinian Const., 1996 and 1998 Ecuadorian Const., 1999 Venezuelan Const. The new 1988 Brazilian Constitution predated the adoption of the n. 169 international convention by one year, anticipating some rights and principles later enshrined by the Convention. The efforts to put into practice the constitutional provisions that recognise indigenous jurisdictions over the administration of justice within specified territorial units have been particularly intense in Bolivia and Colombia, see D. L. Van Cott, “A Political Analysis of Legal Pluralism in Bolivia and Colombia”, in *Journal of Latin American Studies*, 32, 2000.

⁶⁹ If, in the 1990s, the flow of direct investment abroad (DIA) rose by 223% worldwide, in Latin America it increased by almost 600%. In particular, Brazil, Mexico and Argentina represented the 62% of DIAs, while Chile, Colombia, Peru and Venezuela another 26%, see J. Petras, H. Veltmeyer, “La globalizzazione smascherata. L’imperialismo nel XXI secolo”, Milano: Jaca Book, 2002, 116.

⁷⁰ J. L. Esquirol, “Continuing Fictions of Latin American Law”, *supra*, 102-103.

comparative constitutional law, to the extent that it supports a “decolonial” approach to law as well as innovative perspectives on the relationship between law, nature, culture and society.