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.