

ANY COLOUR YOU LIKE.

PLURINATIONALISM AS AN AGENDA OF INTERNAL COLONIALISM IN ANDEAN STATES

Enrico Buono*

Abstract

The approval drop that led to the fall of Evo Morales in Bolivia in November 2019 might be traced back to the progressive disaffection of Bolivian indigenous peoples towards their alleged leader. The official multiculturalism pursued by the MAS party has been critically described by indigenous authors as ‘the concealing mechanism *par excellence* for new forms of colonization’. In that sense, the recent Bolivian crisis is a fitting example of a conflict heavily racialized by a precise political agenda. This agenda has officially adopted the decolonizing discourses of Global Northern academics, crystallizing identity fetishes based on the presumption of an (impossible) ‘authenticity’: a culturalist approach that conceals and obscures the ‘juxtaposition, in small points or spots, of opposed or contrasting colours’, represented by *mestizo* identities. In September 2022, about 80% of indigenous voters have overwhelmingly rejected the Chilean draft constitution, despite its inclusive and progressive character. These two examples show how populist uses of indigeneity can impair transformative constitutional projects, which end up being rejected by the very populations whose inclusion they promote. Therefore, the aim of this study is to investigate the difficulties currently faced by the plurinational discourse, in its pursuit of a genuinely multicolored Andean *nuevo constitucionalismo*.

Indice Contributo

*Ph.D. in Comparative Law and Integration Processes. Scientific Assistant, Centre juridique franco-allemand, Universität des Saarlandes (Saarbrücken, Germany). Investigador Visitante, Universidad Católica Boliviana San Pablo (La Paz, Bolivia). He recently achieved the National Scientific qualification as associate professor, according to Italian law. buono.enrico@gmail.com

ANY COLOUR YOU LIKE.	250
PLURINATIONALISM AS AN AGENDA OF INTERNAL COLONIALISM IN ANDEAN STATES	250
Abstract.....	250
Keywords.....	251
Introduction: From Abbey Road to the Andes. Internal Colonialism and Comparative Law	251
1. Mestizaje and Blanquitud: Racial Hierarchies in the Andean Constitutional Discourse.....	255
2. The ‘Podemos Connection’: Plurinational Populism between Bolivia and Spain	259
3. The Dark Side of Evo the Indio	266
Concluding remarks on Chile’s National Constitutional Referendum.....	271

Keywords

Andean nuevo constitucionalismo – Indigenous rights – Bolivian plurinational State – Chilean draft constitution

Introduction: From Abbey Road to the Andes. Internal Colonialism and Comparative

Law

On the 9th of June 2021, during the *Juris Diversitas* Seventh General Conference – aptly entitled ‘*The Dark Side of the Law*’ – I took part in a panel dedicated to the legacy of Pink Floyd’s 1973 concept album *The Dark Side of the Moon*.

It proved to be a fascinating experiment in *concept conferencing*, one that referenced the track titles of the progressive rock masterpiece in order to address the critical topics underlying them and their relevance to contemporary comparative legal scholarship. The Dark Side of the *Comparative Legal Moon* – as put by the panel’s coordinator

Pasquale Viola – has concealed from our view the influences exerted by colonialism and orientalism¹ on legal structures, including the circulation and transplant of constitutional models.

I was drawn to the track titled *Any Colour You Like* precisely for that reason. According to Roger Waters, the title of *Money*'s instrumental B-side was inspired by a street vendor pitch that reads '*Any colour you like, they're all blue*': 'So, metaphorically, *Any Colour You Like* is interesting, in that sense, because it denotes offering a choice where there is none'.² I was reminded of the 'choices' promised to indigenous peoples by the transformative constitutions of the Andean *nuevo constitucionalismo* and of the 'authenticity dilemma' affecting the 'multicolored fabric' (*bilado abigarrado*)³ of plurinational societies.

The plurinational design enacted by the recent *Constitución Política del Estado Plurinacional de Bolivia* (CPE) of 2009, for example, has redefined the traditional concept of national identity, but has also generated conflicts racialized by a precise political agenda. This agenda has officially adopted the decolonizing discourses of Global Northern academics, crystallizing identity fetishes based on the presumption of an (impossible) 'authenticity': a culturalist approach that obscures the 'juxtaposition, in small points or spots, of opposed or contrasting colours',⁴ represented by *mestizo* identities. This approach has also allegedly led to the negative outcome of the recent Chilean constitutional referendum,⁵ in a society characterized by 'identitarian racism', historically imposed through the unifying function of national

¹ T. Ruskola, *Legal Orientalism. China, the United States, and Modern Law* (Cambridge 2013).

² See P. Rose, *Which One's Pink? An Analysis of the Concept Albums of Roger Waters and "Pink Floyd"* (Collector's Guide Publishing 2002).

³ S. Rivera Cusicanqui, *Ch'ixinakax utxiwa: A Reflection on the Practices and Discourses of Decolonization* (2011) *The South Atlantic Quarterly* 111, 95.

⁴ *Ibid.*

⁵ S. Verdugo, *On the Democratic (but Limited) Virtues of the Chilean Exit Referendum*, *IACL-AIDC Blog* (4 October 2022).

identity.⁶ Despite its inclusive and progressive character, in fact, 80% of indigenous voters have overwhelmingly rejected the Chilean draft constitution.⁷

These examples show how populist uses of indigeneity can impair transformative constitutional projects, which end up being rejected by the very populations whose inclusion they promote.

‘*Any colour you like, they’re all blue*’ is, ‘*all in all*’, a fitting metaphor for ‘colonial continuity in republican times’:⁸ that is, the phenomenon known as *internal colonialism*.⁹

The Mexican sociologist Gonzalez-Casanova has described the emergence of internal colonialism in former colonies as they attained independence from Europe. Cut loose from the direct political subjugation of colonial powers, the creation of the nation-state turned the national governments into the new beneficiaries of the exploitative colonial model: ‘with the disappearance of the direct domination of foreigners over natives, the notion of domination and exploitation of natives by natives emerges’.¹⁰ Gonzalez-Casanova had initially referred to the light skinned elites (*criollos*) that led the Latin American independence movements in the early nineteenth century and their perpetuation of the colonial power dynamic: ‘the exploitation of the Indians continues, having the same characteristics it had before independence’.¹¹

Internal colonialism was therefore developed as a theoretical framework to understand patterns of uneven development within a nation-state, engendered by the exploitation of one population for the advancement of the national economy. This

⁶ C. Alvarado Lincopi, Una razón antropofágica para una constituyente plurinacional. De la nación blanqueada a la comunidad política abigarrada, in VV.AA., Wallmapu: ensayos sobre plurinacionalidad y Nueva Constitución (Pehuén

2020) 95.

⁷ Cf. T. Groppi, Il Cile da un “plebiscito” all’altro. Il rechazo del nuovo testo costituzionale nel referendum del 4 settembre 2022, visto dall’Italia (2022) 23 federalismi.it, ix.

⁸ Cf. Alvarado Lincopi (n 6) 95.

⁹ P. Gonzalez-Casanova, Internal Colonialism and National Development (1965) 1 Studies in Comparative International Development 4. Cf. L. Tapia, Dialéctica del colonialismo interno (Traficantes de sueños 2022).

¹⁰ Cf. Gonzalez-Casanova (n 9) 27

¹¹ Ibid.

growth in the economy thereby benefits the majority population in control of the national government at the expense of the marginalized minority population. In this manner, the exploitative relationship mirrors the core-periphery dynamic of dependency theory, but between populations within a nation-state. Likewise, many Latin American scholars have noted that this relationship also reproduces the extractivist exploitation of colonies by former European powers.¹² This conceptual model is of invaluable service to comparative lawyers observing the post-colonial legal orders of the *Global South*.¹³

The ultimate aim of this study is to investigate the difficulties currently faced by the plurinational discourse, in its pursuit of a genuinely multicolored Andean *nuevo constitucionalismo*, stemming from two initial research questions. Why do (some) comparative lawyers get so excited about the Andean plurinational projects, while their implementation has been politically undermined both in Bolivia and in Chile? Is there a dark side to the Latin American constitutional moon (*keilla* in *aymara*)? Is it related to ages-old issues of internal colonialism/racism? Bolivian constitutionalism provides a case study for the difficulties faced by comparative constitutional lawyers in practice.

Quite fascinatingly, the gap between constitutional promise and political practice finds echoes in an account of *The Dark Side of the Moon's* recording sessions at the Abbey Road studios, given by the four backing vocalists – Doris Troy, Leslie Duncan, Liza Strike and Barry St. John – and reported by John Harris: ‘the singers’ visit to Abbey Road shone light on an amusing irony: though the band’s new songs bemoaned humanity’s lack of mutual understanding and emotional generosity, the Floyd outwardly seemed to be part of the problem. They weren’t very friendly [...] They were cold; rather clinical. They didn’t emanate any kind of warmth’.¹⁴

¹² E. Dussel, *Cultura latinoamericana y filosofía de la liberación* (1984) 6 Concordia, *Revista Internacional de Filosofía*, 42.

¹³ The idea of Global South – as acutely stated by F. Hoffmann, *Knowledge Production in Comparative Constitutional Law: Alterity – Contingency – Hybridity*, *Völkerrechtsblog* (31 July 2017), 2 – has ‘been employed as a critical wedge to crack open the veneer of comparative law’s [...] fundamental and foundational concepts [...], its comfortable embeddedness in (Western) modernity’: as such, it is pushing critical comparative constitutional scholarship further beyond West.

¹⁴ J. Harris, *The Dark Side of the Moon. The Making of the Pink Floyd Masterpiece* (Da Capo Press 2005) 116.

Though the Bolivian Constitution of 2009 states in its preamble that ‘we never knew racism until we were subjected to it during the terrible times of colonialism’, and bemoaned ‘all forms of dictatorship, colonialism, neocolonialism and imperialism’ (Article 255.II.2 CPE), the *Movimiento al Socialismo* (MAS) and its leader Evo Morales seemed to be part of the neocolonial problem. The official multiculturalism promoted by MAS has been critically described by indigenous authors as ‘the concealing mechanism *par excellence* for new forms of colonization’.¹⁵

In order to address the aforementioned issues, this paper is comprised of three sections. The first section provides a comprehensive overview of the Bolivian (and Andean) racial hierarchy from the colonial age to its internalization in the contemporary constitutional discourse; the second section investigates the connection between Morales’ MAS in Bolivia and Iglesias’ *Podemos* in Spain, through the analysis of their plurinational political agendas. The third section tries to shed some light on the – allegedly indigenous – claim to indefinite presidential re-election, enforced by a ruling of the *Tribunal Constitucional Plurinacional*. This decision, which led to Morales’ (fourth) nomination and the resultant civil protests of November 2019, has raised many questions over the populist, distorted use of indigeneity and represents a potential example of an ‘unconstitutional constitutional ruling’¹⁶, or, better yet, of the *Dark Side* of Evo the *Indio*.

The paper ends with a brief analysis of the Chilean constitutional referendum demonstrating how the plurinational advancements proposed by the draft constitution have affected the outcome of the constituent process.

1. Mestizaje and Blanquitud: Racial Hierarchies in the Andean Constitutional

Discourse

Unlike nineteenth century British colonies – where there was a strong colonial taboo against mixed marriages and interracial relations – Iberian rule led to *mestizaje* and,

¹⁵ Rivera Cusicanqui (n 3) 99-100.

¹⁶ See Y. Roznai, *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers* (OUP 2019).

consequently, racism: ‘contemporary India has had to struggle with the question of caste but not as much with colonial racial categories as the states in Latin America’,¹⁷ where instead ‘the conqueror domesticated, structurized, and colonized the manner in which those conquered lived and reproduced their lives’.¹⁸ *Abya Yala*,¹⁹ now known as *Latin America*, reflects this colonization process through racial and cultural hybridity, which distinguished the *mestizo* – the son of the *conquistador* and the Indian woman – from the ‘legitimate *criollo*, or white person born into the colonial world’.²⁰

Criollos became the rulers of the neocolonial order, but *mestizos* were the actual responsables of the cultural construction of Latin America, while also trying to emulate their colonial ancestors. Ecuadorian philosopher Echeverría calls this phenomenon *blanquitud*: ‘*mestizos* who demonstrate *good behavior* [...] participate in *blanquitud*. And, as unnatural as it appears, over time they end up [...] looking white’.²¹

Blanquitud marks the transition from ethnic racism to identity racism, which elevates the needs, behaviors and values of white elites to a communitarian *ethos*, enforced through homogenizing nationalism.

The resistance movement to colonization known as *taki unquy*²² was an indigenous movement; the *libertadores* of the Hispano-American wars were, in contrast, predominantly creole aristocrats, such as Simón Bolívar himself. Unsurprisingly, the Argentine historian Donghi defines this century the *neocolonial* century:²³ for example, the census criteria underlying the recognition of republican citizenship did not

¹⁷ A. Gupta, *Viewing States from the Global South*, in C. Krupa and D. Nugent, *State Theory and Andean Politics: New Approaches to the Study of Rule* (University of Pennsylvania Press 2015) 458.

¹⁸ E. Dussel, *The Invention of the Americas: Eclipse of “the Other” and the Myth of Modernity* (Continuum 1995) 45.

¹⁹ Abya Yala (‘mature land’ in kuna) is the ancestral name of the South American continent. See also R. Webber Jeffery, *From Nuestra América to Abya Yala: Notes on Imperialism and Anti-imperialism in Latin America across Centuries*, (2018) 6 *Viewpoint Magazine*.

²⁰ Dussel (n 18) 47.

²¹ B. Echeverría, *Modernidad y blanquitud* (Era 2010) 65.

²² See J. Hurtado, *El katarismo* (Instituto de Historia Social Boliviana 1986).

²³ T. Halperín Donghi Tulio, *The Contemporary History of Latin America* (Duke University Press 1993).

promote the legal recognition of indigenous peoples who, in fact, helplessly witnessed the supplanting of the colonial monarchical order by the neocolonial republican one.²⁴

As further evidence of the persistence of a highly prolific legalist cryptotype²⁵ – a legacy of Spanish colonialism – some two hundred constitutional texts have been promulgated throughout Latin America from Independence to the present day.²⁶ It can be inferred that, from its genetic moment, Latin American constitutionalism has been characterized by such phenomena as constitutional ‘mimicry’ (also known as ‘*mala mimesis*’)²⁷ and constitutional ‘nominalism’.²⁸

The first Creole constitutions found their ideological references in the *Déclaration des Droits de l’Homme et du Citoyen* (1789) and in the prototypical separation of powers enforced by the U.S. Constitution (1787). In the Bolivian case, the *Constitución política* of 1826 nominally enshrined the principles of the French Revolution, but the abolition of slavery in Article 11 was accompanied by the unchallenged continuation of servitude in the *haciendas*.

Creole elites exerted, therefore, neocolonial domination over indigenous peoples through the acritical transplant of the features of classical constitutionalism; the adoption of the liberal constitutional model resulted in the exclusion of Indians from the republican political, economic and social circuit.²⁹ The liberal formant persists as

²⁴ See J.R. Arze (ed), *Antología de documentos fundamentales de la historia de Bolivia* (Biblioteca del Bicentenario de Bolivia 2015).

²⁵ R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (1991) 1 *American Journal of Comparative Law*.

²⁶ S. Lanni, *Il diritto nell’America Latina* (Edizioni Scientifiche Italiane 2017) 85.

²⁷ A. Colomer Viadel, *Tendencias del constitucionalismo en el siglo XXI: cuestionamientos e innovaciones constitucionales* (2015) 36 *Teoría y Realidad Constitucional*, 344-345. Cf. J.L. Mecham, *Latin American Constitutions: Nominal and Real* (1959) 21 *The Journal of Politics*, 258: ‘Nowhere are constitutions more elaborate and less observed. Politically, Latin Americans seem to be unqualified optimists, for the long succession of constitutional failures has never dampened hopes that the perfect constitution-a cure-all for national ills-will be discovered eventually’.

²⁸ D.E. López Medina, *Teoría Impura del Derecho. La transformación de la cultura jurídica latinoamericana* (Legis 2004) 39.

²⁹ M.E. Attard Bellido, *Sistematización de Jurisprudencia y Esquemas jurisprudenciales de Pueblos Indígenas en el Marco del Sistema Plural de Control de Constitucionalidad* (Konrad-Adenauer-Stiftung 2014) 56.

a systemic element in subsequent evolutions of South American constitutionalism: from colonial law to neocolonial law, from liberal constitutionalism to the neoliberal constitutional discourse that dominated Latin America until the early 2000s.

Bolivia's ethnic-racial hierarchy has formed as the result of economic, social and ideological influences: racism plays a fundamental role in the reproduction of this hierarchy. At present, most members of the Bolivian 'upper bourgeoisie' are white and belong to the white group of the highest socioeconomic status, which in Bolivia is called a *jailón*. The same conclusion can be extended to professional elites, as shown by phenotypes and surnames of their members. In the middle class it is possible to find people of indigenous and *Chola* origin, but who recognize themselves as white. They function as victims on the stage of social representation. At the other extreme, there are activities and economic sectors exclusively reserved for indigenous people. They are, without exception, the most modest: work in agriculture (*campesinado*); domestic service (which plays a fundamental role in the reproduction of racism); unskilled work in masonry, repairs, mining, etc.

This majority gradually disappeared due to a process of social mobility that was also ethno-racial, since it allowed economically ascendant groups and individuals to 'whiten themselves', that is, to repudiate their indigenous and *cholo* origins and 'advance' in the ethno-racial pyramid.

The dominant groups in the country – the whites and the successfully *whitewashed* – inherit racism and retain it because it helps them reproduce dominance over other groups, like the Indians and the *cholos*. As mentioned above, members of dominated ethnic-racial groups often internalize racism and actively participate in processes of whitening (*blanqueamiento*) and discrimination that tend to perpetuate white primacy. Echeverría's *Modernidad y blanquitud*³⁰ – inspired by Fanon's *Peau Noire, Masques Blancs*³¹ – defines *blanquitud* as the 'internalization of the historical capitalist ethos',³² identified with modernity, and distinguishes two types of racism: ethnic racism (based on skin)

³⁰ Cf. Echeverría (n 21).

³¹ F. Fanon, *Peau Noire Masques Blancs* (Points 2015). Cf. J.M. Persánch, (Preámbulo) *De Whiteness a Blanquitud y Branquitude - (Preface) From Whiteness To Blanquitud And Branquitude* (2020) 1 *Journal of Hispanic and Lusophone Whiteness Studies*.

³² B. Echeverría, *Imágenes de la "blanquitud"*, in B. Echeverría et al, *Sociedades Icónicas (Siglo XXI 2007)*, 20.

and identity racism (based on culture). Cultural racism does not seek to eliminate different skin colors. It only seeks to whiten them culturally: therefore, it is tolerant as long as non-whites whiten.³³

For this reason, one can be ethnically non-white but be ‘white’ nonetheless and, conversely, one can be white-skinned but, by rejecting the dominant *ethos*, not be white.³⁴ In the same way, a state that recognizes its inherent multiculturalism, or declares itself plurinational, does not necessarily drop the demand for whiteness, since it does not dissociate itself from the condition of a homogeneous nation-state. In Bolivia, the constituent process had the intention of creating an intercultural and plurinational state, as an alternative to the modern nation-state. This process led also to the adoption of a populist discourse, which is reviewed in the following paragraph.

2. The ‘Podemos Connection’: Plurinational Populism between Bolivia and Spain

A preliminary *caveat* seems advisable. Global Northern scholarship has sometimes contributed to the indiscriminate employment of very diverse categories, such as those relating to *multiculturalism* and *interculturalism*, whereas recent tendencies in Latin American constitutionalism – like *neconstitucionalismo* and *nuevo constitucionalismo* – have been misleadingly confused. Both notions need to be clarified.

As argued aptly by Maldonado Ledezma, multiculturalism is a merely descriptive term, outlining an ‘inescapable reality’³⁵ of human societies; interculturalism is, instead, an ‘eutopic scenery’³⁶ for the construction of a democratic society in which ‘the relationship between cultures [...] are based on respect and equality between different cultural groups. Interculturalism does not admit asymmetries, that is, inequalities

³³ On Barack Obama as an example of *negritud* light see B. Echeverría, *Obama y la «blanquitud»*, in G. Gosálvez (ed), *Crítica de la modernidad capitalista* (Vicepresidencia del Estado Plurinacional de Bolivia 2011) 162.

³⁴ Cf. Echeverría (n 21) 18.

³⁵ I. Maldonado Ledezma, *De la multiculturalidad a la interculturalidad: la reforma del Estado y los pueblos indígenas en México* (2010) 14 *Andamios*, 298.

³⁶ *Ibid.* 299.

between cultures mediated by power, which benefit one cultural group over another'; as such, it is not a descriptive concept, but 'an aspiration'.³⁷

Plurinational constitutionalism, in fact, aims to overcome the sterile descriptivity of liberal multiculturalism (*à la* Kymlicka) towards an intercultural 'synthesis of diverse perspectives [...] able to inform collective decisions'.³⁸

As acutely denounced by Rivera Cusicanqui – one of the most sensitive *aymara* sociologists in Bolivia – the wave of *octroyé* constitutional reformism that spread in Latin America in the early 1990s was the result of protests throughout the continent against neoliberal policies.³⁹

Liberal multiculturalism employed the category of *minorities* to 'capture' indigenous peoples: in 1994, Bolivian president Gonzalo Sánchez de Lozada symbolically nominated an indigenous vice president, Víctor Hugo Cárdenas, opening to a 'truncated, conditional and reluctant' recognition of indigenous territorial and cultural rights. The imposition of a residual *status* – a *de facto* minority – was accompanied by a rhetorical discourse that neutralized every 'decolonizing impulse',⁴⁰ while relegating indigenous people to a stereotyped and static identity:

'And so, as the indigenous people of the east and west are imprisoned in their *tierras comunitarias de origen* (original communal lands) and are NGOized, essentialist and Orientalist notions become hegemonic, and the indigenous people are turned into multicultural adornment for neo-liberalism. The new stereotype of the indigenous combines the idea of a continuous territorial occupation, invariably rural, with a range of ethnic and cultural traits, and classifies indigenous behavior and constructs scenarios for an almost theatrical display of alterity. Rossana Barragán calls this strategy *cholo-indigenous ethnic self-affirmation*, as an 'emblematic identity'. [...] The elites

³⁷ S. Schmelkes, *La interculturalidad en la educación básica* (2006) 3 revista PRELAC, 122; cf. I. Maldonado Ledezma (n 35) 299.

³⁸ M. Aparicio Wilhelmi, *Nuevos avances del poder constituyente democrático: aprendiendo del sur*, in M. Aparicio Wilhelmi, A. de Cabo de la Vega, M. Criado de Diego, R. Martínez Dalmau, A. Noguera Fernandez and R. Viciano Pastor, *Por una asamblea constituyente. Una solución democrática a la crisis* (Sequitur 2012) 126.

³⁹ Cf. Rivera Cusicanqui (n 3) 98.

⁴⁰ *Ibid.* 99.

adopt a strategy of crossdressing and articulate new forms of cooptation and neutralization. In this way, they reproduce a ‘conditional inclusion’, a mitigated and second-class citizenship that molds subaltern imaginaries and identities into the role of ornaments through which the anonymous masses play out the theatricality of their own identity’.⁴¹

The liberal multicultural discourse conceals and denies the ‘ethnicity of the acculturated populations’ and of the *mestizos* (*abigarrados*) who live outside rural areas: ‘the term ‘original people’ affirms and recognizes but at the same time obscures and excludes the large majority of the *aymara* – and *qhichwa* – speaking population of the sub-tropics, the mining centers, the cities, and the indigenous commercial networks of the internal and black markets.’ Ultimately, liberal multiculturalism is a strategy for ‘depriving indigenous peoples of their potentially hegemonic status of indigenous populations’ and of ‘their capacity to affect the state’.⁴²

Eventually, liberal multiculturalism and economical neoliberalism would translate themselves into the constitutional paradigms of *neoconstitucionalismo* (not to be confused with *nuevo constitucionalismo*).

Neoconstitucionalismo aims to describe the results of *constitutionalization*, a process that has led to the positivization of the ‘idea of constitution as the supreme legal rule of the State’ and ‘its decisive presence in the legal system’.⁴³ As Viciano Pastor and Martínez Dalmau argue, it is a *theory of law*, but not a *theory of Constitution*.⁴⁴

⁴¹ Ibid. 99-100.

⁴² Ibid. 99.

⁴³ R. Viciano Pastor and R. Martínez Dalmau, *El nuevo constitucionalismo latinoamericano: fundamentos para una construcción doctrinal* (2011) 9 *Revista General de Derecho Público Comparado*, 7; cf. L. Pegoraro and A. Rinella, *Sistemi costituzionali comparati* (Giappichelli 2017) 93.

⁴⁴ R. Viciano Pastor and R. Martínez Dalmau, *La Constitución democrática, entre el neoconstitucionalismo y el nuevo constitucionalismo* (2013) 48 *El Otro Derecho*, 69; cf. Viciano Pastor and Martínez Dalmau (n 43) 6-10.

Pegoraro aptly defines the constitutions inspired by *neoconstitucionalismo* ‘metaphysical hyperconstitutions’:⁴⁵ these constitutions undermine the hierarchy of legal sources, while the enactment of its principles rest on the ambiguous interpretations of courts and doctrine, possibly leading to – especially in the Latin American context – distortion and abuse. *Neoconstitucionalismo* is, mostly, the product of several years of academic theorizing and is, as such, imposed *from above*.⁴⁶

Nuevo constitucionalismo has, instead, recently emerged – ‘in the periphery of the academic world’⁴⁷ – as a counter-hegemonic push *from below*, towards a constitutional paradigm shift: according to the aforementioned authors, it is mostly a Latin American movement,⁴⁸ as proved by the democratic essence of the indigenous constitutions of Bolivia and Ecuador. These constitutional texts were born out of genuinely participatory constituent assemblies and referendums, representative of demands that were historically excluded from *creole constitutionalism*.⁴⁹

Viciano Pastor and Martínez Dalmau have identified four formal characteristics of the constitutions of *nuevo constitucionalismo*: their innovative content (*originality*), the remarkable number of articles included (*extension*), the combination of technically complex elements with an accessible language (*complexity*) and the specific obstacles for their amendment (*rigidity*).

In the paradigmatic constitutions of Bolivia and Ecuador, substantial changes ‘can be identified in popular participation in the exercise of power, first of all in the constituent process itself, in interculturalism and in a new vision of the relations between man and nature, as the foundation of an attempt to adhere to new economic

⁴⁵ L. Pegoraro, *Constitucionalización del Derecho y cultura constitucional*, Conferencia ‘La constitucionalización del derecho y cultura constitucional’, IV Congreso Internacional sobre Derecho y Justicia Constitucional, Tribunal Constitucional de la República Dominicana, 21 September 2018, 14.

⁴⁶ Viciano Pastor and Martínez Dalmau (n 43) 7.

⁴⁷ *Ibid.* 6.

⁴⁸ With the relevant exceptions of Bhutan, Iceland and South Africa: see R. Martínez Dalmau, *El ejercicio del poder constituyente en el nuevo constitucionalismo* (2012) 11 *Revista General de Derecho Público Comparado*, 12; cf. Viciano Pastor and Martínez Dalmau (n 44) 82.

⁴⁹ Viciano Pastor and Martínez Dalmau (n 43) 7.

models'.⁵⁰ According to Bagni, this new vision of the relationship between man and Nature would lead to a new 'form of State': the *eutopia* of the *Caring State*.⁵¹ From another point of view, the relevance of interculturalism might indicate the emergence of a new 'type of State': the *Plurinational State*.⁵²

The significance of plurinationalism beyond Bolivia is proved by its centrality in the Spanish political debate: just eight months before the celebration of the *referendum d'autodeterminació de Catalunya* in 2017, a survey conducted by GESOP showed a clear polarization of the opinions of Spanish citizens regarding the plurinational nature of the Spanish state (48.3% unational vs. 46.1% plurinational).

In the Spanish context, *Podemos* – a left-wing populist party⁵³ – has obtained consistent electoral results between 2014 and 2016,⁵⁴ becoming the third party (69 seats out of 350, 21.2% of the votes, leading the electoral alliance known as *Unidos Podemos*) in the *Congreso de los Diputados*, with a political project that is closely related to the Bolivian plurinational project: their proposal to create a *Ministerio de la Plurinacionalidad* – clearly inspired by the Bolivian *Constitución Política del Estado* of 2009 – is considered the natural remedy to the territorial crisis that has historically afflicted Spain. This proposal clearly derives from the studies and experiences of the party's founders: Pablo Iglesias and Iñigo Errejón.

⁵⁰ S. Bagni, *Hitos de democratización de la justicia constitucional en América latina: una mirada desde afuera*, in R. Tur Ausina, *Problemas actuales de Derecho constitucional en un contexto de crisis* (Comares 2015) 222.

⁵¹ S. Bagni, *Lo Stato interculturale: una nuova eutopia?* (Dipartimento di Scienze giuridiche 2017).

⁵² On the two concepts – familiar to Italian constitutional lawyers – of 'form of State' and 'type of State', please see my E. Buono, "Columbus' Mistake". Bridging the Gap in the Global South: "Intercultural Constitutional Engineering" between India and Las Indias (2019) 26 *Revista General de Derecho Público Comparado*, 15.

⁵³ On the distinction between left, right and valence populisms, see M. Zulianello and E. Gahner Larsen, *Populist parties in European Parliament elections: A new dataset on left, right and valence populism from 1979 to 2019* (2021) 71 *Electoral Studies* 1. On left-wing populism see the classic E. Laclau, *On Populist Reason* (Verso Books 2007). See also C. Mouffe and I. Errejón, *Construir pueblo: Hegemonía y radicalización de la democracia* (Icaria 2015); C. Balderacchi, *Participatory Mechanisms in Bolivia, Ecuador and Venezuela: Deepening or Undermining Democracy?* (2015) 52 *Government and Opposition* 131.

⁵⁴ Most recently, Pablo Iglesias declared he was resigning from Spanish politics after he has lost the Madrid regional elections. This sound defeat reflects an ongoing trend: since *Podemos* entered a coalition government with Pedro Sanchez's PSOE, it has gradually lost electoral support (losing 36 in the November 2019 general elections).

In November 15, 2017 Pablo Iglesias, general secretary of Podemos stated in an edited volume: *‘En España hay cuatro naciones que comparten un mismo Estado: española, la vasca, la gallega y la catalana’*.⁵⁵ Only five days before presenting his book Iglesias stated, while attending a conference in Cochabamba hosted by the Bolivian vice-president Álvaro García Linera: *‘España nunca ha sido uninacional’*.

Íñigo Errejón, founder with Iglesias of Podemos, discussed in 2011 a doctoral thesis entitled: *‘La lucha por la hegemonía durante el primer gobierno del MAS en Bolivia (2006-2009): un análisis discursivo’*. Errejón has extensively travelled throughout South America, as a Ph.D. student, to study the recent Andean constitutional experiences, with particular regard to the Bolivian and Ecuadorian cases. Both Iglesias and Errejón were members of the *consejo ejecutivo* of the *Fundación Centro de Estudios Políticos y Sociales* (CEPS), strategy consultant of the Bolivian and Venezuelan governments.

The *Podemos* connection to Morales’ MAS (*Movimiento al Socialismo*) – deeply studied by its founders Iglesias and Errejón – is furtherly proved by their similarly built political discourse, which strongly emphasizes the democratic cleavage created by globalization. It is – more or less implicitly – a populist discourse, rooted in the juxtaposition of a hard *afuera*, constituted by the political and financial élite, and a soft *adentro*, heterogeneous and transversal in its dimension:

‘The construction of a people, a force that successfully claims the representation of a new national project – in our case, necessarily plurinational – is never a closure. [...] How can we build a national-popular, democratic and progressive project, in a highly institutionalized society where the crisis of the elites and parties does not translate into a state crisis? Perhaps the answer has to do with the construction of a soft, light ‘Us’, always open to heterogeneity, and a hard ‘Them’, the privileged minority that has placed itself above the law’.⁵⁶

This idea of a soft ‘Us’ lends itself very well to the plurinational paradigm: not unlike Bolivia, Spain has repeatedly failed to build a unified nation. At the turn of the twentieth century, the national visions alternative to the Castilian identity emerged

⁵⁵ A. Domínguez (ed), *Repensar la España plurinacional* (Marcial Pons 2017).

⁵⁶ I. Errejón, *La construcción de un sujeto popular* (2015) 12 *Revista Teknokultura*, 39-53.

distinctly: the urgent need to address the issue remained unresolved. The proposal of *Podemos* has developed inside this framework, promoting the concept of ‘plurinational fatherland’ in a climate of institutional and political crisis; a first common theme between *Podemos* and MAS is therefore the promised recognition of distinct national sensibilities. On the political agenda of *Podemos*, plurinationalism goes further beyond the processes of nation-building and state-building: the ‘plurinational fatherland’ envisioned by Errejón is an inclusive welfare state where ‘we coexist as different nations and that is of no concern to us, nor do we tell anyone in what language he should speak. We are deeply proud of a homeland made up of different peoples and we are proud of the different nations, holding to different cultures and different languages as if they were our own’.⁵⁷

Both *Podemos* and MAS have been catalysts for the convergence of different popular movements: Morales’ MAS is – on a discursive level – the resultant of indigenism (*Katarism*) and marxism, with a broad support that has coalesced around indigenous movements, *cocalero* movements (*campesinado*) and mass protest movements arisen during the *guerra del agua* and the *guerra del gas*. The fundamental role of indigenism is the most distinguishing feature between *Podemos* and MAS: in Bolivia, plurinationalism is associated with decolonization and indigenous struggles for the defence of ancestral territories from corporate extractivism, that resulted in a plurinational constituent process; in Spain, the Catalan crisis – and its ultimate outcome – has demonstrated the presence of a strong state apparatus with no noticeable symptom of a widespread constitutional crisis.⁵⁸

In his fuzzy⁵⁹ classification of populism, Weyland defines Morales’ political agenda in the following terms:

⁵⁷ Ibid.

⁵⁸ This strength has been most recently confirmed during the COVID-19 pandemic: for the analysis of the ‘centralization’ of emergency management under the direction of the President of the Government, please refer to – in this review – my E. Buono, ‘The Estado ambiental de derecho under the ‘state of siege’: COVID-19 and Spanish environmental law (2020) 2 *Opinio Juris in Comparatione*, 241.

⁵⁹ S. Baldin, ‘Classifications and fuzzy logic: a comparative law perspective’, in S. Bagni, G.A. Figueroa Mejía and G. Pavani (eds), *La Ciencia del Derecho Constitucional Comparado. Estudios en Homenaje a Lucio Pegoraro Tomo I* (Tirant lo Blanch 2017) 129-151.

'Bolivia's Evo Morales also constitutes a mixed case because he applies various political strategies, but this combination lies more outside than inside populism. Morales deserves a fuzzy-set score of 0.33 because his rule rests largely on the backing of powerful, contentious social movements, which have retained considerable autonomy and mobilizational capacity. This mass base has continued to limit Morales' personal leadership and blocked important governmental initiatives. While the president has personalistic tendencies and populist aspirations, especially self-perpetuation in office, these goals have not achieved a definitive breakthrough; instead, Bolivia's politicized and highly mobilized social movements have insisted on a good deal of accountability and responsiveness, as demonstrated by their furious and effective reaction to the government's '*Gasolinazo*' of December 2010 [...]. Overall, therefore, Morales and his *Movimiento al Socialismo* do not qualify as populist'.⁶⁰

This claim needs to be tested under a constitutional assessment: the legal implications of the plurinational paradigm are reviewed in the following paragraph, through the analysis of the effective empowerment of indigenous agency more than a decade since the inception of the *Constitución Política del Estado*.

3. The Dark Side of Evo the Indio

In the first administrations of Evo Morales, it seemed that he was legitimized through decolonizing indigenous narratives that had a strong resonance both inside and outside the country: those were the years of the growing international reputation of the first indigenous president of a South American country who presented himself as a champion of the causes of social justice and defence of indigenous peoples and Mother Earth.

At the national level, the discourse of the indigenous state assumed the shape of plurinational indigenism and proposed a decolonizing project of state structures and society: Morales' first governments exploited the ideas and the narratives of decolonization to legitimize its own power.

⁶⁰ K. Weyland, Populism: A Political-Strategic Approach, in C. Rovira Kaltwasser, P.A. Taggart, P. Ochoa Espejo and P. Ostiguy (eds) *The Oxford Handbook of Populism* (OUP 2017) 66.

The enactment of environmental rights has represented the litmus paper of the plurinational project: for many authors, the turning point in which Morales *broke bad* occurred in September 2011 when the repression of the indigenous march for TIPNIS took place.⁶¹

The steps taken by Morales' government, from his third term (2014-2019), suggest that the justification of 'progressive extractivism'⁶² is but the rationalization of the government's predatory capitalist model.

This became more evident after the decision of the government in 2015 to expand the agricultural frontier by one million hectares per year. The pressure of these 'intercultural colonizers', carrying out their slash and burn practices on the public lands awarded to them led to the gargantuan fires in August and September 2019, resulting in more than 2 million hectares of scorched forests in the department of Santa Cruz.⁶³

These circumstances, among others, paved the way for the political resurgence of certain wealthy and white sectors of the population. Thanks to the economic boom of the decade 2005-2015, which generated multiple business opportunities and increased the salary of manual workers, there was a significant economic redistribution to the benefit of indigenous people and *cholos*. In this way, whites acted as a discriminated racial identity that demanded a lost space to be returned to them, but at the same time, they projected themselves as the universal identity, the only one that did not amount to *ethnos*, but to *demos*.

Two opposing tendencies – that had coexisted within the government until then – collided: the defence of the values of indigenous peoples and Mother Nature versus the extractivism of natural resources for the benefit of a populist state.

⁶¹ See the TIPNIS Sentence of the International Tribunal for the Rights of Nature: <https://www.rightsofnaturetribunal.org/wp-content/uploads/2018/04/sentence-tipnis.pdf>

⁶² J. Massal, Institutional multiculturalism in debate in Ecuador and Bolivia: between the plurinational State and the return of a/the nationalist model?, *Is Pluralism Still Relevant in the Contemporary World? Assessing Alternative Paradigms* (24 July 2014) 9.

⁶³ See the Chiquitania, Chaco y Amazonia vs. Estado Plurinacional de Bolivia Verdict of the International Tribunal for the Rights of Nature: <https://www.rightsofnaturetribunal.org/wp-content/uploads/2018/04/Verdict-Chiquitania-Chaco-Amazonia-ENGLISH-FINAL.pdf>

Such circumstance was strongly felt in the – allegedly indigenous – claim to indefinite presidential re-election, enforced by a ruling of the *Tribunal Constitucional Plurinacional*. This decision, which led to Morales' (fourth) nomination and the resultant civil protests of November 2019, has raised many questions over the populist, distorted use of indigeneity and represents a potential example of the *Dark Side* of the plurinational discourse. Evo Morales has, in fact, run for re-election in 2019 despite the outcome (51.3% No vs. 48.7% Yes) of the *referéndum constitucional de Bolivia* (21 February 2016 or 21-F): his unconstitutional *repostulación* raised strong political oppositions.

A ruling (SCP No. 084/2017) of the *Tribunal Constitucional Plurinacional* (TCP), based on an interpretation of the *Convención Americana sobre Derechos Humanos* (Articles 1.1; 23; 24; 29 CADH), has actually overruled the CPE, allowing for indefinite presidential re-election in spite of Article 168 ('The period of the mandate of the President or Vice President is five years, and they may be re-elected once for a continuous term'). Katia Uriona – former president of the *Tribunal Supremo Electoral* – declared that the result of the referendum of 21 February 2016 'is mandatory, binding and in force,' paving the way to a conflict of jurisdictions.

The legal reasoning and arguments behind the TCP decision allow us to define SCP No. 084/2017 a substantially *unconstitutional constitutional ruling*.⁶⁴

According to critics, the most astoundingly unconstitutional element of this decision concerns the competence of the TCP to exert constitutional review over constitutional norms: as in most legal orders inspired by the *Verfassungsgerichtsbarkeit*, judicial review is only exerted over infra-constitutional norms, such as laws, decrees, statutes, but never between constitutional norms.

The consequent declaration of unconstitutionality of Article 168 – with abstract, *erga omnes* effects – appears a constitutional aberration, to say the least: the TCP, not unlike every other constitutional court, has no such competence to modify the constitutional text, since it is an organ emanating from constituted power, with no constituent power. Article 168⁶⁵ has been drafted and approved by the Constituent Assembly,

⁶⁴ Cf. Roznai (n 16).

⁶⁵ The final text of Article 168 CPE is the result of a debate in the Constituent Assembly, as proved by a previous formulation (Proyecto de Texto Constitucional Aprobado en Grande, en Detalle y en Revisión de 9

enforced by the subsequent constitutional referendum, further strengthened by the results of the 21-F referendum: the TCP cannot single-handedly overrule millions of votes.

At a closer look – and by adopting a more literal interpretation – SCP No. 084/2017 does not directly declare any article of the Constitution unconstitutional, but rather affirms the *preferential application* of international human rights, according to Article 256.⁶⁶

Still, what has been universally criticized are the legal arguments developed by the TCP in their interpretation of comparative and international law, leading to no less arbitrary conclusions: a distorted interpretation of Article 23 CADH⁶⁷ is the basis of an (allegedly) human right to indefinite re-election.⁶⁸ The *American Convention on Human Rights* clearly refers to ‘genuine periodic elections,’ without further indications on the length or the number of consecutive terms. The second part clearly defines

Decembre de 2007: ‘La Presidenta o Presidente y Vicepresidenta or Vice-president, podrán ser reelectos consecutivamente por voluntad del pueblo’).

⁶⁶ Article 256.I. CPE: ‘The international treaties and instruments in matters of human rights that have been signed and/or ratified, or those that have been joined by the State, which declare rights more favorable than those contained in the Constitution, shall have preferential application over those in this Constitution’.

⁶⁷ ‘Article 23. Right to Participate in Government

1. Every citizen shall enjoy the following rights and opportunities:

- a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
- b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
- c. to have access, under general conditions of equality, to the public service of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings’.

⁶⁸ This interpretation has its antecedents, aptly quoted by the TCP: Res: 2003-02771. Sala Constitucional de la Corte Suprema de Justicia (Costa Rica 2003); Sentencia No. 06, Jueves, 30 de Septiembre de 2010, Corte Suprema de Justicia (Nicaragua 2010); F-165., 23 de Abril de 2015, Corte Suprema de Justicia - la Sala de lo Constitucional (Honduras 2015).

the possible limitations to the right to participate in government, which is no way definable as an absolute, incompressible, human right.

It can be inferred that all the political turmoil in Bolivia from 2019 onwards derived from this unconstitutional constitutional decision. The political passage of Morales' (fourth) re-election represented a delicate turning point for the whole plurinational project, as its legitimacy – beyond the denounced populist distortions – has been put at stake. The controversial interim presidency of Jeanine Áñez – which led to a downward spiral of racism and violence against indigenous Bolivians – has been put to an end by the overwhelming electoral victory of Luis Arce, MAS' presidential candidate.

On November 10, 2019, the day Evo Morales resigned from presidency, an extra-electoral socio-political change took place in Bolivia. On October 18, 2020, 55% of the population said 'no' to this ongoing extra-electoral change that was promoted by these social sectors and represented by Áñez, Carlos Mesa and Luis Fernando Camacho. Why did the majority reject the change? The polls reported that the predominant values of the Bolivian population had not ceased to be, after the fall of Morales, socialist: moreover, the antinomy between indigenous and anti-indigenous conceptions of the state played a crucial role in Arce's victory.

It can be argued that Arce's election reaffirms the strength of the plurinational project and could pave the way – with the end of the pandemic – to its return to the centre of the Bolivian current political agenda. The transformation of the identity and modes of reproduction of the Bolivian community has been formidable and appears irreversible. Non-indigenous white sectors – the country's traditional elite – have also changed. They moved from scientific racism to cultural racism, advocating cultural miscegenation (*mestizaje blanqueado*) as the prototype of Bolivian national identity.

This leaves Bolivia in a very particular situation: on the one hand, it has an anachronistic elite that acts as a 'caste,' but has not enough political agency to ascend to power; on the other hand, indigenous and popular sectors have the necessary political agency, but their government is undermined by the elites. This contradiction (between many others) can be – as recent political events have aptly shown – the source of a great deal of violence.

After all, ten years is too short of a time span to come to hasty conclusions. The ‘legal formants’ studied by comparative constitutional law do not travel at the same speed: ‘(global) economy is fast, (constitutional) law is slow, (constitutional) culture is slower.’⁶⁹ Comparative constitutional scholarship should draw attention – with a longer look – to the evolution of the Bolivian plurinational state model, while being implemented in little steps.

Concluding remarks on Chile’s National Constitutional Referendum

The *Dark Side* of plurinationalism has shown its face also during the recent rejection of the Chilean draft constitution.

The constitutional history of Chile has been, in fact, characterized by a peculiar feature: despite an indigenous population amounting to 12,8%,⁷⁰ all seven constitutions in Chilean history have never mentioned its indigenous peoples. With the *Acuerdo Por la Paz Social y la Nueva Constitución* of November 2019 and the *Plebiscito Nacional 2020* of October 2020, Chileans have approved the establishment of the Constitutional Convention, in order to rewrite the basic law. The approval of the *Ley de escaños reservados para pueblos originarios* in December 2020 has ensured that 17 seats (out of 155) in the Convention were attributed to representatives of the Chilean indigenous peoples. This has been the first step towards the constitutional recognition of Chile’s plurinationalism, claimed for decades by part of the indigenous movements.

In the historical Chilean constitutions, as Domingo Namuncura points out, ‘indigenous peoples do not exist; not even as a problem [...] neither for good nor for bad [...] Here is the worst arrogance in our nation-building: absolute indifference to our indigenous peoples’.⁷¹ According to Namuncura, this exclusion has assumed the structural character of a historical debt (*deuda histórica*): ‘Chile has [...] omitted or simply ignored [...] the relationship with indigenous peoples in its constitutions, and

⁶⁹ See L. Pegoraro, *Introduzione metodologica*, in G. Morbidelli, L. Pegoraro, A. Rinella and Mauro Volpi, *Diritto pubblico comparato* (Giappichelli 2016) 26.

⁷⁰ Censo de Población y Vivienda, 2017

⁷¹ D. Namuncura, *Pueblos indígenas, reformas constitucionales en América Latina y derechos indígenas en una nueva Constitución*, in VV.AA. (n 6) 40.

this places us [...] as the country lagging furthest behind in [...] the recognition of our indigenous cultures and peoples. Which today, in the 21st century, can be considered as a barbaric and unacceptable omission'.⁷² In other terms, *blanquitud* and internal colonialism in Chile have assumed such proportions as to realize the 'dream of conservative historians: one Chilean nation, Catholic, Castilian and white. *Sin indios ni morenos*'.⁷³

In republican Chile, traditionally characterized by a Napoleonic 'form of State',⁷⁴ the concept of plurinationalism has been employed in the public debate 'without determining its specific content, almost as a synonym for ethnic diversity or for the old ideas of multiculturalism', and as a 'condenser' bringing together the 'demands for constitutional inclusion of indigenous peoples'.⁷⁵

The possibility of a 'domesticated' exercise of the right to self-determination has been critically raised by both the *Coordinadora Arauco Malleco* – which advocates a strategy of territorial control for *mapuche* communities – and the *Consejo de Todas las Tierras* (*Aukiñ Wallmapu Ngulam*), whose *werkén*⁷⁶ Aucan Huilcaman affirmed that the 'declarations of plurinationalism made in the constitutions of states such as Ecuador and Bolivia have solved absolutely nothing in relation to indigenous peoples, nor have they guaranteed plurinational coexistence at all'.⁷⁷ Despite these arguments, the concept of plurinationalism brought an 'emotional adherence'⁷⁸ across the board in the *estallido social* movements, transcending indigenous demands to engage the younger generations of Chilean *mestizos*. Millaleo observed that 'the path to plurinationalism

⁷² Ibid. 43.

⁷³ D. Namuncura, El complejo y más importante "momento constituyente" de los pueblos indígenas de Chile: experiencias y desafíos, in VV.AA. (n 6) 115.

⁷⁴ G. Pavani, El gobierno local. De los antiguos modelos europeos al nuevo paradigma latinoamericano (Olejnik 2019) 206.

⁷⁵ S. Millaleo, Prólogo: ¿el surgimiento de un constitucionalismo indígena en Chile?, in VV.AA. (n 6) 32.

⁷⁶ Werkén is the mapudungun word for 'messenger'.

⁷⁷ N. Romero, Aucán Huilcamán: «El Estado Plurinacional no ha resuelto nada en relación a los pueblos indígenas», Revista De Frente (February 3 2020); cf. J. Aylwin, Pueblos indígenas en el proceso Constituyente de Chile: un desafío pendiente, Debates Indígenas (December 1st 2020).

⁷⁸ Millaleo (n 75) 32.

does not consist in replicating the experiences of Ecuador and Bolivia’, but in the enshrinement of the principle of self-determination, from which a ‘*vía chilena a la plurinacionalidad*’⁷⁹ can be effectively traced.

Ultimately, it was the failure in mapping out an authentically Chilean way to plurinationalism that led to the rejection of the draft constitution. And indeed, this is but one of many reasons that favored the *rechazo*, which primary fall into three categories: political, procedural and substantive.

A thorough evaluation of these three categories goes beyond the reach of these concluding remarks. It suffices to say that political and procedural causes are closely intertwined: on the one hand, as aptly noted by most commenters,⁸⁰ the presence of as many as 88 independent representatives marginalized the role of traditional political parties, particularly those of the former *Concertación*, which steered the democratic transition during the 1990s and early 2000s. On the other hand, Article 133 of the current constitution⁸¹ introduced the much criticized two-thirds majority rule that characterized every aspect of the Constitutional Convention’s operations. Meanwhile, Article 142⁸² reintroduced mandatory suffrage in the ‘exit plebiscite’ required for the final approval of the constitutional proposal. These combined political and procedural factors allowed the Convention to approve each article of the draft constitution by majority vote, without ever needing to compromise with right-wing minorities, which foreshadowed an ideologized ‘presumption’ doomed to collide with the mandatory nature of the exit referendum. The referendum, in fact, ended up performing an ‘effective function of [...] check to the Constitutional Convention’,⁸³ turning citizens into ‘constitutional veto players’.⁸⁴ As Verdugo consistently points out, 62% of

⁷⁹ Ibid.

⁸⁰ Groppi (n 7).

⁸¹ ‘The Convention shall approve the rules and its voting regulations by a quorum of two-thirds of its members in office’.

⁸² ‘Suffrage in this plebiscite will be mandatory for those who have an electoral domicile in Chile. The citizen who does not vote will be punished with a fine for municipal benefit of 0.5 to 3 monthly tax units’.

⁸³ Verdugo (n 5) 3.

⁸⁴ Ibid.

Chilean citizens, ‘given the tragic dilemma of keeping the current Constitution or accepting a new constitution they disagreed with’,⁸⁵ chose to ‘reset’ the whole constituent process.

Among the ‘substantive’ arguments advanced against the approval of the Chilean draft constitution, a major role was played by the aforementioned *Dark Side* of plurinationalism.

From the preamble, the people of Chile are ‘made up of various nations’, while Article 1 of the constitutional proposal defined Chile ‘a social and democratic State based on the rule of law. It is plurinational, intercultural, regional and ecological’. Article 2 insists on this concept by stating that ‘Sovereignty resides in the people of Chile, made up of various nations’; and though Chile ‘forms a single and indivisible territory’ (Article 3), it ‘recognizes the coexistence of diverse peoples and nations within the framework of the unity of the State’ (Article 5). From an institutional standpoint, the Chilean plurinational paradigm would translate into the creation of ATIs, or indigenous territorial autonomies (Article 187, 234 and 235),⁸⁶ with the precipitates of interculturalism (Article 11) and legal pluralism (Article 309) accordingly enforced.

But the ‘binational’⁸⁷ *mapuche* issue is not at all akin to the plurinational composition of countries such as Bolivia and cannot be dealt with satisfactorily through similar experiments of intercultural constitutional engineering:⁸⁸ it is no coincidence that the highest rejection rates in the exit referendum were in municipalities with the greatest concentration of *mapuche* population.

That figure was already forecast in the January 2022 polls. As reminded by Verdugo, the polls clearly indicated legal pluralism and plurinationalism – two vague and easily distorted formulas – as potential culprits for the predictable rejection of the draft

⁸⁵ Ibid.

⁸⁶ See E. Szmulewicz Ramírez, The ‘regional State’ in the proposed Chilean new Constitution: positive developments and challenges ahead (2022) 1 Diversity Governance Papers DiGoP.

⁸⁷ The Council of All Lands proposed the conversion of Chile into a ‘binational’ state. See Minorities at Risk Project, Chronology for Indigenous Peoples in Chile (2004) available at: <https://www.refworld.org/docid/469f38781e.html>

⁸⁸ Cf. Buono (n 52).

constitution. This circumstance brought to a political agreement promoted by President Boric in case of approval (*apruebo con reformas*): the government ‘promised to amend the constitution to clarify or explain that the proposal was not as radical as the critics had suggested [...] This agreement was the parties’ response to the polls that showed that the Rejection vote was probably going to win. [...] In the agreement, they tempered the idea of the plurinational state and of legal pluralism—which did not rank well in the polls’.⁸⁹

In the aftermath of the vote, President Boric made amends: ‘This September 4th, Chilean democracy comes out more robust. This is how the whole world has seen and recognized it. A country that, in its most difficult moments, opts for dialogue and agreements to overcome its fractures and pain. And for this, compatriots, we should be deeply proud’.⁹⁰

Negotiations for a new constituent process continue, hopefully with greater awareness of past mistakes: there is no space left for plurinationalism in the 12 *bases constitucionales* supported by all parties in Parliament. Former president of the Chamber of Deputies, Raúl Soto – who mediated the constituent ‘dialogues’⁹¹– categorically rejected the re-inclusion of plurinationalism in the constituent debate.

As the preceding pages – and the ultimate outcome of the Chilean referendum – have tried to prove, comparative lawyers should not ignore the *Dark Side* of Comparative Law: that is, the colonial and racial layers that underlie any public discourse, which can frustrate and impair the decolonial scope of transformative constitutional projects, especially in the legal environments of the *Global South*.

⁸⁹ Verdugo (n 5) 5.

⁹⁰ S. Schmidt, *Chilean voters decisively reject leftist constitution*, The Washington Post (4 September 2022).

⁹¹ R. Gargarella, *Para continuar con el diálogo sobre el “plebiscito de salida” chileno*, IACL-AIDC Blog (11 October 2022).

