review humanities and law intercultural <
CALUMET

CALUMET – intercultural law and humanities review
ISSN 2465-0145 (on-line)
ISSUE 18(2023)
For Info: www.calumet-review.com

SPECIAL ISSUE

INTERCULTURALISM
A COMPARATIVE LEXICON
Editor: Silvia Bagni

Silvia Bagni

Interculturalism*
Understanding the concept from a comparative perspective

Abstract
The research analyses the prescriptive use of the term 'interculturalism' in the legal sciences, with the dual purpose of understanding: 1) how its content is indebted to theoretical elaborations from other sciences; 2) in a comparative perspective, whether interculturalism has a uniform application in the different legal systems in which it has been implemented. In particular, theoretical and practical applications in Canada (§ 2) and Latin America (§§ 3-4) will be compared. In the conclusions (§ 5), it will be highlighted that, with respect to the research question, interculturalism in the legal field has a broader scope than in pedagogy and anthropology; as for the second question, the conclusion is that two different normative models of interculturalism can be identified, one in the West, and the other in Latin America.

Keywords: Interculturalism, multiculturalism, dialogue, accommodation, Latin American *Interculturalidad*

1. An investigation into the meaning and use of the term 'interculturalism' in comparative constitutional law

The aim of this article is to define the meaning of the term 'interculturalism' in its normative sense, based on the distinction between descriptive and prescriptive language functions[1]. The word is abstract,

* The research has been financed by PRIN 2017 "From Legal Pluralism to the Intercultural State. Personal Law, Exceptions to General Rules and Imperative Limits in the European Legal Space" (PI – prof. Lucio Pegoraro – CUP J34I19004200001). An Italian extended version of this article will be published in S. Bagni, M.C. Locci, C. Piciocchi, A. Rinella (eds), *Interculturalismo. Lessico comparato*. Napoli: ESI, 2024.
[1] Scarpelli (1969: 978).

and thus does not have a referent, i.e., a real-world object that the signifier denotes, so we can only understand its meaning through an intentional definition, i.e., one that indicates its properties and connotations in given circumstances.

It is also a derived word, being constructed from a prefix and a suffix, affixed to the abstract noun 'culture'. In semiotics, the postulate of meaning is the existence of a semantic system, i.e., a system of 'cultural' units, which in turn define a specific culture[2]. To avoid tautology, the code we apply to give meaning to the sign needs to be identified, and the code in this case is important for two reasons. Firstly, being a comparative research, we are comparing different 'linguistic' codes; secondly, within each language, the meaning may vary according to different sectorial sub-codes, defined by the specific sciences, such as anthropology, sociology and pedagogy, that have questioned the meaning of the word 'culture' and its derivatives, multiculturalism and interculturalism (and/or interculturality). This implies, for the jurist, an understanding of whether the prescriptive language of law has taken on board the meanings elaborated by the other sciences, or whether it has its own semantic system related to the term 'interculturalism'[3].

Strangely enough, the entry 'interculturalism' does not appear in English Dictionaries, whereas 'multiculturalism' has its own definition. However, there is a huge amount of Anglo-Saxon literature on Interculturalism. We can infer that, in common usage, there is no need to differentiate between the two meanings. Any difference between the two terms is perceived only at a theoretical level, even though it can produce a concrete impact on real life, affecting the content of State policies and norms.

'Culture' and its forms of expression are juridically relevant in different ways, depending on the concept of culture to which the legal system refers. In this context, we are not concerned with its educational or 'humanistic' dimension, i.e., the right to culture understood as the right to receive an education. Multiculturalism and interculturalism are considered here in their 'modern' sense, as distinct models of social coexistence, which generate, from a legal point of view, a statute of rights for the individual and for the group, and thus influence the relationship between society and the state[4]. This encourages the comparative public lawyer to reflect on the category of the form of government, and to ask whether it is possible to speak of a multicultural state or an intercultural state.

The concept of multiculturalism was initially developed in the social sciences sphere, in the 1960s and 1970s, to describe the emerging issues of coexistence within societies with a strong immigrant component, such as the US, Canada, Australia, and the UK. It appeared necessary to change the legal paradigm of minority groups, from assimilation to empowerment[5]. In the political sciences, multiculturalism indicates the set of public strategies oriented towards the protection of different cultural identities. However, the policies implemented in traditionally liberal countries have always maintained a specific balance of power between the different components of society, perpetuating the relationship of domination between the predominantly white, Christian majority and the rest of the population. From this point of view, multicultural policies are linked to the crisis of the nation-state, at the basis of the Western doctrine of State, which had always considered the two concepts to be necessarily related. The multicultural response that the State has implemented in many contexts has frequently been criticized by subordinate groups, especially indigenous peoples. As noted by the

[2] Eco (1973).
[3] Piciocchi (2015).
[4] On the 'humanistic' and 'modern' dimensions of culture: Pasqualotto (2008: 1-2).
[5] Modood (2007).

Ecuadorian jurist César Trujillo, the tendency of the West is to impose 'que las instituciones, reglas y formas de resolver los conflictos de los indígenas no sean sino la reproducción de las que, con dificultades, el Estado ha adoptado y así buscamos, con no inocente soberbia, la equivalencia de los conceptos, categorías, clasificaciones e instituciones "nuestras" en el derecho indígena, propio o consuetudinario y en cuanto no los encontramos les negamos el derecho a existir en una especie de etnocidio no doloso, pero no por eso no culposo'[6].

In Italian legal literature, trying to trace a line between multiculturalism and interculturalism has not attracted much interest among scholars. We can mention Eleonora Ceccherini's research on 'Multiculturalism (dir. comp.)', published in the *Digesto delle Discipline pubblicistiche* (Digest of Public Law Disciplines)[7]. The most renowned Italian legal encyclopaedias or dictionaries include neither the headwords, 'culture' nor 'interculturalism'. So, it is only from the interdisciplinary and pluralist perspective of comparison[8] that the problem of the definition, translation and interpretation of the linguistic system of pluriculturalism emerges, since 'intercultural' enters prescriptively in the active formants of some constitutional forms of government.

The choice of a pragmatic approach to the study of interculturalism in comparative constitutional law determines the 'spatial' scope of this research, i.e., the legal systems that will be studied. In fact, there is no attempt to construct an abstract comparative legal theory of interculturalism. Instead, inductively, its meaning(s) will be reconstructed on the basis of its normative usage within legal systems that have formally transposed the term into a constitutional and legal formant, contrasting with the term 'multiculturalism'.

Ceccherini, in the above-mentioned entry 'Multiculturalism (dir. comp.)' states that the 'multicultural principle' has been formally implemented in some Constitutions, including those of Canada, South Africa and Hungary. In many others, one finds a series of norms that the author classifies as personal rights, promotional rights, rights to self-government and rights to ethnic representation in institutions, which, individually or jointly, pursue the objective of multiculturalism, that is, to recognise the dignity of cultural diversity. In other words, these norms guarantee to minorities (whether historical or immigrant) the right to maintain their diversity, without any obligation to assimilate or integrate[9]. In fact, among the examples cited, only the Canadian Charter of Rights explicitly uses the word 'multicultural'.

We have surveyed the use of the terms 'multicultural*' and 'intercultural' within constitutional texts, both in English and in Spanish, through the *constituteproject.org* database. The results are the following. In the English translation of the constitutions, "multicultural" is used in the original version of the Canadian Constitution Act 1982, in Art. 27 on the interpretation of the Charter, with the aim of preserving and highlighting Canada's multicultural heritage. The English translations of the constitutions of Montenegro, 2007, and Nepal, 2006, also use the word 'multicultural': the former in the preamble, which recalls multiculturalism as one of the basic values of the State; the latter in Art. 3 dedicated to the Nation, which is defined as multi-ethnic, multilingual, multireligious, and multicultural. Then, the term appears in five Latin American constitutions[10]. However, examining the

[6] Trujillo (2012).
[7] Ceccherini (2008).
[8] Fletcher (1998); Muir-Watt (2000); Pegoraro (2014: 15).
[9] Ceccherini (2008: 489).
[10] Bolivia: art. 95; Costa Rica, art. 1; Mexico, art. 2; Paraguay, art. 140; Venezuela, in the preamble.

original Spanish version, no Constitution uses the term 'multicultural'. In Bolivia (2009), the term 'pluricultural' is used in Art. 95; in Costa Rica, the 2015 reform introduces, in the definition of Art. 1 on the form of government, the word 'pluricultural'; in Mexico, the 2001 reform recognises that the nation has a "*composición pluricultural sustentada originalmente en sus pueblos indígenas*"; in Paraguay (1992), Art. 140 states that "*El Paraguay es un país pluricultural y bilingüe*"; finally, also in Venezuela (1999), the preamble speaks of constituting a multi-ethnic and pluricultural society.

In addition to teaching us that legal comparison requires direct access to texts in the original language, the data should be interpreted as a deliberate and consciously pragmatic option of language. These are relatively recent constitutional texts or revisions, i.e., made in the light of developments in social science studies on cultural pluralism, identity protection, the rights of indigenous peoples, etc. Use of the word 'pluricultural', instead of 'multicultural', cannot be regarded as a chance occurrence, but rather as a precise and deliberate choice not to adhere to a doctrine developed mainly by the Anglo-Saxon countries of the Global North, where indigenous peoples, i.e., the main component of Latin American pluralism, had suffered and continue to suffer discriminatory treatment[11].

The research conducted on the keyword 'intercultural', on the other hand, returns exactly the same results, regardless of language (with the sole exception of Serbia, whose constitution is not included in the Spanish translation in the database). In Serbia (2006), Art. 81, entitled 'Developing the spirit of tolerance' within the section on the rights of national minorities, states that, in the field of education, culture and information, Serbia supports the spirit of tolerance and intercultural dialogue. Two elements are relevant to our analysis: intercultural dialogue is only envisaged with respect to particular spheres of everyday life (education, culture, and information), demonstrating, as we shall see with respect to the analysis of Latin American constitutions, a very narrow view of the applicability of the intercultural principle. Moreover, it is mentioned among the rights of 'national' minorities, and not with respect to immigrant minorities.

The remaining results all involve Latin American legal systems. Among them, we can distinguish two groups, depending on the subject matter to which the article refers and, in a diachronic perspective, on two different cycles of constitutionalism, characterised by a distinct semantic shift in the use of the term. The first group of constitutions (Argentina, Nicaragua, Peru) uses the word 'intercultural' with exclusive reference to bilingual intercultural education; the second group (Bolivia, Ecuador, Venezuela), on the other hand, applies interculturalism comprehensively, defining the form of government itself as being intercultural.

This textual survey therefore leads us to restrict the scope of our analysis to the Canadian system (particularly the Québécois system) and to some Latin American countries, being the only systems that have incorporated interculturalism as a general principle of the form of government in their constitutional and legislative sources.

2. The Québec intercultural model

In Canada, cultural diversity management policies are identified by the term 'multiculturalism' at the federal level, and by 'interculturalism' in Québec. As Taylor makes clear,[12] while the difference is not

[11] Bagni (2017: 143).
[12] Taylor (2012).

merely terminological, it is based more on attempts to defend the francophone identity of the province than on policies and concrete actions that are diametrically opposed to the common goal of integrating diversity.

Starting in the 1960s and 1970s, Canada began a political, legal and cultural journey to overcome the supremacy of Anglo-Saxon culture over the other components of society, starting from the idea that "For although there are two official languages, there is no official culture, nor does any ethnic group take precedence over any other"[13] and that everyone is an equal citizen, regardless of their culture of origin. In 1963, the federal government established the Royal Commission on Bilingualism and Biculturalism to study the role of linguistic and cultural pluralism in post-war Canada. The Commission concluded its work in 1969, with a Report that called for greater encouragement of integration between the two prevailing original cultures, French and English, and the ethnic minority groups present in the territory. This was followed in 1971 by the approval of the *1971 Multiculturalism Policy*,[14] focusing on the protection of cultural identities. The monitoring of the implementation of multicultural policies by a parliamentary commission, created in 1985, led to the adoption of the 1988 *Canadian Multiculturalism Act*.[15] The Act focuses on concrete actions to ensure equal treatment for all ethnic and cultural groups, especially in basic services related to economic and social rights, such as work, education, housing, and health. In the meantime, the 'multicultural' character of the Canadian state was constitutionalised with the adoption of the 1982 Charter of Rights and Freedom.[16]

The assumption of a declared cultural neutrality of the state, where each nationality is placed on an equal footing under the umbrella of a single citizenship, however, immediately sounded to French-speaking Québécois like a threat to their identity, disowning the specific national origins of the Québécois. It appeared necessary for the provincial government to adopt a different model to promote diversity, one that would protect the identity of the French-speaking minority, while integrating it with the contribution of 'other' traditions (especially those of immigrants).[17] Thus, the peculiar feature of 'Québécois interculturalism' emerges,[18] which is grafted onto the French-speaking cultural tradition, with the other nationalities integrating and enriching it, whereby the 'other' is first called upon to learn the basics (linguistic and customary), and then to collaborate in its development through their own specific contribution.

The opposition of the Québécois integration model to the Canadian multicultural model is symbolically sanctioned by the introduction of the term 'interculturalism' into the debates and policies that connote it. In 1981, the Québécois rejection of Canadian multiculturalism was expounded in the policy document entitled *Autant de façons d'être Québécois*; but it was with the Final Report of the 2007-2008 Bouchard-Taylor Commission,[19] set up by the then Québec Premier Jean Charest, that Québécois interculturalism was formally presented as an alternative public policy to multiculturalism.

[13] Discourse by Prime Minister Pierre Elliott Trudeau during the presentation of the multicultural policies to the Parliament, *House of Commons Debates*, October 8, 1971, 8545-8, http://wayback.archive-it.org/2217/20101208165216/http://www.abheritage.ca/albertans/speeches/trudeau.html.
[14] https://pier21.ca/research/immigration-history/canadian-multiculturalism-policy-1971.
[15] https://laws-lois.justice.gc.ca/eng/acts/c-18.7/page-1.html.
[16] «Section 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians».
[17] Ghosh (2011: 7).
[18] Proulx-Chénard (2021).
[19] Bouchard, Taylor (2008).

It is immediately apparent that the Québécois conception of 'interculturalism' is different both from the Latin American and European conceptions of interculturalism. In particular, it seems to make assimilation a prerequisite for integration. In fact, the Québécois intercultural experience, compared to Canadian multicultural policies, is characterised by the aim of protecting French-speaking identity, a majority in Québec, a minority in Canada. The integration between the francophone Québec and the other Canadian cultures is subordinated to the acceptance of three absolute pre-conditions: Québec as a nation; French as the language of intercultural relations; respect for liberal and democratic values. Within this framework, the instruments of integration are those typical of the intercultural lexicon: interaction, reciprocity, intercommunity actions, respect for the original languages, public participation.[20]

In the political and social sciences, some scholars have criticized the Canadian 'multi'-'inter' dualism,[21] pointing out that advocates of interculturalism have ignored that dialogue is also a fundamental principle for multiculturalists, such as Taylor and Parekh.[22] In reality, these concepts overlap in many respects and are undoubtedly complementary, since the problem of the ghettoization of cultures largely depends on the absence of real economic and social equality.[23] The argument looks at the tools, while ignoring the aims. Multiculturalism is a policy for the enhancement and preservation of diversities, not for mediation and dialogue between cultures.[24] On the other hand, interculturalism starts from the assumption that cultures are not marble blocks but evolve and fertilise each other. This aspect is emphasised in Bouchard and Taylor's report,[25] which nevertheless insists on the need to preserve the Francophone identity and recognises the one-way direction of the integration process, from ethno-linguistic minorities to the Francophone majority. In fact, Québec, prior to the implementation of federal multicultural policies, had been hostile to any kind of contamination, especially at an educational level.[26]

Then, if we compare the Québec-Canada model of diversity management with the Latin-American intercultural State, another difference emerges: the complete invisibilization of the indigenous peoples,[27] who have been ignored in both the Canadian and Québécois models, and whose specificity is not considered in the preparation of integration programmes. Whereas, in the Global South, interculturalism is a tool for the decolonisation of law and society,[28] in Canada, the intercultural model is a plan for the redistribution of power within the two ethno-linguistic components of the dominant Western culture, which attempts to 'capture' the immigrants' consensus, so that they are encouraged to support the Francophone political agenda.

[20] *Ibid* at 39-41.
[21] Levrau, Loobuyck (2017-2018).
[22] Modood, Meer, (2012: 30-33).
[23] Sealy (2018: 705).
[24] Ricca (2008: 8).
[25] «Members of the majority ethnocultural group, i.e. Quebecers of French- Canadian origin, like the members of ethnocultural minorities, accept that their culture will be transformed sooner or later through interaction» (p. 40).
[26] Emongo, White (2014).
[27] The Preamble of the *1988 Canadian Multiculturalism Act* merely recall the Constitution: "whereas the Constitution of Canada recognizes rights of the aboriginal peoples of Canada".
[28] Garay Montañez (2022); Estupiñán-Achury,Balmant Emerique, Romero Silva (2023).

3. *Interculturalidad* in Latin America

In Latin American legal systems, the term *Interculturalidad* is used both as a noun and as an attribute ('intercultural'). In the former case, it refers to the theoretical debate around models for managing social coexistence between groups with different cultural identities. Semantically, it is based on concepts of mutual respect and dialogue,[29] also recognised by Western doctrine and sources (see § 2 above), but it includes much more. The creative dimension of dialogue is firmly rooted in the awareness of the past, evidence of a decolonial dimension.[30]

Reading Dussel, it becomes clear that the principle of *interculturalidad* in Latin America is the result of the grassroots demands of indigenous peoples, but also of a contemporary process of constructing a Latin American identity, developed by a group of intellectuals across the continent.[31] These scholars are often educated in Europe but they are critical of post-modern proposals for intercultural dialogue. They suddenly become aware of the extent to which their way of thinking and being is made 'whiter', racialised, colonised, and patriarchal. They stand alongside indigenous peoples in the struggle for freedom of expression and their affirmation of identity, proposing a South-South transmodern dialogue.[32]

The decolonial aspect of *interculturalidad* is also highlighted by the Portuguese sociologist Boaventura de Sousa Santos in his theoretical proposal that contrasts the sociology of absence with the sociology of emergence.[33] Santos starts from the assertion that the modern state is a colonial state, since it assumes the superiority of the Eurocentric (legal) culture.[34] Western culture is defined as 'abyssal' insofar as it is built on a way of thinking that divides social reality into two distinct universes: the first, consistent with the structures of knowledge developed in the West; the second, based on non-Western cosmovisions, simply denied and considered non-existent. Overcoming 'abyssal' thinking is achieved by accepting the 'ecology of knowledge', i.e., not only by allowing the other universe, made up of heterogeneous ways of thinking, to 'emerge', but also by recognising "the continuous and dynamic interconnections between them without compromising their autonomy".[35] This latter action represents a process of 'intercultural translation'.[36]

The Latin American *interculturalidad* differs from Western *Interculturalim* in its connection to the plurinational principle, which is also the basis of decolonial thought. In the plurinational intercultural state, the process of intercultural translation extends from the field of culture to every other field

[29] Ramón Valarezo (2008): "the construction of an intercultural society not only demands the recognition of diversity, its respect and equality, but raises the need to actively banish racism, promote permanent negotiations among the various components to build a new synthesis (inter-fertilization), achieve a plural understanding of reality, channel conflicts and build an equitable and inclusive future".
[30] Mignolo, Walsh (2018: 57 ff.).
[31] It corresponds to the construction of Liberation Theology. See Gutiérrez (1972).
[32] Dussel (2006: 21 ff).
[33] de Sousa Santos (2002). See also Pacheco Rodríguez (2021).
[34] "The modern state is monocultural, and so colonial, since its institutions assume the natural superiority of the Eurocentric norm. Diversity can be accepted, but in no case celebrated". Santos (2021: 374).
[35] Santos (2014).
[36] Ricca (2013) and more recently Id. (2023).

(political, territorial and economic).[37] So, the Latin American intercultural model accepts the existence of different 'ontologies', expressly referred to in the constitutional texts, such as *sumak kawsay* or *suma qamaña*.

Galo Ramón also emphasises how the specificity of Latin American interculturality is linked to the colonial history of the continent. For this reason, he considers the concept to be more consistent with colonialism than plurinationality, as it embraces the phenomena of discrimination, racism and the identity crisis that affects Afro-descendants and mestizos, who do not necessarily have particular roots within the territory, and who remain marginalised by the organisational-institutional implications of the plurination.[38]

Catherine Walsh describes three different meanings of *interculturalidad*. The first is defined as 'relational', in that it indicates dialogue between cultures, and thus has a descriptive function, concealing conflict and not impeding the conditions to dialogue. The second is 'functional' and sees intercultural policies as an instrument to ensure coexistence and tolerance within existing societies, with the aim of normalising differences in a neo-liberal society. This second dimension is what the author attributes to North American, European and international intercultural discourse. Finally, the third meaning is the 'critical' one, developed in Latin America, which aims to resolve the *"structural-colonial-racial problem and its link to market capitalism"*.[39] Critical interculturalism questions the current model of coexistence, seeking to construct alternatives based on the inter-fertilisation of different social traditions: "*Building interculturality -thus understood critically- requires transgressing, breaking and dismantling the colonial matrix still present and creating other conditions of power, knowledge, being, and living that distance themselves from capitalism and its unique characteristics*".[40]

When such a conceptual apparatus denotes a new form of government, as in Ecuador and Bolivia, interculturalism qualifies the concept of relations between state and citizens. The State is not only aware of cultural and national pluralism, considering them constitutive of society, but it also aims to reshape the state in a decolonial perspective. It places different identities on an equal footing,[41] seeking, through the action of constitutional bodies and public policies, to create new expressions of power.[42] In this sense, the Latin American Intercultural State differs from previous experiences of multiculturalism, e.g., in Central and Eastern Europe, in that it does not contemplate a unilateral majority / national minority relationship but invites transversal dialogue between different minorities. This, in the long run, could be an effective instrument to curb the sectarian and corporatist effects of a representation

[37] "The most substantial difference between interculturality within the nation-State and plurinational interculturality is that the latter encompasses the cultural as well as the political, territorial and economic dimensions of diversity". Santos (2021: 380-1).
[38] "Due to the history of exclusions, racism and domination, intercultural dialogue in our country must be deeply critical of internal and external colonialism". Valarezo (2008).
[39] Walsh (2012: 65); Villanueva Flores (2015: 293).
[40] Ibid., 69.
[41] Following Santos (2012: 20 and 27): "Liberal multiculturalism recognizes the presence in society of non-eurocentric cultures insofar as they operate only in the communities that adopt them and do not interfere with the dominant culture in the rest of society. This is not the multiculturalism enshrined in the constitutions of Bolivia and Ecuador. The new emerging plurinational State and its intercultural component does not simply require recognition of diversity, but rather the celebration of cultural diversity and mutual enrichment among the various cultures present".
[42] Walsh (2012: 69).

of minorities primarily as a group, generating, within the minorities themselves, political proposals aimed at guaranteeing an equal level of protection for all.

The decolonial critique, driven by the claims of the indigenous peoples, revisits the very foundations of state doctrine, creating oxymorons that presuppose the concept of 'interculturality': The nation-people breaks down into several peoples and nationalities, including indigenous and Afro-descendants, without necessarily drawing on the concept of minorities; territorial unity is deconstructed not only vertically, but horizontally, creating entities that replace administrative boundaries with cultural ones, even across borders; the legal system transitions from monism to pluralism. Thus, the intercultural state is both a plurinational and a pluralist state. When a new ecocentric legal paradigm is added to these attributes, we consider the emerging form of government as a new autonomous model, the Caring State, being implemented in some Latin American countries.[43]

In the struggles of indigenous movements for their own autonomy and dignity, "*interculturality, increasingly demanded, was enunciated as a criterion that should be the guide to redefine the coexistence of society as a whole, and not only a policy aimed at recognizing rights for 'the different'*".[44] Ferran Cabrero identifies the concept of 'intercultural citizenship' as the cornerstone of the construction of a new form of government. Indeed, intercultural dialogue makes it possible to overcome the contradictions inherent in the traditional idea of citizenship, which in a plural society tends to exclude minorities and create situations of privilege, rather than equalise.[45]

Finally, qualifying a law or a principle as intercultural implies, for judges and civil servants, elaborating new interpretative tools. The analysis of the jurisprudential formant in Latin American courts will show that different meanings of the term "intercultural" emerge, depending on the contexts in which the principle is applied.

4. The intercultural principle from theory to practice: analysis of the jurisprudential formant

The analysis of the jurisprudential formant allows us to deepen the concrete implications of the construction of an 'intercultural' form of government. It shows a conflict between the 'functional' and 'critical' meaning of interculturalism, which depends on the application of limits placed on legal pluralism within constitutions.

In Ecuador, the Transitional Constitutional Court, in one of its very first rulings, 008-09-SAN-CC of 9 December 2009, on the establishment of the *Universidad Intercultural de las Nacionalidades y Pueblos Indígenas 'Amawtay Wasi'*, set out the prerequisites for an intercultural interpretation of law: historical continuity, i.e., the pre-existence of indigenous peoples who have maintained their own system of rules and values; cultural diversity, i.e., the multiplicity of nationalities within the state and among different indigenous peoples ; interculturality, i.e., epistemic dialogue between cultures; and intercultural interpretation, i.e., the use of new approaches in the application of state norms, depending on the cultural context in which they are implemented. Since that first decision, the Constitutional Court has developed its case-law on the application of the intercultural principle, particularly with reference to legal pluralism, trying to define the limits of the indigenous peoples' right to apply their

[43] Bagni (2023).
[44] Briones (2020: 73).
[45] Cabrero (2013: 69).

own legal system within their territories and to their own members (art. 171 const.). For instance, in the so called Cokiuve case,[46] the Court defined both the concepts of interculturalism and plurinationality, considering them intertwined, and stated that legal pluralism is a fundamental expression of the Intercultural State. The Ecuadorian Code on the Exercise of the Judicial Function, (at art. 344, lett. d), introduces the principle *in dubio pro iurisdictione indigena*, and obliges State courts to decline jurisdiction if there is a pending case in front of the indigenous community. In a series of decisions on whether to include the indigenous justice system within the State jurisdictional system,[47] the Court, while defending the *ratio* of interculturalism, puts itself in conflict with the indigenous movement that cherished this measure, to obtain funds from the State. The Court considers the equation between the two systems to be a violation of the right to create, develop, apply and enforce its own customary law, because it would define, once and for all, the characteristics of indigenous justice, which vary from people to people. In a very recent decision,[48] the Constitutional Court has reiterated the obligation for State judges to apply procedural law from the perspective of intercultural interpretation, because the constitutional mandate is to realize a 'dialogical intercultural justice', where intercultural interpretation is part of due process.

In Bolivia, in light of the particular ethnic composition of the state, with indigenous nations constituting the majority in the country, the principle of plurinationality is far more evident than the intercultural principle in the constitution. Nonetheless, the constitutional definition of the intercultural principle is more fully defined than in Ecuador, as a primary instrument of harmonious coexistence between nations. Art. 9, c. 2 of the constitution includes it among the state aims ("To guarantee the welfare, development, security and protection, and equal dignity of individuals, nations, peoples, and communities, and to promote mutual respect and intracultural, intercultural and plural language dialogue"); while art. 98 defines its function with respect to the management of pluralism ("Cultural diversity constitutes the essential basis of the Pluri-National Communitarian State (*Estado Unitario Social de Derecho Plurinacional Comunitario*). The intercultural character is the means for cohesion and for harmonic and balanced existence among all the peoples and nations. The intercultural character shall exist with respect for differences and in conditions of equality").

Bolivian constitutional jurisprudence has also played a significant role in the development of the concept and its applicative scope. A leading case is certainly the *Poroma case*,[49] concerning the discrimination and expulsion by the community of a family whose son had been convicted of theft. Together with the offender, the parents and other siblings are first subjected to intimidation by the rest of the community, and then expelled.

The court orders an anthropological examination in order to carry out the interculturality test. The Court recognizes social pluralism, within which the supreme values that identify different nationalities must be integrated with each other in the light of the principle of interculturality. Legal pluralism, i.e., the community's ability to govern itself, with its own substantive and procedural rules,

[46] *Sentencia Corte Constitucional No. 134-13-EP/20, 22 de julio de 2020.*

47 *Dictamen No. 1-19- RC/19 de 2 de abril de 2019; Dictamen No. 5-19-RC/19 de 4 de setiembre de 2019; Dictamen N.o 9-19-RC/19 del 12 de noviembre de 2019; Dictamen No. 16-19-CP/20, de 8 de enero de 2020; Dictamen No. 6-20-RC/21, de 20 de enero de 2021.*

[48] *Sentencia No. 658-17-EP/23, de 9 de februero de 2023,* which makes reference to *Sentencia 112-14-JH/21, de 21 de julio de 2021.*

[49] *Sentencia Constitucional Plurinacional 1422/2012, Sucre, 24 de septiembre de 2012.*

guarantees the community's cultural identity, but is nevertheless subject to limits, i.e., respect for fundamental rights, which must be interpreted in an inter- and intra-cultural context. At this point, the Court explains how to interpret rights interculturally (Section IV.5). Intercultural interpretation is linked to the *vivir bien* paradigm. The latter is identified as an essential value and a primary goal of the State: from *vivir bien* derives both the recognition of cultural pluralism, which is also axiomatic pluralism, as reflected in Art. 8 of the Constitution, and the principle of intercultural interpretation as the main instrument for managing cultural diversity. It follows from these assumptions that the values of indigenous communities cannot be judged using the same tools and parameters as for the State's rights: "In this perspective, the paradigm of *vivir bien* is configured as a true pattern of the inter- and intracultural interpretation of fundamental rights, through which to understand the acts and decisions of the indigenous legal system, also constituting a plural guarantee aimed at avoiding disproportionate decisions contrary to the axiomatic guidelines of the Plurinational State of Bolivia".

According to the Court, the intercultural interpretation criteria of the *vivir bien* paradigm are: "(a) axiomatic harmony; b) decision according to one's own worldview; c) rituals consistent with procedures and norms traditionally used according to the worldview of each nation and native indigenous people; and, d) Proportionality and strict necessity".

The application of the intercultural test leads the Court to grant the petition filed by the expelled family, considering that the community acted disproportionately and not in accordance with its traditional values.[50]

In Bolivia, the Intercultural State finds its own institutionalisation in the Ministry of Cultures, Decolonization and Depatriarchalization (*Ministerio de Culturas, Descolonización y Despatriarcalización*). The mission of the Ministry, as described on its official website, is to be responsible for the implementation and promotion of policies for the promotion, recovery, and valorisation of the cultures of indigenous peoples, intercultural communities in the cities and Afro-Bolivian communities, as well as the processes of decolonisation and depatriarchalizing. The vision of the Ministry also mentions intercultural dialogue as a means of realising its mission, with a view to the 'transformation of the state'. The connection between interculturality, pluralism and the process of decolonisation is evident here, supporting the thesis that considers the Caring State a new model for the form of government.

We have already defined the spatial scope of our research, limiting our analysis to Latin American legal systems that have incorporated interculturalism into the legal formant. It is worth adding, however, that Colombia and Peru, where the state merely recognises and protects cultural diversity in the Constitution,[51] have developed a rich constitutional jurisprudence concerning the intercultural interpretation of rights. In Colombia, intercultural dialogue is expressly used as a method to support legal pluralism and indigenous legal autonomy.[52] As in Bolivia, Colombia has recently institutionalised the intercultural approach in legislative and administrative Acts, through peace agreements and their implementation process. In fact, the Peace Agreements contain an ethnic chapter and a *Protocolo de*

[50] Almost the same arguments used by the Court in this case can also be found in *Sentencia Constitucional Plurinacional 0778/2014, Sucre, 21 de abril de 2014*.
[51] Colombia: "art. 7. The State recognizes and protects the ethnic and cultural diversity of the Colombian Nation"; "art. 8. It is the obligation of the State and of individuals to protect the cultural and natural assets of the nation". Peru: "Art. 2, n. 19. [...] To his ethnic and cultural identity. The State recognizes and protects the ethnic and cultural diversity of the Nation".
[52] Bagni (2023b: 117).

Diálogo Intercultural (Protocol for intercultural dialogue), complemented by an Act on how to provide assistance and guarantee full compensation to indigenous victims of conflict.[53]

In Peru, the Constitutional Tribunal reaffirmed the multi-ethnic and 'multicultural' nature of the State, declared in Article 2 of the Constitution, and identified intercultural dialogue as one of the instruments to implement it, particularly in the famous *Tres Islas* case (Exp. No. 01126-2011-HC/TC).[54] As we have already seen in Bolivia, and to some extent in Colombia, also in Peru there is a tendency to institutionalise the intercultural principle, perhaps in this case due to the significant percentage of indigenous peoples in the country. Indeed, the organisation of the State provides for a *Vice Ministerio de interculturalidad* (a Vice-Ministry of Interculturality, within the Ministry of Culture). Despite the fact that its mission is mainly focused on the effectiveness of the indigenous peoples' right to prior consultation, the Vice-Ministry has drawn up a document entitled *"Política nacional para la transversalización del enfoque intercultural"* (National policy for mainstreaming the intercultural approach)[55] in which a detailed description of the principle of interculturality appears, applied to public policies for the management of pluralism.

5. Conclusions

The comparative analysis on the use of the concept of 'interculturalism' in legal documents has led us to two main observations: 1) its legal meaning is different from the anthropological and pedagogical meanings; 2) its interpretation is different from the Western legal framework and Latin American tradition.

Even if the legal concept of interculturalism derives from its anthropological and pedagogical meanings, it then extends far beyond the educational sphere (the prevailing field of pedagogy) and that of the recognition of the identity rights of indigenous peoples (the prevailing field of anthropology). Interculturalism affects the form of government, transversally characterising all public policies, with the aim of peacefully managing social coexistence in diversity. If, at an inter- and supra-national level, the concept remains a guiding principle of the policies of individual states, once it is incorporated into the sources of law (as in Canada and Latin America), it becomes preceptive, influencing the organisation of government (creating ad hoc ministries or departments) and the interpretation of the law by judges and civil servants.

However, there is a caesura between the application of the concept in the West and in Latin America, which essentially reflects the two meanings of interculturalism indicated by Catherine Walsh ("functional" and "critical"). In Latin America, interculturalism is an instrument for the decolonialisation of law and society, whereby it is linked to the emergence and progressive replacement of institutional and legal structures that have rendered indigenous peoples invisible for centuries. In Europe and North America, on the other hand, interculturalism aims to include the 'other' (usually a migrant), in the liberal socio-economic paradigm. It repudiates the 'ghettoization' effect typical of the

[53] *Decreto Ley 4633 de 2011 Por medio del cual se dictan medidas de asistencia, atención, reparación integral y de restitución de derechos territoriales a las víctimas pertenecientes a los pueblos y comunidades indígenas.*
[54] Yrigoyen Fajardo (2013).
[55] *Política nacional para la transversalización del enfoque intercultural*, Ministerio de Cultura, Lima, 2017.

multicultural model, to promote instead a concrete form of inclusion, integrating elements of alien cultures into the local model, but always prioritizing the values of the liberal-democratic tradition.

If, at first sight, the two models of interculturalism appear difficult to integrate, due to the diversity of socio-historical contexts and theoretical premises, our analysis shows how a greater understanding and reciprocal knowledge of the two different approaches could instead provide useful insights to strengthen each model.

In Latin America, on the one hand and from a critical perspective, the intercultural state still remains predominantly on paper, as evidenced by ongoing social conflicts and the precarious national jurisprudence regarding the limits to legal pluralism. The persisting racism towards the indigenous and Afro population makes these countries prioritise racial criteria as a precondition for intercultural policies, including territorial claims and legal pluralism. However, the European example of the programme on intercultural cities could help Latin American countries to overcome the failure in the implementation of indigenous lands, territories, municipalities or districts.

Moreover, looking at the Latin American Intercultural State from Europe, and noting its enormous subversive potential, one hopes that it could evolve beyond its historical origins, to embrace other historically invisible subjects, such as immigrant foreigners. Otherwise, Latin American constitutionalism will repeat the same error as its European counterpart, excluding some subjects from the status of citizens.

On the other hand, in Europe we should understand "indigenousness" as a human characteristic detached from the colonial phenomenon, but linked to the common characteristic of every human being to produce culture in a given space.[56] As a consequence, the process of decolonising law could also be undertaken in the West,[57] and should aim at accepting both collective and individual identities, but without reifying the collective one. In this way, Europe could counteract the new sectarian, segregationist, nationalist and racist tendencies that have emerged. In fact, when critical interculturalism asserts the need to go beyond the legal structures of the former empire, it encourages to rethink the traditional categories of constitutionalism, such as those of state, power, sovereignty, and rights. These have contributed, in the initial illusion of equality, to generating exceptions within the concept of citizenship, which only makes sense if citizenship is considered to be universal. Understood in this way, Andean critical interculturalism could offer useful ideas and tools, not only for other contexts of decolonization,[58] such as Africa or Asia, but also in a broader sense, with respect to any kind of imposition of an assimilationist dominant culture.

Bibliography

Bagni, Silvia 2023a. "*Forms of State in Latin America*", in S. Bagni, S. Baldin (eds), *Comparative Latin American Constitutionalism*. Trieste: EUT: 45-70, open access: https://www.openstarts.units.it/server/api/core/bitstreams/4944da4a-e57c-411b-884c-9ffe658aa564/content.

[56] Ricca (2023: 380).
[57] Garay Montañez (2022: 33).
[58] Mignolo, Walsh (2018: 59).

Bagni Silvia 2023b. "*Rappresentanza e rappresentazione del pluralismo etnico e linguistico in un contest interculturale e plurinazionale*", in R. Toniatti (a cura di), *La rappresentanza delle minoranze linguistiche*. Trento: Università di Trento: 110-133, open access: https://iris.unitn.it/retrieve/ea06c4e0-3017-4ece-a933-9c77e1697f71/La%20rappresentanza%20delle%20minoranze%20linguistiche.pdf.

Bagni, Silvia 2017. "*Lo Stato interculturale: primi tentativi di costruzione prescrittiva della categoria*", in S. Bagni, G.A. Figueroa Mejía, G. Pavani (coords), *La ciencia del derecho Constitucional comparado. Estudios en homenaje a Lucio Pegoraro*. II, México: Corte Suprema: 137-190.

Bouchard, Gérard, Taylor, Charles 2008. *Building the future. A Time for reconciliation*. Gouvernement du Québec, https://red.pucp.edu.pe/wp-content/uploads/biblioteca/buildingthefutureGerardBouchardycharlestaylor.pdf.

Briones, Claudia 2020. *Conflictividades interculturales. Demandas indígenas como crisis fructíferas*. Wetzlar: Calas.

Cabrero Ferran (coord.) 2013. *Ciudadania intercultural. Aportes desde la participación política de los pueblos indígenas en Latinoamérica*. Nueva York: UNDP.

Ceccherini, Eleonora 2008. "*Multiculturalismo (dir. comp.)*", in A. Angeletti, R. Bifulco, A. Celotto, M. Olivetti, E. Palici di Suni, *Digesto delle Discipline pubblicistiche*, Milano: Utet.

Dussel, Enrique 2006. *Filosofía de la cultura y de la liberación* México: Unam.

Eco, Umberto 1973. *Segno*, Milano: Isedi.

Emongo, Lomomba, White, Bob W. 2014. *L'interculturel au Québec. Rencontres historiques et enjeux politiques*. Montréal: PUM, https://books.openedition.org/pum/5430 .

Estupiñán-Achury, Liliana, Balmant Emerique Lilian, Romero Silva, Mateo (eds) 2023. *Constitucionalismo de la resistencia y la integración desde y para Abya Yala*. Bogotà: Universidad Libre.

Fletcher, George P. 1998. *Comparative Law as a Subversive Discipline*, in *The American journal of comparative law*, vol. 46, n. 4: 683-700

Garay Montañez, Nilda 2022. *Eurocentrismo y constitucionalismo: sobre lo genérico y lo no occidental*, in *Rev. gen. der. púb. comp.*, n. 31: 1-34.

Ghosh, Ratna 2011. *The liberating potential of multiculturalism in Canada. Ideals and realities*, in *Canadian issues [Special Edition]*: 3-8.

Gutiérrez, Gustavo 1972. *Teologia della liberazione. Prospettive*. Brescia: Queriniana.

Levrau, François, Loobuyck, Patrick (eds.) 2017-2018. Collection *Multiculturalism-Interculturalism*, in *Comparative Migration Studies*, https://www.springeropen.com/collections/multiintercult.

Mignolo, Walter D., Walsh, Catherine E. 2018. *On Decoloniality. Concepts, Analytics, Praxis*, New York: Duke University Press.

Modood, Tariq, Meer, Nasar 2012. *Interculturalism, Multiculturalism, or Both?*, in *Political Insight*: 30-33.

listi, n. 4, 2015, p. 2).

Modood, Tariq 2007. *Multiculturalism*, in G. Ritzer (ed.), *Blackwell Encyclopedia of Sociology*, Hoboken: Blackwell Publishing.

Muir-Watt, Horatia 2000. *La fonction subversive du droit comparé*, in *Rev. int. droit. comp.*, n. 3: 503-527.

Pacheco Rodríguez, Miguel Ángel 2021. "*Hermenéutica y diálogo intercultural*", in F.J. Díaz Revorio, M. González Jiménez (dirs), *Interculturalidad, derechos de la naturaleza, paz*. Valencia: Tirant lo Blanch: 13-40.

Pasqualotto, Giangiorgio 2008. "*Nota introduttiva. Cultura, multiculturalismo, intercultura*", in G. Pasqualotto (a cura di), *Per una filosofia interculturale*, Milano/Udine: Mimesis: 1-2.

Pegoraro, Lucio 2014. *Diritto costituzionale comparato. La scienza e il metodo*, Bologna: BUP.

Piciocchi, Cinzia 2015. *From strategies to constitutions: identity, multiculturalism and interculturalism as legal values. A comparison between Europe and the Andean countries*, in *Revista general de Derecho público comparado*, n. 17: 1-23.

Proulx-Chénard, Samuel 2021. *Interculturalism*, in *The Canadian Encyclopedia*, 22 June 2021, *Historica Canada*, www.thecanadianencyclopedia.ca/en/article/interculturalisme.

Ramón Valarezo, Galo 2008. *Plurinacionalidad o interculturalidad en la Constitucion?*, www.cebem.org/cmsfiles/archivos/plurinacionalidad-19.pdf.

Ricca, Mario 2008. *Oltre Babele. Codici per una democrazia interculturale*. Bari: Dedalo.

Ricca, Mario 2013. *Culture interdette. Modernità, migrazioni, diritto interculturale*. Torino: Bollati Boringhieri.

Ricca, Mario 2023. *Intercultural Spaces of Law. Translating Invisibilities*. London/New York: Springer.

Santos, Boaventura de Sousa 2002. *Para uma sociologia das ausências e uma sociologia das emergências*, in *Revista Crítica de Ciências Sociais*, n. 63: 237-280.

Santos, Boaventura de Sousa 2012. "*Cuando los excluidos tienen Derecho: justicia indígena, plurinacionalidad e interculturalidad*", in B. de Sousa Santos, J.L. Exeni Rodríguez (eds), *Justicia indígena, plurinacionalidad e interculturalidad en Bolivia*. Quito: Abya Yala.

Santos, Boaventura de Sousa 2014. "*Más allá del pensamiento abismal: de las líneas globales a una ecología de saberes*", in B. de Sousa Santos, M.P. Meneses (eds.), *Epistemologías del Sur. Perspectivas*. Madrid: Akal: 21-65.

Santos, Boaventura de Sousa 2021. "*El derecho de los excluidos: justicia indígena, plurinacionalidad e interculturalidad en Bolivia y Ecuador*", in B. de Sousa Santos, S. Araújo, O. Aragón Andrade (orgs.) *Descolonizando el constitucionalismo. Más allá de promesas falsas o imposibles*. Madrid: Akal: 363-404.

Scarpelli, Uberto 1969. *Semantica giuridica*, in *Novissimo Digesto Italiano*, vol. 16.

Sealy, Thomas 2018. *Multiculturalism, interculturalism, 'multiculture' and super-diversity: Of zombies, shadows and other ways of being*, in *Ethnicities*, vol. 18, n. 5: 692-716.

Taylor, Charles 2012. *Interculturalism or Multiculturalism?*, in *Philosophy and Social Criticism*, vol. 38, n. 4-5: 413-423.

Trujillo, Julio Cesar. 2012. *Plurinacionalidad y Constitución*, in B. de Sousa Santos, A. Grijalva Jiménez (eds.), *Justicia indígena, plurinacionalidad e interculturalidad en Ecuador*. Quito: Fundación Rosa Luxemburg/AbyaYala: 308.

Villanueva Flores, Rocío 2015. *La interpretación intercultural en el Estado constitucional*, in *Revista Derecho del Estado*, v. 34: 289-310.

Walsh, Catherine 2012. *Interculturalidad y (de)colonialidad: Perspectivas críticas y políticas*, in *Visão Global*, v. 15, n. 1-2: 61-74.

Yrigoyen Fajardo, Raquel 2013. *Litigio estratégico en derechos indígenas. La experiencia de la Comunidad Nativa Tres Islas (Madre de Diós, Perú)*, Lima: IIDS.

Email: silvia.bagni@unibo.it

Published online on December 16, 2023