The constitutionalisation of indigenous culture as a new paradigm of the caring state

Silvia Bagni

Dipartimento di Scienze giuridiche,
Bologna University,
via Zamboni 27/29, 40126 Bologna, Italy
Email: silvia.bagni@unibo.it

Abstract: The air of freshness blown into the debate on alternative and sustainable development by the concept of *buen vivir* is beginning to produce discussions even in the juridical field, involving in particular constitutional comparativists. Ecuador and Bolivia have constitutionalised this concept since the constitutional reforms of 2008 and 2009, but if we try to understand this phenomenon under comparative lenses, we may find traces of institutional change even in countries with different cultural and historical backgrounds, such as Bhutan and South Africa. All these countries have been interested in processes of constitutional (re)foundation and chose similar methods and contents for their new constitutional systems. Comparing all the common elements in the experiences analysed, even if aware of the different contexts, I propose to read them as the germinal phase of a new form of state, the caring state, where the state cares for each member of the community, everyone cares for the other and both the state and each individual care for the environment as a living part of the biotic community.

Keywords: *buen vivir*; new constitutionalism; form of state; *ubuntu*; gross national happiness; rights of nature; caring state; interculturalism; chthonic tradition; indigenous culture.

Reference to this paper should be made as follows: Bagni, S. (2015) 'The constitutionalisation of indigenous culture as a new paradigm of the caring state', *Int. J. Environmental Policy and Decision Making*, Vol. 1, No. 3, pp.205–226.

Biographical notes: Silvia Bagni is a Researcher in Comparative Constitutional Law, University of Bologna, Italy. Her research areas include Latin America, constitutional transition, popular participation; constitutional justice.

This paper is a revised and expanded version of a paper entitled 'From the welfare state to the caring state?' presented at the 25th Annual EAEPE Conference 'Beyond (de)industrialization: The Future of Industries?', Paris, 7–9 November 2013.

1 Introduction

The austerity policies implemented by European Governments to tackle the economic crisis have been justified to the citizens affirming their character of inevitability, as

demonstrated by the particular language used in political and legal discourse by our representatives and legislators. Let us take as an example the Italian process of implementation of the so called Fiscal Compact Treaty in 2012. Prime Minister Mario Monti, to justify the measure to the Senate, affirmed: "L'introduzione di meccanismi più rigidi di risanamento va evitata, ma la regola della riduzione del debito di un ventesimo della percentuale eccedente è *ineludibile*" (stress added, press release, Senate, 663rd session, 25 January 2012).

As for the language of the law, the preamble of the treaty is enlightening: "Bearing in mind that the *need* for governments to maintain sound and sustainable public finances and to *prevent* a general government deficit becoming excessive is of *essential importance* to safeguard the stability of the euro area as a whole, and accordingly, *requires* the introduction of specific rules, including a 'balanced budget rule' and an automatic mechanism to take corrective action; conscious of the *need* to ensure that their general government deficit does not exceed 3% of their gross domestic product at market prices and that their general government debt does not exceed, or is sufficiently declining towards, 60 % of their gross domestic product at market prices". By the way, nobody explains why we should all be 'conscious' of these necessities, that are simply presented as a matter of fact, and not measures whose implementation must be justified.

This attitude simply wants to keep alive what has seemed to many a model of development in agony, as well as deeply unfair, at least if we look at figures. Although 'austerity policies', last ISTAT report on occupation in Italy shows unemployment in February 2015 has reached up to 12.7% (European average is 11.2%), with a trend constantly increasing since 2008, whereas juvenile unemployment rate is at 42.6%. From a worldwide perspective, OXFAM briefing paper n. 178 of the 20th of January 2014, 'Working for the few. Political capture and economic inequality', demonstrates that almost half of the world's wealth is now owned by just one percent of the world population and that the bottom half owns the same as the richest 85 people in the world.

From a legal and constitutional point of view, economic policies affect what is called the 'form of state'. It is an expression almost unknown in common law literature, but very familiar in continental countries. In comparative public law, it is one of the main criterion used to classify all legal systems around the world. The concept of form of state wants to describe the relationship between authority and liberty, state and citizens, i.e., the system of principles and values sanctioned by the constitution that must influence public policy-making.

Historical evolution of forms of state in Europe starts from absolute monarchy in the 17th century; it changes after French and US revolutions into liberal state, built around the principles of separation of powers and constitutional recognition of formal equality before the law and civil liberties such as property, life, freedom of expression, religion, reunion, etc.; finally, it turns into social-democratic state or welfare state, with the universalisation of suffrage and the rise of mass parties, during the 20th century. From an institutional point of view, the constitutive elements of this form of state are rigid constitutions and constitutional justice; as a matter of principles, the values enshrined in the democratic constitutions are those of substantive equality and solidarity, through the defence of social, economic and cultural rights, such as work, health, social security, education.

In my opinion, recent legal reforms implemented by European countries and institutions, supposedly to face the economic crisis, have deeply affected this conceptualisation, because they are undermining the legal foundations of the

social-democratic form of state, dismantling the guarantees of social rights, taking Europe back in history towards the form of liberal state.

Having in mind these premises, the question I want to face in this article is if this return back to liberal principles of government is so ineludible as they are trying to convince us in Europe. For instance, what is happening in the rest of the world?

The purpose of this survey is to provide evidence that, at least from a comparative constitutional perspective, some countries are experimenting different ways to overcome the crisis, implementing first of all constitutional, legal and institutional reforms, along with economic ones, that could represent a step *forward* in the theory of the forms of state.

The experiences addressed to are: the so called *nuevo constitucionalismo andino* (Carducci, 2012; Carbonell, 2004, 2007), with particular attention to the constitutions of *buen vivir*, especially the Ecuadorian one; the South African Constitution, as integrated by the Constitutional Court, which has recognised the traditional concept of *ubuntu* as one of the values and founding principles of the new democratic order; and finally the new Constitution of Bhutan, which has introduced the concept of 'gross national happiness'. These countries, instead of following the actual mainstream in policy making of Western states, are trying to build a more inclusive society and institutions more deeply concerned with the human needs of its members. I will call it the 'caring state', meaning a state that takes care (Bauman, 2002), where the public takes care of the private, the individuals care for one another, and both take care of the environment in which we live.

The basic principles that characterise this new constitutional order are: interculturality and popular participation. From these two pillars derive other fundamental values that theoretically imply the shift of the form of state not back to liberal standards, but forth to a new paradigm.

As far as the first element is concerned, references to *buen vivir*, *ubuntu* and Buddhism realise what Article 1 of the Ecuadorian Constitution proclaims as an 'intercultural, plurinacional' state[1] and Article 1 of the Bolivian Constitution 'Estado Unitario Social de Derecho Plurinacional Comunitario', where different cultures, colonial and indigenous, not only coexist, but mutually influence each other. Finally, the conquering people perceive the value of chthonic culture (Glenn, 2011: the expression indicates the culture of originary people, before colonisation or Western civilisation) as a contribution to its own, "como algo con lo cual los ladinos sientan también relación, y algún tipo de relación, no ya del corte 'folclórico' o de 'atracción turística', sino de potenciar para construir un Estado con base en la riqueza de autonomías éticas con repercusión en la estructura política" [Ordóñez Cifuentes, (2008), p.258].

The proposals for change that the indigenous movement has been promoting for years are in fact not only related to the original question of recognition of nations, but aim to "generar consensos en el contenido, en los objetivos comunes, hacia la convergencia en una agenda unitaria, un mínimo común" [Macas, (2011), p.47]. In this sense, interculturality should lead all the peoples to participate at equal conditions in the process of nation-building. The result of this shared process is the constitutionalisation of chthonic worldviews, such as *sumak kawsay*, *ubuntu* and principles of Buddhist philosophy, founded on a new relationship between man and the environment, in search for harmony, and a relationship between people based on solidarity, mutual recognition,

consent, intergenerationality, communitarianism and respect, that implies also a strong sense of responsibility towards future generations.

From interculturality derive other fundamental values and principles of the caring state:

1 the recognition of collective rights based on group membership, owned by indigenous people or by other groups

2 new subjects of law, such as nature

3 the idea of universal citizenship, opposed to citizenship as a status (Art. 416, par. 6 Const. Ecuador), so that the entitlement of constitutional rights would depend solely on the mere basis of belonging to the human race

4 proposal for a new economic model, that includes development indexes based on a holistic assessment of human life, opposing the chthonic ideal of 'good life' or 'life with dignity' to the Western idea of wellness or even fitness.

As far as popular participation is concerned, the real novelty is that this is no more a methodology that government may choose or not to adopt or to encourage. It is indeed a fundamental principle of the form of state, used during the constituent process and constitutionalised as an autonomous power, a right for citizens and an obligation for the public administration at all levels of decision-making.

The three experiences will be analysed in order to underline the above mentioned elements, in the light of indigenous tradition, highlighting how this makes them converge towards a new form of state that I have called the caring state, which rediscovers the bonds between man and nature, promotes the communitarian dimension of human rights and achieves an intercultural society.

2 The intercultural state: from the right to be different to 'diversity' as a common good

The recent Andean Constitutions have adopted an intercultural approach (de Sousa Santos, 2012), based upon the possibility offered to all the communities that form the plurinational state to build together a new common identity, starting from the dialogue between the original peoples and the old conquerors.

It is essential to understand what is the innovative aspect of this approach. European colonists imposed the paradigm of assimilation to Indios. Only after independence, the paradigm of the relationship with originary nations changed to the recognition and protection of indigenous rights, within a multicultural and multiethnic state, where, however, the different cultural and legal systems coexisted but did not communicate (Lanni, 2011).

This approach, which assumes a form of dominance by Western culture on the 'others', can also be detected in some international documents in defence of indigenous rights, especially through the subordination of traditional law to the limit of compliance with human rights doctrine, such as in the 2007 UN Declaration on the Rights of Indigenous Peoples (Art. 46) or in the 1989 ILO Convention n. 169 concerning Indigenous and Tribal Peoples (Art. 35). It is not a problem about contents but on method, as it requires to interpret a culture and legal tradition through parameters of

another one, the two often completely incompatible (Pegoraro, 2011). The recognition of a particular status for indigenous peoples, which includes legal pluralism, can in fact be thwarted by subordination clauses to international 'human rights' standards, born in the Western tradition (Aparicio Wilhelmi, 2011). Just think, for example, at the administration of justice and its essential principles: the two levels of jurisdiction, the right to defence, the right to an independent and impartial court. How to apply them in a tribal context? Another example: how to fit the respect to *Pachamama*, typical of Latin American indigenous traditions, with the theory of human rights? The basis of the two legal systems are totally different: whereas the Western legal culture is based on the concept of subjective right, the indigenous one is instead often a communitarian tradition, which has its hub in collective rights, especially those related to the land.

Glenn (2011) finds that there has been implicit and explicit opposition to put in writing the chthonic legal tradition, especially for substantial reasons related to the desire to let it remain a legal system without a caste of interpreters, but the constitutionalisation of traditional worldviews does not affect the principle of orality. It only requires judges and legal practitioners of the Western tradition to update themselves in respect to local law, imposing an intercultural interpretation of constitutional dispositions. This forces them to confront with a different logic, no longer binary, Aristotelic, systematic, but multivalent, inclusive and communitarian, paving the way for 'sustainable diversity'.

From a legal point of view there is no shared definition of 'indigenous people' (Mazza, 2004), nor of 'minority' (Palermo and Woelk, 2008).

The first attempt to define the word 'indigenous' in an official document of the UN is found in the report 'Study of the problem of discrimination against indigenous populations' by the Special Rapporteur of the UN Economic and Social Council José Martínez Cobo in 1983. From that time on, the UN engaged in creating a path to legal definition of the rights of indigenous peoples, which culminated in 2007 with the entry into force of the declaration, which, however, does not define the term 'indigenous'. Similarly, the ILO Convention n. 169 does not provide a definition but only certain criteria for the identification, considering the self-recognition as the main criterion to follow.

The rights of indigenous peoples can not even be totally identified with the rights of 'minorities'. First, indigenous peoples represent a 'majority' in some situations, such as in Bolivia or Guatemala (Ordóñez Cifuentes, 2008) or South Africa. Secondly, one of the priority claims of indigenous peoples is self-determination, a territorial right that does not usually regard the other types of minorities (Mastromarino, 2010). Kymlicka bases precisely on this criterion the well-known distinction between multicultural and poliethnic states, arguing that where in the first the aspiration of the group is to maximise the difference, for members of immigrant minorities the aim is instead to achieve integration (Kymlicka, 1999).

Actually, it could be argued that in both cases the setting point is the same, namely the recognition and appreciation of differences. The partial failure of multicultural policies only proves that the realisation of this goal through the claim of individual rights is not sufficient to produce interculturality.

The right to be different means that 'we' (the dominant culture) recognise 'them' (the minority or indigenous). The approach of the *nuevo constitucionalismo*, instead, builds a 'we' joining on an equal base 'us' and 'them', forming together the multinational state. This has been done, and here is the crucial element, through the constitutionalisation of

chthonic legal culture, not just as rights of a minority but as principles applicable to everyone.

In the case of Bhutan, instead, the constitutionalisation of local traditions plays a mediating role in the transition from autocratic to democratic form of state, facilitating the integration between the two legal systems and avoiding crisis of rejection by the community towards alien social structures. If from a historical point of view, Bhutan has not experienced colonisation by Western powers, top-down imposition of foreign legal models might have generated similar effects and reactions. Therefore, also the Bhutanese experience can be read with the lens of interculturalism in a diacronic comparison, notwithstanding the absence of any minorities' problem[2].

3 The role of tradition in the construction of the caring state

3.1 Buen vivir in the Andean region: attempts of definition

Buen vivir is an open concept, not easily definable, still under construction:

> "es un espacio de encuentro de diferentes culturas, tanto aquella del *sumak kawsay* como las de feministas o biocéntricos. No es un mero ejercicio multicultural o de yuxtaposición de culturas, sino que es un encuentro intercultural, entendiendo que existe un plano de igualdad entre distintas culturas, pero que a la vez opera un decolonialidad en admitir la superioridad de los saberes europeos." [Acosta and Gudynas, (2011), p.81]

First, even in Latin America, we should speak of *buenes vivires*, because there are differences between the various peoples. This richness is recognised by the Bolivian Constitution, which refers explicitly to the traditions of many indigenous peoples[3]. The Constitution of Ecuador, from this point of view, is more monolithic, making explicit reference only to Kichwa *sumak kawsay*.

Outside Latin American cultures, the concept refers to worldviews alternative to development, so it has been identified as an 'anti-hegemonic' concept (Hidalgo Flor, 2011). The starting point for understanding *buen vivir* is the transition from an anthropocentric conception of the relationship between man and nature, which finds its greatest development in the Renaissance culture and in Catholic personalism, to a biocentric one, which refers to the new ecological thinking. Nature is no longer perceived as Enemy and then as an object to dominate and manipulate through the myth or technique, but rather as part of a whole in balance and harmony.

Beyond identification or not with a particular cultural system, it can be said that common elements of *buen vivir* are:

1 Representing an alternative to development, and not a mere alternative conception of development. It rejects the Western capitalist economic model, based on the idea of history as linear progress and on an index of well-being based on the relationship between increasing production, expenditure and growth, which has led to a culture of inequality. It is a holistic vision that commits man to realise all the material and spiritual conditions for a good life. It is a model that recovers the idea of solidarity and relativises the value of parameters such as productivity and efficiency.

2 Postulating a new and respectful relationship between human beings and nature. The latter, in the Constitution of Ecuador, becomes for the first time in the history of

> constitutionalism, subject of law (Art. 71 et seq.) (Larrea Maldonado, 2011).
> It refuses to understand nature as a 'resource' to be exploited, exported, marketed, or as 'natural capital'. It proposes a model of land use, capable of maintaining biodiversity, through a balanced use of natural resources.

In the constitution, *buen vivir* is embodied in a group of integrated and sustainable measures, in economic, political, socio-cultural and environmental fields, which commit the state to implement actively objectives that lead to improving: the quality and the hope of life; just and solidal economy; popular participation in the governance of public affairs; nature conservation and a healthy environment; Latin American integration; protection and promotion of cultural diversity. It is a new type of constitutionalism, which, by introducing some fundamental values partially different from those of the democratic state and developing others in a new direction (such as the dignity of the person, the environment, political participation) points strongly towards the construction of a new form of state. The engine for it all is definitely popular participation in political life through the direct exercise of sovereignty, as we saw during the constituent processes of Venezuela, Ecuador and Bolivia, and as appears embedded in their new constitutions. However, whereas in Bolivia the constitutional process has had a very strong thrust by the indigenous movement and helped to strengthen its position as the leading subject of national policy, the role of the original nationalities in Ecuador, although valued as much in the constitutional process as in the subsequent governmental action, has not brought the movement to positions of prominence in the political landscape.

Another fundamental character of a policy based on *buen vivir* is the refusal of economic growth as the sole objective of public policies in favour of the pursuit of a better quality of life for every member of the community. The quality of life is no longer measured only in strictly economic terms, but in a holistic dimension, based on cultural, social, environmental factors. Such a consideration of the value of human life was somehow already present at the origins of Western constitutionalism[4] and today it begins to reassert itself in some constitutional systems (see Section 5).

The biocentric perspective (Gudynas, 2009) linked to the concept of *buen vivir* implies, in the constitutional discourse:

1 courageous stances with respect to particular issues, e.g., ban on the production and use of transgenic food (Art. 15), prohibition of recognition of intellectual property rights on ancestral knowledge (Art. 57, c. 1, no. 12), prohibition of mining in protected areas (v. *infra* the Yasuní project), such as those in which peoples in voluntary isolation live (Art. 57, c. 1, no. 21)

2 completely new provisions, recognising rights to new subjects of law, such as nature itself, invoked in both Spanish and Kichwa language (*Pacha Mama*, Art. 71 ff.).

This approach is in itself disruptive, since it allows to introduce into the subject on environmental protection, worldviews different from the Western ones, placing them all on the same level. In addition, it is also a new perspective in the theory of subjective rights. Indeed, in the Western legal culture, the right to a healthy environment has been recognised as a third generation right, i.e., a right to a public performance. On the contrary, the recognition of nature as a subject of law allows legal action even by persons who were not directly damaged or injured by the violation. In our legal systems, this

perspective has only been discussed in theory in respect of animals' rights (Battaglia, 2002; Rescigno, 2005).

This position does not belong to all of Latin America. Venezuela, for example, married an economic policy that fits fully in the Western development model. The only country that comes close to Ecuador is Bolivia, where nevertheless there are strong tensions and internal contradictions, which, in hindsight, also appear in Ecuador, especially in relation to the model of exploitation of natural resources, commonly called neo-extractivism.

3.2 Buen vivir as a principle or a constitutional provision

The Constitutions of Ecuador and Bolivia show a different approach to *buen vivir*. In fact, while in Bolivia the *vivir bien* (*suma qamaña*) is inserted between the principles, values and goals of the state (Chapter II, Art. 8), so as an extralegal element that must inspire the public conduct, the Ecuadorian Constitution builds *buen vivir* both as a principle as much as a statute of rights (Title II, Chapter II '*Derechos de buen vivir*'), which the state must therefore enforce.

Buen vivir (*sumak kawsay*) in Ecuador is mentioned in the constitution 21 times (compared to only seven references in Bolivia), the first in the preamble, as a target for the construction of a new form of coexistence between citizens, based on diversity and harmony with nature. Later, we find it as one of the 'primordial duty of the state' (Art. 3, par. 1, no. 5), and immediately after, in Title II dedicated to fundamental rights. The first group of rights is 'derechos de buen vivir': to water (Art. 12), to healthy and sufficient food (Art. 13), to a healthy environment (Art. 14), to an intercultural, inclusive, diverse and participatory information and communication, which includes the right to access to information and technology (Art. 16), to cultural identity (Art. 21), to leisure (Art. 24), to benefit from the application of scientific progress and ancestral knowledge (Art. 25), to education (Art. 26), to a safe and healthy habitat and dignified housing (Art. 30), to a sustainable urban space (Art. 31), understood as the right to participate in its governance and to property rights with social and environmental function, to health, including sexual and reproductive health (Art. 32), to labour (Art. 33) and social security (Art. 34). This chapter therefore recognises as relevant to *buen vivir* a large part of social rights and third generation rights, which, however, are further enhanced in subsequent chapters through the recognition of rights to social groups (children, adolescents, young adults, pregnant women, people with disabilities, elderly, migrants[5], prisoners, consumers) and communities, peoples and nations as such.

From the concept of *buen vivir* also derive duties and responsibilities of citizens: "Ama killa, ama llulla, ama shwa. No ser ocioso, no mentir, no robar" (Art. 83, c. 1, no. 2), but above all "Promover el bien común y anteponer el interés general al interés particular, conforme al buen vivir" (Art. 83, c. 1, n. 7). It should be read in connection with Art. 85, which constrains the orientation of public policies to give effect to *buen vivir*, according to the principle of solidarity. It therefore gives prevalence to the communitarian perspective over the individualistic one, even if it imposes an attempt to reconcile the interests in conflict, but, "sin perjuicio de la prevalencia del interés general sobre el interés particular".

Finally, *buen vivir* plays a key role in the economic constitution of the country, since it pre-orders and reinforces the development scheme of the state to specific objectives: "El régimen de desarrollo es el conjunto organizado, sostenible y dinámico de los

sistemas económicos, políticos, socio-culturales y ambientales, que garantizan la realización del buen vivir, del sumak kawsay" (Art. 275, c. 1). However, if the first recipient of the provision is the state, which has to plan the country's economic policy in that direction, communities, peoples and nations are also called to actively participate through the exercise of their responsibilities "en el marco de la interculturalidad, del respeto a sus diversidades, y de la convivencia armónica con la naturaleza" (Art. 275, par. 3). Again, this is a partially new setting in the landscape of constitutional law. For example, also the Italian Constitution recalls the duty of solidarity, but it does so from an individualistic perspective, as a mean for the self-development of the personality ("La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo, sia nelle formazioni sociali ove si svolge la sua personalità, e richiede l'adempimento dei doveri inderogabili di solidarietà politica, economica e sociale").

The Ecuadorian Constitution joins the individual and the community, emphasising that its main scope is the common good, which of course always include the individual good. This view is confirmed by Art. 277 that by listing the general duties of the state for the realisation of *buen vivir*, indicates a triad of beneficiaries: individuals, communities, nature. When she speaks of *buen vivir* the constitution never refers to 'citizens'. I do not think this is a coincidence: the paradigm of citizenship coincides today, in modern social-democratic systems, with the politics of exclusion, of mere formal equality, of the neutralisation of differences through abstraction. This is exactly the model that *buen vivir* wants to overcome.

Buen vivir as a key principle of the Ecuadorian economic model finds a concrete definition in the chapter on 'Economic Sovereignty'. Article 283 defines the economic system as 'social y solidal'. Its main goal is the production and reproduction of the material and immaterial conditions that make *buen vivir* possible. We find the typical liberal economic system (public, private and mixed), side by side with popular and solidal economy. It is perhaps worth pointing out, in a time when within the European Union, the economic policies have imposed even constitutional amendments in order to guarantee the containment of public debt, that Art. 290 recognises national sovereignty, fundamental rights and *buen vivir* as limits for the legitimacy of public debt and expressly prohibits the nationalisation of private debts.

Finally, the constitution defines a 'Régimen del buen vivir', divided into two spheres of action: social rights and the rights of nature, already set forth in Chapter VII of Title II. Pursuant with Art. 71, Nature (*Pacha Mama*), defined as the place where life reproduces and develops itself, has the right to fully self-respect of its existence and its vital cycles, structure, functions and evolutionary processes. This right can be implemented by any individual, community, people or nation, independent from the fact that he has suffered damages on a personal basis. The state is required to apply the precautionary principle and possibly to impose restrictions with respect to activities that may lead to the extinction of species, the destruction of ecosystems or permanent alteration of life cycles (this requirement is supplemented by that of consultation with indigenous communities on any decision affecting their territory, their existence and their lifestyle, Art. 57). The introduction of genetically modified organisms and material that can alter in a definitive way the national genetic heritage is totally prohibited (Art. 73). Individuals, communities, peoples and nations will be able to enjoy the natural resources and the environment, but environmental services should remain within public ownership (Art. 74).

Only in Ecuador, nature is recognised as a subject of law, while the 'ecological constitution' in Bolivia develops only through the paradigm of third-generation rights, which are always individual rights (the right to a healthy environment, the right to health, etc.), ie. legal situations concerning the development of individual identity.

The test in order to verify the effective implementation of *buen vivir* and the promotion of an alternative lifestyle is undoubtedly how the state regulates the exploitation of natural resources. Whereas, as I said above, Venezuela and Bolivia opted for patterns consistent with liberal economic principles and extractivism, Ecuador tried, at least at the beginning, to give a strong signal towards the gradual abandonment of an economic model primarily based on the unconditional exploitation of subsoil resources.

In 2007, President Correa presented, at the General Assembly of the United Nations, the Yasuní ITT project. With this initiative, Ecuador pledged to give up oil extraction in the territories of Ishpingo-Tambococha-Tiputini, included in the Yasuní National Park in the Ecuadorian Amazon, with the effect of preventing the release into the atmosphere of 407 million tons of CO_2, equal to the annual production of greenhouse gases in countries such as Brazil or France. The area is the most important reserve of biodiversity on the planet and the home of the two indigenous communities in voluntary isolation in Ecuador. In return, the government asked the international community for an economic partnership in the project, amounting to half the value of the revenue that the state would have lost by renouncing to the extraction (estimated in 3.6 billion US dollars). A fund managed by the United Nations Program for Development (UNDP) would have been created, to which states, international organisations, NGOs and individuals could contribute. The income would have been used to finance projects related to the exploitation of clean and renewable energy, reforestation, preservation of the natural Park, research and development on sustainable energy systems, development of local farming communities.

Unfortunately, the international community did not support the project and in August 2013 President Correa asked the National Assembly to vote the declaration of public interest in the exploitation of the ITT area, constitutionally necessary to begin oil extraction in the natural reserve.

The change in the productive matrix remains one of the main challenges for this country in order to really accomplish the high objectives that the realisation of *buen vivir* implies.

4 *Ubuntu* in the South African constitutional order

In South Africa, the constitution-making process that from the Chart of 1993 led to the adoption of the Constitution of 1996, was characterised by the desire to overcome the past through reconciliation (Lollini, 2005; Federico and Fusaro, 2006), with a strong and essential appeal to the value of human dignity, conceived also in its communitarian dimension, deeply rooted in indigenous culture, through the Zulu idea of *ubuntu* [Dau, (2011), pp.35–36]. In order to understand the contribution of this chthonic tradition to the construction of the new South African legal system, it is necessary to understand *ubuntu* first as a philosophical and ethical concept, then as a legal principle. Such a study will lead us to discover various points of contact with the Kichwa concept (Cornell, 2008a) of *buen vivir* and, more generally, with the Ecuadorian constituent experience.

Ubuntu is the Zulu translation of a concept known by many African indigenous tribes with various nuances and names (Cornell, 2008b; Cornell and Muvangua, 2011).

"uBuntu is both the African principle of transcendence for the individual, and the law of the social bond" (Fuller and Cornell, 2008). "This profound and all-encompassing social philosophy has on occasion been summed up in the word ubuntu, a term which has both the strength and the debility of being open to many different interpretations. At the heart of traditional African legal concern is a sense of human solidarity, of regard for all. No one is cast out or left by the wayside" [Sachs, (2008), p.357].

In this ethic, the 'bond' with others is an essential part of the human nature. Each man is born into a network of relationships as much constitutive as his own corporeality. This is not merely a social accidental fact: these bonds are genuine moral obligations, reciprocal steps in the path towards the complete fulfilment of each person, so that the individual is not sacrificed to the group but is led to develop simultaneously the two dimensions of himself[6]. While the word 'obligation' in the context of Western legal culture assumes an 'economic' sense, because it implies to give back something of equal value, in the African context it expresses the way in which each individual is related to another as a human being (Chabal, 2009). Here, there is a strong analogy with *buen vivir*: "el individuo como tal no es 'nada' (un 'no ente'), es algo totalmente perdido, si no se halla dentro de una red de múltiples relaciones" [Ávila Santamaría, (2010), p.16].

As far as the Western tradition is concerned, the concept usually includes (without exhausting in) the idea of 'human dignity'. In Italy, for example, the idea is expressed in Art. 2 of the Constitution, even if the concrete meaning of 'social formations' is still under definition (Rescigno, 2006; Rossi, 2006). The *Weltanschauung* of the Western world, which also dominates the international framework of human rights, is based on the individual: the pluralist principle is only *one* of the possible dimensions for his fulfillment. *Ubuntu*, instead, refers to the sense of 'belonging' of the individual to a community: the family, the tribe, the nation, the whole of humanity, each with its practices and traditions. From these bases, every human being develops a strong feeling of gratitude to his ancestors and responsibility towards future generations, an aspect that can also be found in the idea of *buen vivir*, especially in the bonds and duties to the neighbours, but also to nature itself.

Buen vivir has had direct recognition in the constitution and in public policies developed by the Correa Government, but so far it has not found expression in the case law, not even in Constitutional judgments. *Ubuntu*, on the contrary, although appearing in the constituent debates, was not expressed in the event in any constitutional provision. By contrast, however, it has been richly developed by the constitutional case law in South Africa.

The Constitutional Court mentioned it for the first time in 1995, in the case S v Makwanyane, about the inconstitutionality of the death penalty. The concept is defined by Justice Mokgoro in her concurring opinion in both its ethical and moral implications ("Generally, ubuntu translates as humaneness. In its most fundamental sense, it translates as personhood and morality. Metaphorically, it expresses itself in umuntu ngumuntu ngabantu, describing the significance of group solidarity on survival issues so central to the survival of communities") and in its political, ideological and legal ones, being recognised as a supreme principle of the law, unwritten but part of the super-Constitution[7].

Justice Mokgoro states in the judgement that the new South African Constitution recognises and values the ideals and the indigenous traditions, from which the concept of *ubuntu* derives, incorporating them into the interpretative parameters of the Bill of Rights, with a view to dialogue and communication with indigenous cultures, which had been silenced before the epochal transition to democracy. This argument echoes the traits of the Ecuadorian experience, albeit in a cultural, social and political different context, so it is worthwhile to compare the two processes.

The recognition of *ubuntu* among the supreme principles of the new constitutional order appears also in the case S v Mandela in 2001, again in criminal matters, where Justice Davis of the Supreme Court of Appeal states that the South African society is now "a constitutional community, based on fundamental principles including those of freedom, dignity, ubuntu and respect for life […] where each and every person is deserving of equal concern and respect and in which community grows sourced in the principle of ubuntu".

In 2006, Dikoko v Mokhatla, the Constitutional Court is asked to rule in a case of defamation about the constitutionality of the compensation remedy. In her dissenting opinion about the *quantum* of damages awarded by the trial court to the injured party, Justice Mokgoro states that in the spirit of *ubuntu,* which must guide the national legislation as a basic constitutional principle, judges should promote and apply specific actions, such as rectification, and not merely compensation, aiming at a real restorative justice and conciliation, restoring the balance and harmony between the parties, and not otherwise exacerbate the conflict[8]. Justice Sachs, concurring with Justice Mokgoro on the part relating to the *quantum* of compensation, once again reiterates that *ubuntu* is to be considered a fundamental value of the new democratic order: "uBuntu-botho is more than a phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived at. It is intrinsic to and constitutive of our constitutional culture". He states that the legislature must develop in every field regulations that conform to this constitutional value, and that the courts, in libel cases, have to go beyond "the hydraulic pressure on all concerned to go with the traditional legal flow", seeking new procedural instruments consistent with the goal of a restorative justice[9].

Another decision concerned the freedom of expression and information, this time under a substantive and not a procedural profile. In 2010, case *The Citizen (1978) (Pty) Ltd and Others v McBride (Lara Johnstone; Freedom of Expression Institute, South African National Editors' Forum; Joyce Sibanyoni Mbizana; MBASA Mxenge as Amici Curiae)* the complainants (journalists and publisher of a newspaper) had been convicted of defamation and violation of human dignity for having published articles in which they opposed the application of the defendant at the head of the metropolitan police in one of the most important districts of South Africa, calling it 'a criminal and murderer'. The defendant had in fact been convicted in the past for an attack in front of a pub in Durban, where he had killed several people. The defendant was a member of the ANP and had been able to take advantage of the amnesty for political crimes under the 1997 Promotion of National Unity and Reconciliation Act (Reconciliation Act).

In the judgement, the court interprets the Reconciliation Act in the light of the principles of *ubuntu and Botho*, that have always characterised the way of life of the South African communities according to "law, order, generosity, peace and common decency", even though today these values are significantly challenged. The Court recalls how *ubuntu* has been implemented in the epilogue of the 1993 Constitution and how these concepts are to be considered the basis for the construction of the new South Africa,

having as objectives 'bridge-building, national unity and reconciliation'. That is why freedom of expression is limited by the respect for human dignity, interpreted in the light of these principles.

Ubuntu has been a constitutional parameter, aside from the field of civil liberties and criminal law, also in economic, social and cultural rights, including property. Again, not surprisingly, these are the same matters that in Ecuador correspond to the regime of *buen vivir*. For example, in the 2004 case *Port Elizabeth Municipality v Various Occupiers*, involving property rights against the right to housing, Justice Sachs says:

> "The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving society of the need for human interdependence, respect and concern."

The judge defends the need to interpret the right of ownership over its ordinary meaning in common law, with the aim to arrive at a 'fair and equitable' judgment, in a spirit of reconciliation, which incorporate *ubuntu* as a supreme principle of the *Bill of Rights* [Himonga et al., (2013), p.396]. Some authors add that the spirit of mediation and reconciliation that the Constitution promotes by appealing to the concept of *ubuntu* can be concretely realised only by means of participatory democracy:

> "It is important to emphasise that this sustainable reconciliation is only possible through direct participatory democracy in which everyone in the community must have a voice and must be heard. Thus participatory democracy is organic to the communities in conflict and it is the actual voices of the human beings involved in the conflict that must be heard in order to enable a genuine reconciliation of the parties." [Fuller and Cornell, (2008), p. 28]

In the cases *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another*, decided by the Constitutional Court in 2004, the concept of *ubuntu* is used to sanction the traditional law of customary origin, in matters of succession, which provides for the right of primogeniture in the male line and the prohibition for women to inherit in the presence of male relatives. Justice Langa, while recognising the right of primogeniture contrary to the Constitution, points out that the traditional customary law, which the constitution rightly protects, is generally consistent with the spirit of *ubuntu*[10].

The incidence of the concept of *ubuntu* on the recognition of cultural rights can be traced even in the 2008 case *MEC for Education, Kwazulu-Natal and others v Pillay*. In fact, sending one's daughter to school with a ritual nose piercing is recognised as a cultural right of an ethnic minority, as an expression of a tradition proper to the community to which the girl's family belongs.

Finally, in the 2011 case *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* (CCT105/10) it is disputed whether the interpretation of contractual provisions on good faith should be recognised as having a direct descendant from the Constitution on the basis of its interpretation in the spirit of *ubuntu*. Justice Yacoob in his minority opinion states that the law of contract, although of Western origin and dominated by the common law, must be developed in the light of traditional values of the South African population. Between them, the interpretation and execution of the contract in accordance

with good faith, arising from the concept of *ubuntu*[11]. This means that a party can not take advantage of the other, interpreting the terms of a contract according to the narrow self-interest ("The idea that people or entities can undertake to negotiate and then not do so because this attitude becomes convenient for some or other commercial reason, certainly implicates ubuntu"). In the majority opinion, the reasoning regarding this subject is confirmed, despite the appeal at the end is rejected on procedural grounds.

Even if there is no statutory implementation of *ubuntu* in South African legal order, neither explicit or implicit references to it in Governmental action or public policies, the *ubuntu* jurisprudence has definitely made the concept a legal and normative one, a principle fundamental for the reinforcement of the South Africa's post-apartheid legal culture of 'transformative constitutionalism'. As we have just seen, it has been used by constitutional judges to limit some unjust effects derived from the strict interpretation by ordinary courts or by the legislator of individual liberties or liberal economic rights.

5 Gross national happiness in Bhutan

While in Ecuador the Constituent Assembly was discussing the content of the new Constitution, at the other end of the world, a small Asian country, Bhutan, was experiencing a similar epochal shift, from a regime of absolute monarchy to a parliamentary monarchy, with the adoption of its first constitution, entered into force in 2008, the same year as the Montecristi Constitution. However, while in the case of Ecuador the constitutional process was sponsored by popular movements, democratisation in Bhutan was carried out from above, on exclusive will of the monarchy itself (Gallenkamp, 2010). In 2001, the Sovereign Jigme Singye Wangchuck established the drafting committee for the elaboration of the constitution, while in 2006, when the process was well towards its conclusion, abdicated in favour of his son, explaining that "democracy was not necessarily Bhutan's goal, but a part of good governance and a key pillar of the King's ultimate objective […] In order for the country to achieve 'collective happiness', its citizens must become empowered, in the King's view" [Sinpeng, (2007), p.21]. The democratisation process had already started in 1953, with the establishment of the first Parliamentary Assembly, again on the will of the sovereign; it continued over the years with various administrative reforms such as decentralisation, which introduced forms of participatory democracy at the local level, and the creation, in 1998, of an executive supported by the parliament, and not appointed by the king. The change culminated with the final transition to parliamentary monarchy sanctioned by a constituent process highly participated by people, through public consultation with the cultural *élite* of the country and the population in the villages. The king had to deal even with the popular resistance to change, so much so that it was decided not to submit the text to a referendum for fear that the people would not have accepted it (Kinga, 2009).

The case of Bhutan is so much interesting in this context not only in relation to the process of democratic transition, but also for having introduced in the new constitution a revolutionary concept, namely that of gross national happiness. This idea appears in the preamble, in Art. 9 par. 2, entitled 'Principles of State Policy': "The State shall strive to promote those conditions that will enable the pursuit of Gross National Happiness"; and in Art. 20 on the Executive: "1. The Government shall protect and strengthen the sovereignty of the Kingdom, provide good governance, and ensure peace, security, well-being and happiness of the people".

Since many years, there are economists, including Amartya Sen most of all, who have criticised the use of the sole gross domestic product as indicator of prosperity of a state, and have promoted the introduction of additional parameters in its measurement, which take into account the needs of people in a holistic way, including also emotional and cultural aspects. These arguments have been rediscovered with the crisis of 2008 and found a concrete referent in the constitutionalisation of the concept of gross national happiness in Bhutan. Several among the most industrialised countries are now giving clear signs of wanting, or at least considering, alternatives to GDP and look upon the Bhutanese experience with interest.

The origin of the concept are to be found in the desire for reform of the fourth king of Bhutan, who in 1972 stated for the first time "Gross National Happiness is more important than Gross National Product" and committed to promote the goal of creating "an enlightened society in which happiness and wellbeing of all people and sentient beings is the ultimate purpose of governance" [Wangmo and Valk, (2012), p.53]. In fact, the concept is also an expression of a legal cryptotype: already in the first code of laws, after the unification of the kingdom, in 1792, it is said that "if the Government cannot create happiness (*dekid*) for its people, there is no purpose for the Government to exist". The principle thus plays the same role that in the West is attributed to Art. 16 of the French Declaration: it defines the substantive content of a constitution. However, the concept of 'happiness' in the Bhutanese culture does not coincide perfectly, as we shall see below, with the discussion on happiness in Western literature.

The idea of gross national happiness requires that people well-being can not be accessed only through economic parameters. For this reason, there are four pillars on which public action focuses to achieve this objective:

1 promotion of culture

2 equitable and sustainable economic development

3 good governance

4 preservation of environment.

As to the first pillar, Art. 4 of the constitution[12] is specifically dedicated to the protection and promotion of culture in all its forms, as well as the development of traditional values. As to the second pillar, the state is committed to minimise the differences in income and wealth and to promote the equitable distribution of public resources[13].

About the fourth pillar, the constitution recognises that mineral resources, waters and forests must be state-owned (Art. 1, c. 12), while Art. 5, dedicated to the environment, specifically define every Bhutanese as *trustee* of natural resources and the environment of the country, for himself and for future generations[14]. The duty of environmental protection, defined as maintenance of biodiversity and preservation from pollution and noise, is an individual duty of every citizen (Art. 8 c. 2), as well as a specific state commitment. We find, therefore, even in this culture, the strong awareness of the interconnection between different generations of humanity. State action is realised through various constitutional provisions: the establishment of environmental protected areas (Art. 5, par. 5), the commitment that forests can not fall below 60% of the territory (Art. 5, par. 3) and the legislative prohibition for companies to engage in activities that endanger the natural environment. This attitude towards nature is intimately connected with the values of the cultural tradition of Bhutan, where the popular beliefs are

intertwined with the ethical principles of Buddhism, based on a biocentric view of the universe. Thus, for example, it can be read in an anthropological study carried out to understand the links between culture and public policies that almost the totality of those surveyed believes that nature is populated by spirits and deities.

In 2008, together with the new constitution, the government approved also an index to measure gross national happiness, that, with an holistic approach, takes into account intangible assets as indicators of happiness, divided into nine areas (psychological wellbeing, health, education, time use, cultural diversity and resilience, good governance, community vitality, ecological diversity and resilience, and living standards), each of which monitored through 33 indicators, so that there are at the end 124 variables that concur in building the index.

The first GNH survey has been realised in 2010 and it shows that 40.8% of people in Bhutan have achieved extensive or deep happiness whereas the 10.4% of people is definitely 'unhappy'. The remaining 48.7% has been considered as 'not yet happy' so the results of the survey should be used as policy guidance to increase happiness, for instance to decide how to allocate resources. The government has created a GNH Commission, composed by the prime minister, the cabinet secretary, all secretaries to ministries, the head of the National Environment Commission Secretariat and a GNHC secretary, with the objective of ensuring that GNH is mainstreamed into the planning, policy making and implementation process. It operates mainly through the adoption of a five-year plan, the last one being the 11th, from 2013 to 2018.

The Bhutanese constituent project took place through the integration between the local cultural tradition and Western constitutionalism, which is used as a reservoir of models for the new constitution: "policymakers in Bhutan recognise that 'simply imposing development models from outside which do not take religion and tradition into account will not only serve to diminish existing culture, but will also meet with limited success'" [Wangmo and Valk, (2012), p.55].

Gross national happiness is intimately linked with the traditional Bhutanese cultural heritage, in particular the principles of Buddhism, that preaches harmony between human beings and the natural environment[15]. In addition, it must be considered that Bhutan has always been a state isolated from the international scene, and has undergone limited interference and contamination by the Western culture, so the design and implementation of gross national happiness may well be regarded as an expression of chthonic law.

Inside of Buddhist ethics, incorporated in the constitution, we find principles such as compassion and altruism, understanding and kindness, which serve as the foundation of expressed individual and state constitutional duties[16]. Another fundamental ethical principle from which the concept of gross national happiness takes its origins is interdependence between men and between man and nature, which thus requires respect for all living beings.

> "Mahayana Buddhism is deeply embedded in all aspects of Bhutanese society and thus, in GNH. The basic doctrine of Mahayana Buddhism is sunyata – the interdependence of all things in the cosmos. According to this principle, nothing exists independently from each other, but everything influences and depends on each other." [Hoellerer, (2010), p.37]

One consequence of this is that, as in *ubuntu*, happiness is not only detected as an individual measure, but "it is a function of relational harmony, where people relate and mutually contribute to each other" [Chopel, (2012), p.95; Ura et al., (2012), p.1].

> "We have now clearly distinguished the 'happiness' … in GNH from the fleeting, pleasurable 'feel good' moods so often associated with that term. We know that true abiding happiness cannot exist while others suffer, and comes only from serving others, living in harmony with nature, and realizing our innate wisdom and the true and brilliant nature of our own minds. It includes harmony with nature (again absent from some Western notions of happiness) and concern for others." [Ura et al., (2012), p.7]

Even in the West, philosophy, from its inception, confronted the idea of 'happiness' (De Luise and Farinetti, 2001; Trampus, 2008). For Aristotle, the *eudaimonia* was the main purpose of the human being, coinciding with the good, even and especially in its political dimension. However, over the centuries, and especially in the period in which constitutionalism was born, the greatest philosophers have given it a purely individualistic and hedonistic sense, unsuitable to be used as common public objective (Fonnesu, 2013). On the other hand, the concept was turned into *oikonomia*, for which the self-development of the individual becomes a public affair promoted by the state. Opposite to the Rousseavian communitarian and solidaristic vision, generally characteristic of the French and Italian thought (Lanzillo, 2012), this 'public affair', in its welfare state version, means *individual* "enjoyment and, together, self-development" (Esposito, 2013). Not surprisingly, Napoleon Bonaparte, during the *coup d'état* between the 18th and 19th Brumaire, 1799, introduced himself as a defendant of the values of the revolution, that is, freedom, equality and *property*, replacing with the latter the word 'fraternity', while one of the most durable and bright results of the empire will be the *Code civil de français* and its often imitated Art. 544, which establishes property as an absolute right[17].

6 Conclusions

At the end of this comparison, I want to summarise the similarities between the experiences analysed. The constitutions of Ecuador, South Africa and Bhutan have focused on the integration of indigenous traditions in the system of sources of law. The first two are also intercultural states, being the constitutions a synthesis of values from different traditions, all on equal ground.

In Ecuador and South Africa the constitutional process drew legitimacy from the will to overcome the colonial and racist past and the prevalence of desire for reconciliation above that of revenge. The past of discrimination that has characterised both experiences led the legal system to recognise community values and solidarity and to identify itself in keywords such as 'harmony': between the spiritual and the corporeal, between the self and the others, between man and nature. The implementation of the chthonic traditions has been perceived as a key to rebuild their legal systems on new basis. While in Ecuador this has occurred explicitly in the constitution, in South Africa the Constitutional Court has recognised the African traditional legal culture as an important part of the new legal system [Himonga et al., (2013), p.374], on the base of article 39. So, the fusion of Western and African traditions has created a new legal framework, defined, although with denigratory intent, 'rainbow jurisprudence' (Cockrell, 1996).

In Bhutan, the constitution-making process was not born from a popular movement, but has marked a moment of profound institutional change, as it has produced the transition from an autocratic form of state to a democratic society.

We have dealt with concepts not easily definable, contested by some legal scholars, who wonder about their actual pertinence to a specific indigenous culture, about their qualification as values, about the effective element of novelty compared to concepts already widely known in the West tradition as dignity, participation, solidarity, etc., and about the practical possibilities of hybridisation. However, it is important to emphasise that the intercultural approach postulates a process of mutual adaptation and change, so that at the end it is not important which interpretation will prevail, but the fact that the result has been discussed and shared by all the peoples that constitute the nation.

The common element of the various chthonic traditions is a different understanding of law and human rights, opposed to the current dominant liberal model. de Sousa Santos (2010) has defined it the 'epistemology of the south'. It consists in the recognition of autonomous subjective situations regarding nature, as in Ecuador; in the subordination of individual rights, such as property and economic initiative, to a normative paradigm which requires the balancing of individual interests with the common good and collective rights of the community, as in Ecuador and South Africa; in the definition of public policies by means of parameters no longer economical, such as GDP, but cultural, spiritual and environmental factors, such as those included in the concepts of *buen vivir* and gross national happiness.

Analysing the concept of *buen vivir*, I have stressed that one of its features is to offer an alternative to the neo-liberist economic model, which is based on the idea of development. GNH has been instead theoretically elaborated within a paradigm of sustainable development, so all the practical actions implemented by the government to realise GNH are perfectly in compliance with the Millennium Development Goals and the post-2015 development framework elaborated by UN institutions. Even *ubuntu* does not affect the main economic policies of South Africa, that since the beginning of the new democratic regime opted to adhere to the principles of the Washington Consensus and from the Zuma Presidency is following the principles elaborated by Development Economics (Orrù, 2012). So, although their constitutional values are similar, due to the fact that they have been inspired by cultural and philosophical traditions that have many points in common, from an economic analysis the three experiences here analysed represent opposite approaches to similar challenges.

Nevertheless, from a legal point of view, these countries have shared a common path in their process of nation-building and the instruments they have implemented represent, in my opinion, a real element of novelty in constitutional theory. It is a model that does not impose itself as universal, but which may, not must, create a universal, through reconciliation between indigenous traditions and the dominant Western culture.

References

Acosta, A. and Gudynas, E. (2011) 'La renovación de la crítica al desarrollo y el buen vivir como alternativa', *Utopía y Praxis Latinoamericana*, Vol. 16, No. 53, pp.71–83.

Aparicio Wilhelmi, M. (2011) 'Pueblos indígenas y multiculturalismo: de la igualdad multicultural al diálogos entre iguales', in Aparicio Wilhelmi, M. (Ed.): *Los derechos de los pueblos indígenas a los recursos naturales y al territorio: conflictos y desafíos en América Latina*, pp.7–30, Icaria Editorial, Barcelona.

Ávila Santamaría, R. (2010) *El derecho de la naturaleza: fundamentos*, UASB Digital, Ecuador [online] http://repositorio.uasb.edu.ec/handle/10644/1087 (accessed 14 April 2014).

Battaglia, L. (2002) *Alle origini dell'etica ambientale: uomo, natura, animali in Voltaire, Michelet, Thoreau, Gandhi*, Dedalo, Bari.

Bauman, Z. (2002) *Modernità liquida*, translated by S. Minucci, Laterza, Roma-Bari, original title *Liquid Modernity*, Polity Press, Cambridge, 2000.

Carbonell, M. (2004) *Neoconstitucionalismo(s)*, Trotta, Madrid.

Carbonell, M. (2007) *Teoria del neoconstitucionalismo: ensayos escogitos*, Trotta, Madrid.

Carducci, M. (2012) 'Epistemologia del Sud e costituzionalismo dell'alterità', *Diritto pubblico comparato ed europeo*, No. 2, pp.319–325.

Chabal, P. (2009) *Africa. The Politics of Suffering and Smiling*, Zed Books, London/New York.

Chopel, S. (2012) 'Culture, public policy and happiness', *Journal of Bhutan Studies*, Summer, Vol. 26, pp.82–99.

Cockrell, A. (1996) 'Rainbow jurisprudence', *South African Journal on Human Rights*, Vol. 12, pp.1–38.

Cornell, D. (2008a) *uBuntu, Pluralism and the Responsibility of Legal Academics to the New South Africa* [online] https://www.uct.ac.za/downloads/uct.ac.za/news/.../Drucilla_Cornell.pdf (accessed 14 April 2014).

Cornell, D. (2008b) 'uBuntu, pluralism and the responsibility of legal academics to the New South Africa', *Law and Critique*, Vol. 20, No. 1, pp.43–58.

Cornell, D. and Muvangua, N. (Eds.) (2011) *uBuntu and the Law: African Ideals and Postapartheid Jurisprudence (Just Ideas: Transformative Ideals of Justice in Ethical and Political Thought)*, 2nd ed., Fordham University Press, New York.

Dau, F.M. (2011) *Costituzionalismo e rappresentanza. Il caso del Sudafrica*, Giuffrè, Milano.

De Luise, F. and Farinetti, G. (2001) *Storia della felicità. Gli antichi e i moderni*, Einaudi, Torino.

de Sousa Santos, B. (2010) *Refundación del Estado en América Latina. Perspectivas desde una epistemología del Sur*, Instituto Internacional de Derecho y Sociedad, Lima.

de Sousa Santos, B. (2012) 'Cuando los excluidos tienen Derecho: justicia indígena plurinacionalidad e interculturalidad', in de Sousa Santos, B. and Grijalva Jiménez, A. (Eds.): *Justicia indígena, plurinacionalidad e interculturalidad en Ecuador*, Abya Yala/Fundación Rosa Luxemburg, Quito.

Esposito, M. (2013) 'Il governo della felicità. Un percorso genealogico e critico sul concetto di benessere', *Filosofia politica*, No. 1, pp.27–40.

Federico, V. and Fusaro, C. (Eds.) (2006) *Constitutionalism and Democratic Transitions. Lessons from South Africa*, Firenze University Press, Firenze.

Fonnesu, L. (2013) 'La felicità e il suo tramonto. Dall'Illuminismo all'idealismo', *Filosofia politica*, No. 1, pp.11–26.

Fuller, S. and Cornell, D. (2008) 'Introduction', in Cornell, D. and Muvangua, N. (Eds): *Law in the Ubuntu of South Africa* [online] http://www.isthisseattaken.co.za/pdf/Papers_Cornell_Muvangua.pdf. (accessed 14 April 2014).

Gallenkamp, M. (2010) *Democracy in Bhutan. An Analysis of Constitutional Change in a Buddhist Monarchy*, Institute of Peace and Conflict Studies, New Delhi.

Glenn, H.P. (2011) *Tradizioni giuridiche nel mondo. La sostenibilità della differenza, translated by S. Ferlito, il Mulino, Bologna, original title: Legal traditions of the World. Sustainable Diversity*, Oxford University Press, Oxford, 2000.

Gudynas, E. (2009) 'La ecología política del giro biocéntrico en la nueva Constitución de Ecuador', *Revista de Estudios Sociales*, No. 32, pp.34–47.

Gudynas, E. (2011) 'Debates sobre cooperación y modelos de desarrollo. Perspectivas desde la Sociedad Civil en el Ecuador', in Weber, G. (Ed.): *Debates sobre cooperación y modelos de desarrollo. Perspectivas desde la sociedad civil en el Ecuador*, Centro de Investigaciones CIUDAD-Observatorio de la Cooperación al Desarrollo en Ecuador, Quito.

Hidalgo Flor, F. (2011) 'Buen vivir, Sumak Kawsay: Aporte contrahegemónico del proceso andino', *Utopía y Praxis Latinoamericana*, Vol. 16, No. 53, pp.85–94.

Himonga, C., Taylor, M. and Pope, A. (2013) 'Reflections on judicial views of Ubuntu', *Potchefstroom Electronic Law Journal*, Vol. 16, No. 5, pp.371–429 [online] http://dx.doi.org/10.4314/pelj.v16i5.8 (Accessed 8 April 2015).

Hoellerer, N.I.J. (2010) 'The use of qualitative and ethnographic research to enhance the measurement and operationalisation of gross national happiness', *Journal of Bhutan Studies*, Winter, Vol. 23, pp.26–54.

Kinga, S. (2009) 'The constitution – the king's gift: defiling and sanctifying a sacred gift', *Proceedings of the International Conference 'Beyond the Ballot Box': Report from the Deepening and Sustaining Democracy in Asia Conference* [online] http://www.bhutanstudies.org.bt/publications/conference-publications/ (accessed 14 April 2014).

Kymlicka, W. (1999) *La cittadinanza multiculturale*, translated by G. Gasperoni, il Mulino, Bologna, original title: *Multicultural Citizenship*, Oxford University Press, Oxford, 1995.

Lanni, S. (2011) 'Sistema giuridico latinoamericano e diritti dei popoli indigeni', in Lanni, S. (Ed.): *I diritti dei popoli indigeni in America Latina*, pp.1–90, ESI, Napoli.

Lanzillo, M.L. (2012) 'Una "candida" felicità. Le peripezie della coscienza borghese nei Lumi francesi', *Filosofia politica*, No. 3, pp.399–418.

Larrea Maldonado, A.M. (2011) 'El Buen Vivir como contrahegemonía en la Constitución Ecuatoriana', *Utopía y Praxis Latinoamericana*, Vol. 16, No. 53, pp.59–70.

Lollini, A. (2005) *Costituzionalismo e giustizia di transizione. Il ruolo costituente della Commissione sudafricana verità e riconciliazione*, il Mulino, Bologna.

Macas, L. (2011) 'El Sumak Kawsay', in Weber, G. (Ed.): *Debates sobre cooperación y modelos de desarrollo. Perspectivas desde la Sociedad Civil en el Ecuador*, pp.47–60, Centro de Investigaciones CIUDAD-Observatorio de la Cooperación al Desarrollo en Ecuador, Quito.

Mastromarino, A. (2010) *Il federalismo disaggregativo. Un percorso costituzionale negli Stati multinazionali*, Giuffrè, Milano.

Mazza, M. (2004) *La protezione dei popoli indigeni nei paesi di common law*, Cedam, Padova.

Ordóñez Cifuentes, J.E.R. (2008) 'Restitución de la armonía cósmica. Propuesta jurídica de los pueblos originarios de Abya Yala', *Revista de la facultad de derecho del México*, pp.245–302.

Orrù, R. (2012) 'L'ordine costituzionale sudafricano post-apartheid: luci e ombre nell'orizzonte dei BRICS', in Scaffardi, L. (Ed.): *BRICS: Paesi emergenti nel prisma del diritto comparato*, pp.101–145, Giappichelli, Torino.

Palermo, F. and Woelk, J. (2008) *Diritto costituzionale comparato dei gruppi e delle minoranze*, Cedam, Padova.

Pegoraro, L. (2011) 'Multiculturalismo e comparazione', in Amirante, D. and Pepe, V. (Eds.): *Stato democratico e società multiculturale. Dalla tutela delle minoranze al riconoscimento delle diversità culturali*, pp.155–157, Giappichelli, Torino.

Rescigno, F. (2005) *I diritti degli animali. Da res a soggetti*, Giappichelli, Torino.

Rescigno, P. (2006) *Persone e gruppi sociali*, ESI, Napoli.

Rossi, E. (2006) 'Art. 2', in Bifulco, R. et al. (Eds.): *Commentario alla Costituzione*, pp.38–64, Utet, Torino.

Sachs, A. (2008) 'Towards the liberation and revitalisation of customary law', in Cornell, D. and Muvangua, N. (Eds.): *Law in the Ubuntu of South Africa* [online] http://www.isthisseattaken.co.za/pdf/Papers_Cornell_Muvangua.pdf (accessed 14 April 2014).

Sinpeng, A. (2007) 'Democracy from above: regime transition in the Kingdom of Bhutan', *Journal of Bhutan Studies*, Winter, Vol. 17, pp.21–48.

Trampus, A. (2008) *Il diritto alla felicità. Storia di un'idea*, Laterza, Roma-Bari.

Ura, K. et al. (2012) *A Short Guide to Gross National Happiness Index*, The Centre of Bhutan Studies, Thimphu.

Wangmo, T. and Valk, J. (2010) 'Under the influence of Buddhism: the psychological wellbeing indicators of GNH', *Journal of Bhutan Studies*, Summer 2012, Vol. 26, pp.53–81.

Notes

1 Article 2 goes on recognising the existence of nations and native indigenous peoples and their ancestral domain in the territories, guaranteeing their right to self-determination within the unity of the state; Article 3 defines the Bolivian nation as "conformada por la totalidad de las bolivianas y los bolivianos, las naciones y pueblos indígena originario campesinos, y las comunidades interculturales y afrobolivianas que en conjunto constituyen el pueblo boliviano".

2 In fact, there is a problem of minorities also in Bhutan, in respect to Bhutanese refugees of Nepalese origin expelled from the territory in the '80s and currently housed in refugee camps in Nepal. This problem is still unresolved despite the constitutional transition. Perhaps the intercultural model proposed here could be useful to open up new prospects for a resolution of the matter.

3 "Artículo 8. I. El Estado asume y promueve como principios ético-morales de la sociedad plural: ama qhilla, ama llulla, ama suwa (no seas flojo, no seas mentiroso ni seas ladrón), suma qamaña (vivir bien), ñandereko (vida armoniosa), teko kavi (vida buena), ivi maraei (tierra sin mal) y qhapaj ñan (camino o vida noble)".

4 For example, the pursuit of happiness was one of the three primary values in the 1776 US Declaration of Independence.

5 Article 40 states: "Se reconoce a las personas el derecho a migrar. No se identificará ni se considerará a ningún ser humano como ilegal por su condición migratoria".

6 "umuntu ngumuntu ngabantu": literally "I am because you are". Nelson Mandela explains the meaning of ubuntu in an interview posted on many videos on Youtube. In the words of the judge Jajbhay in the case City of Johannesburg v Rand Properties "In South Africa the culture of ubuntu is the capacity to express compassion, justice, reciprocity, dignity, harmony and humanity in the interests of building, maintaining and strengthening the community. uBuntu speaks to our interconnectedness, our common humanity and the responsibility to each that flows from our connection".

7 In interpreting the Bill of Fundamental Rights and Freedoms, as already mentioned, an all-inclusive value system, or common values in South Africa, can form a basis upon which to develop South African Human Rights jurisprudence. Although South Africans have a history of deep divisions characterised by strife and conflict, one shared value and ideal that runs like a golden thread across cultural lines, is the value of ubuntu – a notion now coming to be generally articulated in this country".

8 "In our constitutional democracy the basic constitutional value of human dignity relates closely to ubuntu or botho, an idea based on deep respect for the humanity of another. Traditional law and culture have long considered one of the principal objectives of the law to be the restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms. It should be a goal of our law to emphasise, in cases of compensation for defamation, the re-establishment of harmony in the relationship between the parties, rather than to enlarge the hole in the defendant's pocket, something more likely to increase acrimony, push the parties apart and even cause the defendant financial ruin".

9 "In the light of the core constitutional values of ubuntu-botho, trial Courts should feel encouraged proactively to explore mechanisms for shifting the emphasis from near-exclusive attention to quantum, towards searching for processes which enhance the possibilities of resolving the dispute between the parties, and achieving a measure of dignified reconciliation".

10 "The positive aspects of customary law have long been neglected. The inherent flexibility of the system is but one of its constructive facets. Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements. Nor are these aspects useful only in the area of disputes. They provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as ubuntu. These valuable aspects of customary law more than justify its protection by the Constitution".

11 "The common law of contract regulates the environment within which trade and commerce take place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the approach of the majority of people in our country place a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone" (paragraph 23 of the judgement).

12 "Article 4 Culture. 1. The State shall endeavour to preserve, protect and promote the cultural heritage of the country, including monuments, places and objects of artistic or historic interest, Dzongs, Lhakhangs, Goendeys, Ten-sum, Nyes, language, literature, music, visual arts and religion to enrich society and the cultural life of the citizens.

2. The State shall recognize culture as an evolving dynamic force and shall endeavour to strengthen and facilitate the continued…".

13 "The State shall endeavour to develop and execute policies to minimize inequalities of income, concentration of wealth, and promote equitable distribution of public facilities among individuals and people living in different parts of the Kingdom".

14 "Article 5 Environment. 1. Every Bhutanese is a trustee of the Kingdom's natural resources and environment for the benefit of the present and future generations and it is the fundamental duty of every citizen to contribute to the protection of the natural environment, conservation of the rich biodiversity of Bhutan and prevention of all forms of ecological degradation including noise, visual and physical pollution through the adoption and support of environment friendly practices and policies…".

15 "Article 3 Spiritual Heritage. 1. Buddhism is the spiritual heritage of Bhutan, which promotes the principles and values of peace, non-violence, compassion and tolerance".

16 Among the duties of every citizen we can find: Art. 8, par. 3 "A Bhutanese citizen shall foster tolerance, mutual respect and spirit of brotherhood amongst all the people of Bhutan transcending religious, linguistic, regional or sectional diversities" and Art. 9, par. 20: "The State shall strive to create conditions that will enable the true and sustainable development of a good and compassionate society rooted in Buddhist ethos and universal human values".

17 "La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements".