CHAPTER 13

THE RULE OF LAW AND THE LEGAL TREATMENT OF NATIVE AMERICANS

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The state is a cultural construct, not a natural product, and it is a European invention. The concept was created by a part of humanity which was convinced that it represented humanity in its entirety, and was intent on imposing itself upon the rest of humanity through the political institution of the state, among other means. Beginning in the eighteenth century, its different legal expressions went forth from Europe as ways of imposing a European presence and culture. Consequently "the rule of law", "the constitutional state", "the rule of rights", "the rule of the different rights of freedom", or similar formulas aiming at the subordination of political institutions to the legal system, can have very different meanings in Europe than for the rest of humanity.

And so it is that the state, even "the state of rights" or the "state of freedoms", presents a problem that is difficult to understand or even to formulate if our perspective remains European. From this perspective, the most interesting experiment is the American continent, with its states (from Canada to Argentina) founded by a population of European origin faced with native populations that, initially, were a majority but who were destined to become foreigners in their own lands. This chapter aims to show how this came about using an approach based on the supremacy of law and including freedom as its premise.

1 CONSTITUTIONAL EXCLUSION: THE USA AND CANADA

The United States inaugurated the constitutional history of the continent with an intransigent policy towards the indigenous populations which preserved their own culture: in short, exclusion. As to specifically legal effects, there was no conception of any communication with a population which was alien to European culture. Communication, however, was unavoidable, because of the presence of such populations and also because of the expansionism of the new states, which certainly did not facilitate matters. This is well known, if only from the cinema. One

P. Costa and D. Zolo (eds.), The Rule of Law: History, Theory and Criticism, 443–466.

should not look, however, for a historiographic reconstruction of a legal-constitutional type. It would prove to be a disappointing enterprise.[1]

In this case the antecedent was the colonial experience. The English monarchy had not dominated in a direct way over any native people and the United States did not have legal precedents of this type within its borders. Before the Independence, in 1763, a solemn proclamation had recognized the "territory" as an indigenous, legal, and political system, not on the basis of a right of the population but rather as the expression of the colonial aspect of the monarchy, of its "sovereignty, protection, and dominion"; the territory was an object subject to the *sovereignty* and *protection* of the Crown. The entire territory inhabited by the Indians of North America was "reserved" for them, as a gracious concession on the part of Great Britain, which claimed powers in the name of this same *protection*. The declaration of 1763, considering the Indians incapable on principle of alienating their lands, permitted them to do so only to the benefit of this monarchy and of this *sovereignty*, which in this way extended and applied itself beyond its own colonies, beyond the Atlantic strip which had been occupied until then, thus marking out a boundary.[2]

The opposition of the colonies themselves to such a boundary was one of the major factors that sparked the struggle for independence but, by that time, a legal situation had been created that the new United States would inherit, including the same claim to sovereignty. The definitive Federal Constitution, that of 1787, would make manifest this intention, attributing to Congress the competence "to regulate commerce with foreign nations, among the several states, and with the Indian tribes" (Article 1, Section 8, part 3); this was interpreted extensively, along the lines of a subrogation in the sovereignty, with regard to that sort of "third kind", the Indian tribes, which were neither foreign nations nor an integral part of the state. The indigenous peoples were initially not considered a part of the United States but they were in any case subject to Federal sovereignty. The constitutional rulings of the Federal Supreme Court would formulate this position within just a few decades, maintaining that these peoples constituted "domestic dependent nations"; that is, they were *nations*, but *domestic* and *dependent*, "in a state of pupillage", placed under a *guardianship* that was in a certain sense "family-like", in so much as they were permanently considered to be *minors* with regard to the United States.[3]

The *Indian tribes* were here understood as *nations* and therefore capable of self-government, except for their incapacity, in so much as they were *wards*, to negotiate and stipulate agreements with any other than their *guardian*, the Federation of the United States. From this perspective,

relations could be established and developed between "nations" and "Nation", between the Indian *nations* and the United States *Nation*. The *guardianship* was intended in such a way that the former could only undertake relations in a stable manner with the latter, among all the nations on earth. The indigenous peoples possessed territories, had governments and their own systems. They maintained *international* relations with the United States, which were compulsory relations in principle and of a precise significance. They were held above all to peace, in such a way as to legitimize the war which the United States waged on those indigenous peoples who did not abide by what had been established. The normative procedure for the realization of such relations would thus be *international*, that of *treaties* in the strict sense of the term. Shortly before the Constitution of 1787, offers of incorporation into the Federation[4] were made to the Indian peoples.

Before the Federal Constitution another step of constitutional significance was made, the invention of the "Territory", as an alternative to the "State", with the precise aim of avoiding a formal autonomous constitution. It was a transitional system, until colonization developed or the Indian population was reduced. It was a context in which the terms of treaties did not count and neither did the principle of territorial recognition contained in the colonial proclamation of 1763. The United States arrogated to itself the right to plan and manage the areas of western expansion that were not part of the states of the interior. From this perspective, the making of treaties could be undertaken in terms, rather unbalanced, of the concession of reservations, government authorizations and ways of applying guardianship. With the Constitution of 1787 this order of ideas was already present.[5]

The situation did not change for decades. The practice of treaties remained until 1871, giving rise to less formal agreements, more directly subject to the decisions of the Federal powers. The possibility of founding at least one indigenous state remained alive, especially in the Oklahoma Indian Territory, but it was reduced in the following years but was definitively abandoned in 1907, when the territory constitutionally became another state, without the indigenous people having any part in it. The relationship between "guardian" and "ward" thus contained the whole of the relationship between indigenous people and the United States. In the period around the turn of the century, there ensued a further erosion of the indigenous peoples' position, caused by the practice of treaties and reinforced by keeping their own territories and governments. If these continued to exist, it was under the colonial condition of *reservation* and *guardianship*.[6]

Relations were established in *international* terms, which implied a principle of not inherently degrading legal recognition, even though relations were still based on colonial-type assumptions. Through these relations, established by means of treaties, the Indian side could maintain its own idea of law, starting from the attribution of a different meaning to words. The common term *nation* could be perfectly well be taken as a sign of legal equality. And other terms as well might not have a pejorative or derogatory accent. The *reservation* could be understood as the land which the indigenous people conserved for themselves while making available or ceding another part of its own territory. From this perspective, *guardianship* might also be seen as assistance which was negotiated and accepted in exchange for peace and lands, legitimizing in this way a defensive war. And not only word-meanings were in play but also signs of another type. Gestures of friendship and exchanges of respects could have a wider meaning not perfectly coinciding with the meaning of a text written in a foreign language, even if it was a *lingua franca* such as English. The sharing of tobacco smoke could be legally more meaningful than a legal text. All of this in any case was law.[7]

It was a law which did not have prevalence over that of the United States, nor was it on equal terms with it. The *reservations* remained dependent and under the guardianship of the United States, without having contributed to or provided consensus for its constitutionalism and without integrating with it. During the period around the turn of the century, between the end of the period of the treaties and the birth of the state of Oklahoma, the indigenous peoples of the *reservations* continued to be *nations* in so much as they were excluded from *the* Nation. Their members were not citizens of this *Nation*. Continuing to be in force was the requirement of conversion not only to a public order but also to the private order of property and the family. That was the requirement for access to citizenship, or better, for its imposition. This period was characterized by an aggressively integrationist political strategy, based on the privatization of lands and destruction of the communities, a strategy that was not definitively carried to completion and which resurfaced periodically during the twentieth century. And recourse was not lacking to churches in the exercise of a guardianship geared to an acculturation that was meant to be not only civilizing but also soul-saving.[8]

The inhabitants of the indigenous reservations received US citizenship in 1924, not at their own request but through the decision of the United States itself, which created, as a consequence, resistance. The more general *international*, or better interstate context was beginning to change. Until then a sovereign conception of the state and a territorial conception of

sovereignty were generally accepted. In 1919, however, the League of Nations was established and it began to concern itself with the destinies of peoples not constituted into states, or *minorities* as it defined them. In 1923 some indigenous Americans attempted to attract the League's attention. In this context the United States proceeded towards a goal which was, as will be seen later, a point of departure for other American states: incorporating the indigenous population into citizenship, without taking into account their self-determination or respecting their rights. Only later, in search of improved legitimacy, and without changing the fundamental basis of the system, were specific rights of the native populations examined, rights which the US state has always controlled the right to define, to allocate, to subject to conditions, and to shape.[9]

When the culturally indigenous peoples finally received citizenship and certain rights, they constituted a minority within the United States. And their territories, which these peoples governed internally, were reservations, not states. They were *internal dependent nations*, nations subject to Federal powers but not part of the Federal system constituted by another nation, the Nation with the capital "N". The first approaches of some treaties were lost with the "short-circuit" of their international premises. And the Constitution remained silent, except for the enigmatic reference to the "third kind", the "Indian tribes", which as we know had no states of their own and were not foreign states. No United States Federal amendment has made reference to the question. Judicial rulings could proceed calmly to constitutionalize a substantially colonial position.[10]

The constitutional case of neighbouring Canada was more open. Originally it consisted of colonies which did not join the process of independence and therefore did not react against the English proclamation of 1763. The point of departure was quite distinct. The current constitutional norm of 1982 expressly contains those rights or freedoms recognized by the proclamation of 1763[11] in favour of "the aboriginal peoples of Canada", *les peuples autochtones du Canada*, recognition which extends to treaties and other agreements.

Keeping this proclamation in force, together with its constitutional value, can be significant from a comparative perspective. Remember that the proclamation did not limit itself to the recognition of territory and rights. This second aspect proved more problematic. The declaration started from an explicit affirmation of *sovereignty* which placed colonial law above indigenous law, the latter recognized in as much as it was determined by the former, while the contrary could not be conceived of, despite the fact that it was the law of a native population residing in its

own territory. All of this, moreover, implied the projection of a guardianship that devalued the position and reduced the rights of the indigenous population, since the "dark side" of the proclamation of 1763 continued to weigh, with its constitutional recognition, on the Canadian system.[12]

Given this situation, what about the rule of law with regard to two Anglo-American zones such as the United States and Canada? How can there be an effective law for them which is as common to the Indio-American side as to the Euro-American, and recognized by both peoples? Apart from the constitutional pretensions and illusions of the counterpart of European origin, what possibilities were there for setting up a system able to offer a real guarantee? It is evident that Anglo-American constitutionalism was and is rooted in a European colonialism that is, as such, incapable of establishing a rule of law which is able to involve all of the interested population. But it is better not to draw hasty conclusions: it is in fact necessary to widen our panorama to the rest of the American continent and, given its colonial matrix, also establish our observation point outside of it.

2 CONSTITUTIONAL INCLUSION: LATIN AMERICA

It has already been noted that the Latin American point of departure is different or even apparently, opposite: it is a question of inclusion. The states that became independent of the Spanish monarchy did so in the name of their entire population, and not only those of European origin. These states originated in a colonial system that had already established a direct dominion over the native population, setting up, expressly and effectively, a mechanism of *guardianship*. Now some Constitutions were written with the premise of a single *Nation*, on the basis of an implicit or even explicit *nationality* and also a citizenship shared with the indigenous population. Incorporation, however, did not take place. Instead there was exclusion, produced by specific legal mechanisms and other means that do not concern us here.

It is not easy to avoid becoming lost among the diversity of cases, found in this part of the American continent (from Mexico to Argentina) that today calls itself Latin. We need to build up a general picture. The point of departure of the plan of inclusion was expressed rather clearly in one of the first Constitutions of this area, that of Venezuela in 1811. It was developed on the supposition of a common citizenship and produced the effect of the explicit cancellation of the status of *guardianship* over the indigenous people, of the "privileges of the minor" which "in seeking to protect them, instead jeopardized their development, as shown by experience".

In defence of this innovation, a long article preceded it devoted to that "part of the citizenry until now called *indios*". There emerges an attempt at a cancellation of still greater significance: a programme of conversion, first religious and then cultural, of the *indios*. The need is underlined to "make them understand the close connection with all the other citizens" and the need to share rights "based on the simple fact of being people equal to all the others of their species". The programme of an indigenous "deculturation" through constitutional acculturation was applied by the Constitution itself, in view of the "distribution of the property of the lands which had been conceded". It was thus understood that there was no territorial dominion which did not come from private property.

The first Latin American constitutions were for the most part of this sort, but many others did not result in such drastic cancellation. The Constitution of Ecuador of 1830 was the clearest. It considered the indigenous an "innocent, abject and miserable class" and declared "the venerable priests as their natural guardians and fathers", maintaining in this way the system of *guardianship*. The Declaration of Rights of Guatemala, of 1839, went no less far in this direction. It specifically proclaimed that "protected in particular are those who due to sex, age or incapacity cannot know and defend their own rights", so that not only women, but also other adults were considered as minors. There remained expressly understood "indigenous people in general", incapable of knowing their own rights and therefore presumably also of understanding an institution that was as alien to their culture as was private property.

The position of qualitative *minority* of the indigenous populations (which however constituted the quantitative *majority*) and the corresponding guardianship, both state and ecclesiastical, were not manifested in such an open way constitutionally, but they represented the current politics. Venezuela itself, having started off with the absolute affirmation of equal citizenship, passed in 1864 to the constitutional formula of state *guardianship* through the system of *territories*, then arriving at the way of the Church in 1909: "the Government may negotiate the arrival of missionaries who will settle in the areas of the Republic where there are indigenous to civilize". The current Venezuelan Constitution of 1963 goes further, offering a further coverage: "the law will establish the exceptional system required for the protection of the indigenous and their progressive incorporation into the life of the Nation" (Article 77).

Both in Mexico and in Argentina, and in other cases or phases of the federal development of Latin American states, the system of the *territorios*, which invention of the United States, served to claim and impose

dominion over the independent indigenous population. The influence of federalism was not alien to this design. And the *international* law of the time favoured it, not conceiving of the possibility of recognizing as *Nations* in conditions of equality peoples endowed with territory and rights and predating the arrival of the Europeans. This external factor, which had important internal consequences will be considered subsequently. From the latter perspective, within the different constitutions which speak of the state and boundaries without taking into consideration nations, there exists quite a range of positions between the extremes of total subjugation and full independence.

There were a great variety of practices, from agreements to war, passing through every sort of mediation and settlement, and with the common denominators of evolving and developing at the margins of programmes and constitutional mandates; and by the creating and maintaining an arbitrary, uncontested power on the part of the state and weak, uncertain rights on the part of the indigenous people, whose autonomy was based on customs and practices but not assured by any power of its own or by recognition. From one system to another, from the explicit willingness of some states to the hypocrisy of others, it doesn't seem that a general law was established. What was the possibility for a rule of law actually to extend itself to the entire Nation?

The premises of these results were evident in the initial proclamations of general citizenship. Indigenous incorporation had to mean the abandonment of indigenous culture. Without this, there was no recognition of rights; with this requisite came a definitive loss of autonomy. Expressed in other terms, the state of *guardianship*, a guardianship which was quite significant because it aimed not only at religious conversion but also at a legal transculturation, was always understood as a necessary phase of transition towards this type of community and citizenship. There is not then so much difference between the first and the last extreme of Venezuelan constitutional evolution. There is certainly not much difference in the basic principles of citizenship and guardianship. What distinguishes one approach from another, the Anglo-American model from the Latin American one, is a question of accent, not of paradigm. Both move between inclusion and exclusion, the former colonial and the latter constitutional.

Both prefer to avoid an explicit constitutional commitment; it will be seen, however, that this commitment is not entirely lacking and it is always significant. Canada resorts to amendments, while the United States resists this approach. The constitutional texts of Uruguay, Chile, and Costa Rica remain silent, even in their most recent versions of 1997.

During the nineteenth century, constitutional manifestations were always sporadic. They always focused on religion, the "conversion to Catholicism", as that of Argentina stated in 1853, or the "conversion to Christianity and to civilization", as that of Paraguay specified in 1870: a programme for indigenous peoples which involved the loss of their own culture and other no less concrete hardships, such as the confiscation of lands or, in case of resistance, extermination.

With the new century the picture seemed to change. In Ecuador, in Peru, and again later, in Brazil, Bolivia, Ecuador, and Guatemala, legal formulations which were a bit more respectful of the indigenous presence began to appear; since these were autonomously organized, they did not incorporate the constitutional presumptions, even if there was no compromise on what regarded the powers of the state and on the consequent uncertainty of any right which did not derive from it. Ecuador began, with demanding declarations in 1906 and 1929: "the Public Powers must protect the Indian ethnicity with regard to the improvement of its social life". Peru followed in 1920: "the State shall protect the indigenous ethnicity", "the Nation recognizes the legal existence of the indigenous communities" and "the law shall emanate the corresponding rights". The State *protects*, the Nation *recognizes* and the Law determines *rights*. The Peruvian Constitution of 1933 dedicated an entire article to the *indigenous communities*, recognizing their "legal existence and legal personality" as well as "the integrity of property" and autonomy in the administration of revenues and properties in conformity with the law: "the state shall emanate the civil, penal, economic and administrative legislation which the indigenous have need of". In 1934 Brazil offered a constitutional recognition of the possession of lands by the *indios*.

In 1938 Bolivia, like Peru, added an adjective – *legal*, which denotes subordination to the state – to a noun – *comunidad*, which stands for a whole having its own order – and introduced a reference to legislation that is to the determining role of political decision. In addition there was the obligation to institute "indigenous school nuclei, including the economic, social and pedagogical aspects" that served as a chapter in the "education of the *campesino*". All of this was included in the section on the "peasant condition", without any recognition of an autonomous culture and within a perspective which tended simply to cancel it. Nor did the position of the constitution of Ecuador in 1945 appear any different when it declared that "in the schools of the areas with a predominance of the Indian population, in addition to Castilian, Quechua or the corresponding native language shall be used". The subsequent constitution of 1946 changed the language so as to lower the level of compromise

to the point of reducing it to a mere registration: educational instruction "shall devote particular attention to the indigenous ethnicity", without any other specification.

In the same year, 1945, Guatemala affirmed in its constitution the existence of "indigenous groups", declaring of "national utility and interest" policies aiming at their economic, social, and cultural improvement and entrusting the safeguarding of their "necessities, conditions, practices, usages and customs" to the state. In 1965 the state committed itself "to the socio-economic betterment of the indigenous groups with the aim of their integration in the national culture". Until 1945 the perspective was still that of a cancellation of the indigenous culture, even though guarantees on common property and appreciation for popular art were added. In 1967 the Constitution of Paraguay declared that "the national languages of the republic are Spanish and Guaranì", adding that "Spanish will be used officially", while skipping over the other.

After 1972 the Constitution of Panama offered a further development of these same positions (Articles 84, 104, and 120–123). It recognized "cultural models" and not only the languages of the "indigenous groups", just as it guaranteed "the collective property of the indigenous communities". These were aspects which remained entrusted to the state, since only the general objectives were enunciated. Its policies would have to develop "in accord with the scientific methods of cultural change". The positive recognitions themselves were to be understood as transitory. Prematurely however a constitutional reform of 1928 had conceded the creation of "special statute zones" which offered to the indigenous communities a measure of autonomy under guardianship and guaranteed by the law. Some of these "zones" were able to equip themselves with a statute of their own, citing then current *international* law on *human rights* with the aim of reinforcing themselves constitutionally with regard to the law of the state.[13] But of this suprastate dimension more will be said further on.

There followed a wave of more or less innovative constitutional declarations. In 1978 the Constitution of Ecuador added to the guardianship of linguistic aspects the recognition of "community property" as one of the fundamental sectors of the economy. In 1982 the Constitution of Honduras declared that "the state shall preserve and stimulate the native cultures", attending to "the protection of the rights and interests of the indigenous communities existing in the country" (Articles 172, 173, and 346). In 1983 the Constitution of El Salvador affirmed that "the native languages which are spoken in the national territory are part of the cultural heritage and will be the object of conservation, diffusion and

respect" (Article 62). In these cases, at least more dignified formulations were utilized, without speaking explicitly of *guardianship*, without giving constitutional expression to an approach of a "tutelary" sort. *Culture* is spoken of where once one spoke of lack of civilization.

In 1985 the Constitution of Guatemala widened the panorama with the recognition of the "right of persons and communities to their own cultural identity, in accordance with their own values, language and customs", consequently reformulating the rules about property: "the indigenous communities or communities of other types which have historically held land as property and have by tradition administered it in a special manner will maintain that system" (Articles 58, 66–76, and 143). There appears to be a change in perspective in so much as the recognition seems based on the individual's right and is therefore not uncertain or transitory; this innovation however did not become effective, since everything remained dependent on a "specific law" which, regardless of its actual application, it to the discretion of the state to realize this right.

It was a terrain on which other recognitions would appear, with sometimes significant integrations. In 1987 the Constitution of Nicaragua introduced a system of territorial autonomy by means of legislative acts for the area where the indigenous population is predominant (Articles 8, 11, 89–91, 180, and 181). In 1988 the constitution of Brazil entrusted to legislation the identification and determination of land boundaries (Articles 49.16, 215, and 231). In 1991 the Constitution of Colombia, considering "the ethnic and cultural diversity of the Nation", consented autonomy through legislation and organized the participation of an indigenous minority in the legislature (Articles 7, 10, 171, 176, 286–288, 329, and 330). In 1992 Mexico provided for the recognition not only of language and customs, but also of actual cultures: "the Mexican Nation has a multicultural composition which assumes its form originally from its native populations" (Article 4). Reaching the goal requires ordinary legislation. At the same time, however, some guarantees for community property provided for in the Mexican Constitution of 1917 (Article 27.7) were cancelled out.

Also in 1992 Paraguay reinforced its recognition of multiculturalism: "this Constitution recognizes the existence of indigenous peoples, defined as groups with a culture preceding the formation and organization of the Paraguayan state", which is translated into the rights to "ethnic identity" and to "community property". "Paraguay is a multicultural and bilingual State", and this was to be made effective through a law (Articles 62–67, 77, and 140). In 1993 Peru constitutionally recognized

"the ethnic and cultural plurality of the nation", but in the Constitution itself the orientation was towards a multilingual approach which was weighted in favour of Castilian and towards a system of "peasant and native communities" which tended, as in the Mexican case, to favour privatization masked by the constitutional recognition itself (Articles 2.19, 17, 48, 88, 89, and 149).

In 1994 the Argentine Constitution went as far as to recognize the presence and the identity of indigenous cultures and lands, entrusting to law the regulation of the question (Article 75.17). In the same year Bolivia declared itself constitutionally "multi-ethnic and multicultural" as well as a "unitary Republic". The Bolivian constitution recognizes "the social, economic and cultural rights of the indigenous peoples who live in the national territory" or of the indigenous communities, understood more specifically as collective subjects with legal personality (Articles 1 and 171). The problem is relegated less to legislation, but it is still the state which reserves for itself as political subject the power to create and administer law, even for matters concerning peoples organized as autonomous communities.

Ecuador went even further. In addition to the recognition in 1996 of multiculturalism, it produced in 1998 a new and truly innovative constitution, thanks to the attention paid to indigenous rights and culture (Articles 1, 3.1, 23.22, 24, 62, 66, 69, 83–91, 97.20, 191, 224, and 241). The recognition of the plurality of cultures and of their respective "equity and equality" was presented as a way to "reinforce national identity in diversity" within a framework of "interculturalism". The idea of a common national substratum also made progress: "the indigenous peoples, who define themselves as nations with ancestral roots, and the black or Afro-Ecuadorian peoples are part of the Ecuadorian state, one and indivisible". "Castilian is the official language"; "the ancestral idioms" are as well "for the indigenous peoples, according to the terms established by law". This was the recurrent emphasis, like a sort of exceptional parenthesis, in the various chapters of the Constitution. Among the rights provided for, there was that of "participating in the cultural life of the community" and that to "identity, in accordance with the law".

While Latin American constitutionalism has developed in Castilian, there is an article in the Ecuadorian Constitution of 1998, under the title of "duties and responsibilities", in an idiom which is different from the second constitutional language of the Americas, that is English, and different also from the other current languages, Portuguese and French, an idiom which is not even European: *Ama quilla, ama llulla, ama shua*,

that is "do not be lazy, do not lie, do not steal" in Quechua, the principal lingua franca among the indigenous languages of the Andean region, including above all Peru and Bolivia. There is also an extension of the motto. It may seem an extemporaneous and negligible passage in a constitutional text, but it is a pertinent and relevant sign as an expression of a sense of community.

On the basis of the data up until 1998, it cannot be said that the indigenous presence has been ignored by most of the constitutions. A certain constitutionalism, however, based on the culture of difference and authority, continues to ignore it. Up until this point, though this process is "adventurous" in constitutional terms it has had scant results for indigenous peoples. The self-identification of some peoples as a *nationality* in conditions of equality with others, without excluding those of a European origin, appears indirectly in Ecuador today to be a form of self-denomination bereft of a precise significance in terms of constitutional recognition and of clear institutional impact. In the whole framework of the Ecuadorian constitution, the indigenous presence is taken into account, but it is not in terms of this that the constitutional framework is restructured. The problem already emerges in the chapter on rights, where *rights* do not appear as such, in a strict sense, since their realization is always entrusted to legislation, so that the indigenous condition is subordinated to the ordinary measures of political institutions. These institutions appear more extraneous than indigenous, more bounded than common.

To complete the Latin American panorama, it is also worth mentioning, if only summarily, an international instrument of recognition of the indigenous presence which is assuming constitutional value in some states of this area. The reference is to Pact 169 of 1989 of the International Labour Organization regarding the "Indigenous and Tribal Peoples in Independent Countries", currently ratified by Mexico, Colombia, Bolivia, Costa Rica, Paraguay, Peru, Honduras, Guatemala, and Ecuador. For the sake of brevity, it can be said that this Pact assumes a degree of recognition of native peoples equivalent to that of the most recent constitutional developments previously illustrated. It is a law of these states. In some, as in Costa Rica, it can compensate for the lack of constitutional indications. In others, as in Honduras, it can increase their significance. In any case, it reinforces them. In no case does it change their nature. It continues to be a dispensation conceded by those who resist the recognition of the rights of the peoples already residing in their territory. However there are compromises. There is a sense to the fact that some states, such as Chile, resist both constitutional recognition and

the ratification of this Pact, and prefer to resort to the easier procedures of ordinary law.

From a constitutional point of view, within a more legal vision of the state, there exists, if not an actual autonomous right of the indigenous, at least a right to obligatory recognition, which not only legitimizes but also determines a common system of relations. This has little to do with multiculturalism, with a paradigm which can really establish a rule of law, if the nation itself is not open to pluralism, does not begin to recognize existing diversities, the plurality of cultures, and collective subjects endowed with their own systems and powers. The effective rights of native peoples arose and to a large extent continue to be relegated to the margins of constitutions, beyond the reach of the constitutional mandates of the states. Can a non-illusory rule of law mature under these circumstances?

3 THE RULE OF THE LAW OF NATIONS: ALL OF AMERICA

Is it possible to have a rule of law for the American continent which does not imply a situation of *apartheid* (since that is the result) for native peoples, for those who possess territory, community, and entitlements which precede the European presence and the formation of the states? Does an American rule of law exist which is not an illusion of the nations, harmful for the peoples? Perhaps. *Apartheid* itself, as has been demonstrated very clearly in South Africa, can perfectly well be a rule of law, the law of a state which adheres to a system and respects it.

On the American continent there exists in fact a *status iuris gentium*, above all a rule of the law of nations, of international law in all its extensions. We have already had to make reference to the fact that, at the end of the nineteenth century, the American states were able to enjoy the advantages of a general interstate system, which supported and favoured a presumption of sovereignty and the claim of its distribution over the entire area of the Americas, as if there did not exist independent territories of indigenous peoples or actual populations in these territories, as if their presence were literally invisible. This is an important factor in understanding the illusion of the rule of law on the American continent. The position assigned to native peoples was not the invention of the state, of each state on its own. Between exclusion and inclusion, there is a basic coincidence which is at least symptomatic.[14]

Guardianship, and all that this implies in terms of reduction of role and neutralization of rights, was an invention of the *ius gentium*. This *ius* was a law which, since medieval times, had conceived of Europe as the

one and only humanity, without taking into account the rest of the world's peoples, and which presented itself as *ius naturale*, as natural law, therefore as an obligatory order. And the guardian, as we know, had at his disposal many discretional powers. He was presumed to know the interests of his ward better than the ward did himself. As once with the Monarchies and the Churches, by then the Churches and the states knew what the native peoples of America needed. Thus no law could be invoked to oppose the discretion of the guardianship. Even when this was not made explicit or established, as in some initial cases or in other recent developments, this basic position was maintained. The states felt that they were invested not only with power but also with science in managing the indigenous population, like a passive humanity incapable of attending even to its own interests.

The degradation of some *gentes* with respect to others and the Europeans was not a constitutional invention. It derived from the preceding centuries and was even aggravated on the eve of certain crucial moments, when that which would be called the rule of law was already taking form. Recourse was made to the most respected authority in the period of the formation of many American states, an authority well known to the world, both Anglo-Saxon and Latin: the *Droit des Gens* by Emmerich de Vattel.[15] Around the middle of the eighteenth century, a rather clear way of defining the rule of law, including the constitutional state, was arrived at. And yet here we find restrictive formulations which lead to the colonial exclusion of the indigenous population, of the human beings present in the American territory before the Europeans.

We must analyze above all the category of *Nation ou État*, of a *state* identified with the *Nation*, the political institution created by men to protect themselves and procure benefits and security by uniting their forces, and endowed to fulfill this aim with the power of sovereignty or self-government, as a true *sovereign state*. The form in which all of this materializes is the constitution, that which forms the *constitution of the state*. These categories are all defined in such general terms that it seems as though all of humanity can make recourse to the national, state, and constitutional formula, to obtain for themselves a good guardianship. However the dependence on a *foreign* state is a warning sign. Regardless of other applications, the theme at hand already emerged in some way in a context which was not exactly that of the plausibility of the nation and of the possibility of the state and of the constitution.

We are speaking of America. We see it cited in a chapter on "the natural obligation to cultivate the earth" or in another devoted to the problem of "whether it is permissible to occupy a part of a country in

which there are only nomadic peoples and in small numbers", where prejudice towards the indigenous population signals that the answer to the question will be in the affirmative. This was "a celebrated question, raised to a large extent by the 'discovery' of the New World": already the idea of *discovery* reinforced the prejudicial scenario. It was from this context that the answer arose: "the peoples of Europe, too restricted in their own countries, finding a territory of which the savages have no particular need and make no current and continual use, may legitimately occupy it and establish Colonies". If there were reservations, it was because of Spanish colonialism, not Anglo-Saxon, to the extent to which the former went too far in its direct domination of native peoples. In this case nothing was said of *guardianship*, which already existed for some and would arrive for others, because we are already in the original constitutional position of exclusion, which was the basis of the early United States constitutionalism.

It was Europe, extended into the "New World", which was the subject of this law of nations, of peoples. *Les peuples de l'Europe*, the peoples of Europe, are those which count, and which can count, taking advantage of their rights as nations, of the institution of the state, and of the constitutional system. The rest are *les sauvages*, savages, people who are presumed to be without culture, populations with inferior credentials, bereft of their own law in a strict sense, rooted in their own territory, and faced with the European presence. It is a normative framework based on a specific cultural presumption, with the consequence that aspects which are so important for the existence and protection of all, such as the nation, the state and the constitution, are not accessible to all peoples. Those peoples who remain independent in America and have a non-European culture cannot claim a position of legal and political equality with the population of European provenance and culture; only from the latter can nations, states, and Constitutions arise.

Let us make a jump back in time, undoubtedly opportune, given that there exists a certain continuity.[16] The international, interstate, or interconstitutional scenario which has been delineated continued substantially at least until 1960, until the date of the Declaration on the Granting of Independence to Colonial Countries and Peoples of the General Assembly of the United Nations, despite the Universal Declaration of Human Rights itself, which in 1948 had in fact maintained this colonial discrimination among the peoples, as if it were indifferent with regards to individual liberties (Article 2.2). In 1960 this Declaration asserted that "the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental

human rights", to then go so far as to recognize that not only established states, but also "all peoples have the right to self-determination" (Articles 1 and 2). It was a step forward that, at the time, was not sufficient but which would end up concerning the native peoples of the American continent.[17]

According to the United Nations, the qualification of *foreign* attributed to decolonization excluded from the very beginning, for the American continent, the hypothesis of any colonial relation existing inside the states of that continent. The very criteria used to identify the new peoples capable of affirming themselves as nations and constituting themselves as states are of a colonial sort: populations external to the borders of the colonizing states and in conformity with the borders which divided up the colonies themselves. The people can be understood as the population which constitutes the state but, in this way, the assimilation between the two parts is taken for granted, ignoring the problem of another entity within the state. The term *Nation*, as in the very name of the United Nations, whose members are actually states, perpetuates this problem.

With the Universal Declaration of Human Rights of 1948, and the decolonization compromise of 1960 that was undertaken in its name, under the impetus of the United Nations itself, the American states were pushed well beyond the point to which they had meant (as has been seen) to arrive. Reference has been made to the 1989 Conference of the International Labour Organization, a specialized organ of the United Nations. Since 1958, the human rights have been developed; meanwhile, controversies have emerged which have produced case law in this regard inside the United Nations itself. Both Declarations and that of case law are relevant.[18]

Two legal instruments regulate the development of human rights, the Covenant on Civil and Political Rights of 1966, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, or Linguistic Minorities of 1992, to which has been added the Declaration on the Rights of Native Peoples, which though only a project, has already been formalized. The Covenant of 1966 is more relevant in this regard than that, parallel and simultaneous, on Economic, Social, and Cultural Rights, despite the adjective "cultural", because it is the former more than the latter which recognizes the right to a particular culture, and not a culture of universal character. Moreover, it adds a protocol which establishes the Human Rights Committee, a judicial body more independent than the common system of checks realized through exchanges and encounters between states and the United Nations.

Both Conventions inserted as a first article the declaration of the rights of all peoples to self-determination. In this way they require (just as the annex on the judicial body) for them to enter into force, contrary to the Declarations, a special and therefore more binding ratification on the part of the states.

The Covenant on Civil and Political Rights, apart from the first article on the collective right to self-determination already cited, consists of a list of individual rights, including the right to one's own culture: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language" (Article 27). As this is not a collective right, it inheres in the individual person and not in the *minority* as such. It is necessary to be a *people* to be able to count on the rights recognized by this covenant, those of the first article. Human Rights Committee, to which the citizens of the states that accept its jurisdiction can apply and adjudicates the problems that arise.

This Committee has already received claims to the right to self-determination, declared in the first article of the Covenant on Civil and Political Rights, by a certain number of peoples not constituted as a state, as occurred with the initiative of the native populations of Canada. Canada immediately ratified these rights. The Human Rights Committee cannot respond to these requests for a procedural reason. The United Nations which constituted it, the Protocol of the Covenant which empowered it, the Covenant itself which structured it and the states which accept it without reserve acknowledge the legitimacy only of individual rights and not collective ones. In other words, the Committee cannot pass judgement on the right of peoples expressed in the first article, but only on individual cases as provided for in the remaining articles.[19]

This is not, however, a denial of the substantial existence of this primary collective right, but only of the possibility of taking advantage of it through this judicial channel. Case law expressly declares that the recognition and the exercise of the right to self-determination is not fulfilled and exhausted with decolonization, the criteria of which it clearly avoids making any recourse to. The Human Rights Committee does not maintain that the requirement is met only in the case of "alien subjugation, domination and exploitation", as asserted, with all its consequences, by the first article of the Declaration of 1960. Now it is understood that the question exists, because of the differences among

peoples, even in a context of greater contiguity or in the case of inclusion in the same state. The criteria of decolonization have rightly been overcome. For this judicial agency of the United Nations, the problem remains open.

The Human Rights Committee is also producing case law on Article 27, relative to the right to a particular culture, a right whose entitlement is individual and whose exercise is social. Up until now there have not been sufficient cases to delineate a line of interpretation. Given the tension, characteristic of this article, between the individual right and the collective context, it is not possible in any case to go so far as to take into consideration a collective right, different from that of the state, which gives force to an individual claim, but a direction is nonetheless indicated. The right to culture no longer appears only as a right to one's own language or to other forms of communication and coexistence, but also includes, for example, a right to one's own territory and to the ways of utilizing one's own resources. That also is considered culture and so is protected by Article 27, approaching the realm of collective rights which are not acknowledged, as we have already said, for reasons more of a procedural than a substantial character.[20]

There are other innovations in the United Nations: for example the question itself of the *minority*, of this category which serves to determine the scope of Article 27 of the Covenant on Civil and Political Rights. It is not a new concept for the indication of a human group. It had already been utilized by the preceding agency, the League of Nations. The United Nations has used this term since its origin, indeed it gave the name to one of its most active institutions, the Sub-Commission on Prevention of Discrimination and Protection of Minorities. It is a term which serves to identify the existence of groups endowed with a precise constitution and culture of their own, but without their own state. The criterion therefore is from the beginning qualitative, not quantitative. It can be and indeed is applied without hesitation, by the United Nations, even to populations which are a majority within the corresponding state, which however is a state that identifies with a different culture. That a minority from the legal point of view may be a de facto majority according to the standards of state evaluation happens at times in Latin America, despite all immigration policies.

Though a language of a *tutelary* sort is lacking, a certain continuity exists with the more clearly colonial language of the permanent underaged *minor*. Given that the concept of qualitative *minority* is, moreover, extended to the rest of the population, regardless of whether it is quantitative or not, it is possible to understand the activity of the

above-mentioned Sub-Commission for the purpose of protection. There are many cases in which states do not secure any protection and therefore the *minority* is by definition deprived of the possibility of helping itself on its own. But decolonization does not cease to influence our problem. There are *minorities* that, once recognized as *peoples*, disappear when states are formed; and there are others that, without having had recognition, remain more visible precisely because they have been excluded from such transformation. The fact is that over the last few decades the Sub-Commission on Prevention of Discrimination and Protection of Minorities has not only seen its work increase, but it has also had to forcefully pose the problem of its object and aims, with an urgency unthinkable in more openly colonialist times.

The key question is the existence of peoples, not only of minorities, deprived of guarantees from the human rights perspective, a perspective defined not in 1948 but in 1966. The form in which the Conventions are laid down, with a first article on a collective right, the right of peoples to their own self-determination, and an extension of individual rights, delineates the underlying theme. With respect to the declaration of 1960 on decolonization, the point of departure is not reiteration, but integration. Individual human rights are established assuming collective human rights as a premise. The right of each people to their own freedom is a requisite of individual freedom. Reference is made, that is, to individuals whose existence is established, life develops, identity is formed not within an undifferentiated humanity, but within a specific culture, national or adopted. Otherwise the states themselves would be enough. Perhaps even one would be enough.

Other than decolonization, the principal question before the United Nations is that of the native peoples, peoples colonized and integrated without any determination on their own part in constitutional states which continue to be alien to them. It is necessary to remember that, according to statistics issued by the United Nations itself, this condition, which may be called *indigenous*, concerns about 400 million individuals, 40 million of whom are on the American continent. But the problem of rights is not quantitative; it is above all qualitative. A characteristic, though not an exclusive one, of the American continent is that the constitutional order, originally and still so in some states, has ignored the presence not only of that particular part of the population but also of the rest of the population. There exist many peoples without any recognition who are even today deprived of the human right of self-determination, of a right which is the social premise of individual freedom.

The United Nations has dealt with the problem, arriving at the formulation of a project for the Declaration of the Rights of Indigenous Peoples, which is of twofold interest because it does not limit itself to a proposal to recognize them as peoples.[21] The recognition of peoples as collective subjects endowed with self-determination is the first innovation. But there is another no less substantial, which is attention paid to the problem of what happens when people and state do not coincide. A distinction has to be drawn between these two concepts and it is necessary to explore the possibility of how they can be made compatible, without cancelling the right of the people to self-determination. In other words, the process which opens up, making possible the formal emergence of these subjects, the peoples, is a process of proliferation not of *sovereignty* but of *autonomies*, autonomies which however are recognized and guaranteed internationally before the respective states. The people and not the state take responsibility not only for their own rights but also for the level and the form of communication and participation. Internal autonomy itself becomes the expression of self-determination, whether the inclusion of the people in the state is maintained or whether this collective freedom, when it can be expedient, is exercised.

For the moment, this is a project. Within the ambit of an international law of human rights, it is with the Human Rights Committee and in its case law that the greatest importance and topical relevance resides. There are, however, other innovations. Everything that has been proposed and deliberated concerning the rights of native peoples, collectivities that cannot be adequately described by the category of *minority*, has certainly had an influence on a new instrument (not on a mere project) in the development of human rights: the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, issued in 1992.

This new instrument is expressly presented as the evolution of the before-mentioned Article 27 of the Covenant on Civil and Political Rights. Its title does not seem to promise much in the way of innovation when it specifies how individual rights and also the rights of "persons who belong to minorities" are to be treated. One undoubted innovation is the qualification of *national* for the word *minority*, whereas *nation* had until then corresponded only to states, as continues to be the case in the name of the United Nations, is placed before those of ethnic groups, religion, and language, which had already appeared in the previously-mentioned article of 1966. And there is a substantial innovation, although not at the beginning. The rights which are declared are actually of individual entitlement and of collective use, with the contradiction

which we have already seen to occur when there is not, as in this case, a right attributed to the collectivity itself. The minority continues to be the sphere of the liberties of individuals whose culture cannot count on the protection of their own state. There are those who are lucky to have this protection and those who cannot take advantage of it collectively and must therefore rely to a large degree upon a state of a different culture.

This innovation however applies to an indigenous population that, there not yet being any Declaration which regards it, remains a *minority*, continuing to avail itself of the treatment provided for in the international order. Now, by means of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, there is a commitment that "the measures adopted by the states to guarantee" such rights must not be contrary to the principle of equality (Article 8.3), that is to a canon which is part not only of constitutions but also of the human rights in the Universal Declaration of Human Rights. Within the state, this basic principle is defined with respect to groups. It is clear what that can imply: there is a change in measurement. The equality of individual rights, which is allegedly universal, must be evaluated not by the state, as in constitutional practice, but by the *minority* itself. It is impossible that legally autonomous peoples should not obtain a space within the constitutional states, because that would be an attack against the equality of citizens, according to a common argument used by native peoples in the whole American continent. Equality is measured by the minority, so by the peoples as clearly distinct from the state.

The minority is thus a measure of itself, which modifies the category itself. How can it continue to call itself *minority* if, on the essential question of rights, it is dealing not with something extraneous but with itself? Individual equality is collective, the equality of all the individuals in a cultural space of their own in the same measure, without any discrimination or exclusion. There are no *gentes* who are more cultured with greater rights and others who are in need of acculturation, as the Universal Declaration of Human Rights itself in substance presumed. This has been the presumption of colonialism since the times of *ius gentium* in Medieval Europe.

What kind of rule of law has been the result and what one might be possible? With regards to the past (a past which in any case has continued up until our times), we have an answer. The future is a greater unknown but suggestions coming from the evolution of constitutionalism throughout the whole American continent are not lacking, nor are those coming from the development of the human rights system at the initiative and impetus of the United Nations. If we keep in mind and put together both phenomena, if we stop looking at the constitutional

question in the European mirror, and if we understand that a constitutionalism which goes beyond Europe passes today by way of international law, there are answers. Other hypotheses are not necessary.

Between state law and international law, between constitutional rights and human rights, today the necessity arises for some states which have interiorized colonialism constitutionally to reorganize themselves, not merely recognizing a "presence" to which to attribute some rights, but giving rise to a new constitutionalism which, in the area of individual liberties, will not limit itself to privileging the collective entitlement (the states already do that with their own orders), but instead makes the most of the actual existence of peoples who differentiate themselves by their own cultures.

The protection of individual rights depends exclusively on the rule of law within each nation state and ends up harming the individual himself, since, as happens on the American continent, the *people* who form the nation state and identify with its culture are neither the entire population within its borders nor the original population. Expressions of collective autonomy, only *the rights of the peoples* (where not only the first term but also the second is in the plural and not the singular), assumed as the basis and aim of individual rights, can establish *a rule of rights* void of those old colonial claims from which the European rule of law has not been able to free itself.

NOTES

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