

DECOLONIZING CONSTITUTIONALISM

Beyond False or Impossible Promises

*Edited by Boaventura de Sousa Santos,
Sara Araújo and Orlando Aragón Andrade*

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<i>Preface</i>	<i>xi</i>
<i>Boaventura de Sousa Santos, Sara Araújo and Orlando Aragón Andrade</i>	
<i>Acknowledgements</i>	<i>xv</i>
Introduction: The Constitution, the State, the Law and the Epistemologies of the South	1
<i>Boaventura de Sousa Santos, Sara Araújo and Orlando Aragón Andrade</i>	
PART I	
The Vast Landscape of Constitutionalisms	27
1 Do Constitutions Matter?: The Dilemma of a Radical Lawyer	29
<i>Issa G. Shivji</i>	
2 Healing a Wounded Islamic Constitutionalism: Sharia, Legal Pluralism, and Unlearning the Nation-State Paradigm	34
<i>Asifa Quraishi-Landes</i>	
3 Nihilisms, Contradictions, and Anomie in New Constitutionalisms: A View from India	60
<i>Upendra Baxi</i>	

- 4 Indigenous Women: Towards a New Transformative Constitutionalism? 80
Rosalva Aída Hernández Castillo

- 5 Modern Constitutionalism, Legal Pluralism and the Waste of Experience 101
Sara Araújo

PART II

Post-Colonial Transitions: The Case of South Africa 123

- 6 Legacies and Latitudes: Past, Present and Future in South Africa's Post-colonial Legal Order 125
Heinz Klug

- 7 Shared Experiences from South Africa Constitutional Court 148
Albie Sachs

- 8 On Settler Colonialism and Post-Conquest *Constitutionness*: The Decolonising Constitutional Vision of African Nationalists of Azania/South Africa 168
Tshepo Madlingozi

PART III

The Return of the Abyssally Excluded?: The Indigenous Constitutional Struggles in Latin America 193

- 9 Can Silence Be a Constituent?: A Reading of the Indigenous Communitarian Constitutionalism of Bolivia 195
Salvador Schavelzon

- 10 Plurinational Constitutionalism: Plurinationality from Above and Plurinationality from Below 214
Raúl Llasag

- 11 Transformational Constitutionalism, Interculturality and the Reform of the State: Looking through the Eyes of the Originary Peoples 240
Nina Pacari

- 12 Participation and Presidentialism in the Ecuadorian Constitution of 2008 255
Agustín Grijalva

- 13 Transforming Transformative Constitutionalism: Lessons from the Political-Legal Experience of Cherán, Mexico 271
Orlando Aragón Andrade

- 14 The Law of the Excluded: Indigenous Justice, Plurinationality and Interculturality in Bolivia and Ecuador 288
Boaventura de Sousa Santos

- Conclusion 323

- Index 325

INTRODUCTION

The Constitution, the State, the Law and the Epistemologies of the South

*Boaventura de Sousa Santos, Sara Araújo
and Orlando Aragón Andrade*

The concept 'epistemologies of the South' was coined in a special issue of the *Revista Crítica de Ciências Sociais* in 2008, but the background to the proposal dates back to Boaventura de Sousa Santos' ethnographic experience of legal pluralism in a Rio de Janeiro favela in the 1970s (Santos, 1977). In the division between Pasargada law and asphalt law presented in this first work, we can see what would, decades later, come to be formulated as a constitutive concept of the epistemologies of the South, namely the abyssal line which divides the world that counts from the one which, in light of the five monocultures constituting modern thought,¹ is irrelevant, local, residual, inferior and non-productive (Santos, 2014, 2018).

As such, legal pluralism was not only a theoretical and analytical issue but also an epistemological and political problem concerning the definition of what counts as truth:

What is the truth or validity of an official scientific-legal knowledge which considers that which is 'of worth' to vast sectors of the popular classes, as another law or alternative legal knowledge, to be non-law or ignorance of the law?

Santos, 2003: 43

The aim of this book is to extend the debate, bringing together a set of post-abyssal reflections in the field of socio-legal studies with an emphasis on discussions concerning the limits and possibilities of critical constitutionalism.

The South, as the founding metaphor of an emerging subjectivity, appears in a 1995 publication in a chapter entitled 'Don't Shoot the Utopist' (Santos, 1995). It established a challenge in three phases: learning that there is a South, learning to go South and learning from the South (Santos, 1995: 508). Learning from the South

is currently the greater challenge. It requires a process of unlearning the social sciences which have divided the world between those who produce knowledge and those who are the object of study. Making this statement is different from proclaiming the irrelevance of the knowledge produced in the geographic North or romanticizing the South. The South is a metaphor for knowledge born of capitalist, colonial and patriarchal violence, and the social struggles that have opposed them (Santos, 2014, 2018). Unlearning the North involves questioning the hierarchies imposed by the Eurocentric canon and provincializing theories which, due to their distorted self-image, start from a premise of immunity to context (Chakrabarti, 2000; Santos, 2014, 2018).

The epistemologies of the South, which are incompatible with general theories, do not offer a formula but propose a combination of epistemological instruments that serve not only to denounce epistemicide (Santos, 1995) and juricide (Santos, 2011) but also to identify silenced knowledge and expand the political imagination. The social sciences are, from the outset, invited to develop a sociology of the absences in theories, concepts and long-established questions, and to raise questions and identify concepts that allow for the production of a sociology of emergences.

When Boaventura de Sousa Santos defines the concept of the abyssal line, he identifies absences produced through the regulation/emancipation dichotomy hitherto central to his work:

Indeed, the regulation/emancipation dichotomy only applied to metropolitan societies. It would be unthinkable to apply it to colonial territories. There, another dichotomy would apply, the appropriation/violence dichotomy which, in turn, would be inconceivable if applied on this side of the line.

Santos, 2014: 119

The tension between regulation and emancipation is relevant where the social contract is valid. The other side of the abyssal line is the state of nature, the zone of non-being (Fanon, 2008 [1952]), which can be subjected to violence and appropriated, either through the elimination of subjects or through a civilizing process (Santos, 2014). This dividing line was identified by Mamdani, in the context of the African continent, as a 'bifurcated state', a colonial heritage separating humans and lesser humans, linguistic discourse and vernacular conversation, art and crafts, modern law and customary law: in short, the civilized and the savage (Mamdani, 1996: 61). The abyssal division, however, crosses other locations, namely the geographical North. In Europe too, the development project was based on the elimination of the Souths, with all the knowledges and alternatives they contained. This waste of experience is constitutive of modernity, which only recognizes the knowledge of a science favourable to capitalist development and the capitalist order, as an exportable legal model compatible with this project.

Having identified the abyssal line, the incompleteness of the theory of regulation and emancipation becomes visible. Hence, a core question is revealed as incomplete: can the law be emancipatory? (Santos, 2002). This question is formulated from this side of the line, a sphere in which cultural differences fit within modern codes of interpretation and inequalities can be translated into modern legal language. It is not a case of declaring the question irrelevant, but of arguing for the need to broaden its terms. Legal thinking must consider both sides of the line and the three structural axes of power within modernity that are constitutive of modern law – capitalism, colonialism and patriarchy. Thus, the question has become: is it possible to build a post-abyssal law? In other words, is it possible to decolonize, decommodify and depatriarchalize the law? This is a very broad question which can be translated into multiple questions, whose answer can only be found in the convergence of very different knowledges.

1.1 Epistemologies of the South and Constitutionalisms

The modern-Western hegemonic project identifies the constitution as a set of basic elements that establish and regulate political and legal agreements in the social life of a given community and sees it as the legal scale *par excellence* for political unity within Western modernity: the nation state. In turn, the modern state, which began to be constructed in Europe in the seventeenth century, was mainly conceived as a machine for political and social engineering from the mid-nineteenth century onwards. Its formal, mechanical and artificial constitution has given it a strength and plasticity unprecedented in any other political entity. Its plasticity resulted from its virtually infinite institutional and legal manoeuvrability, which provided the state with the ability to define the normal and abnormal means, as well as the normal and abnormal ends, of social transformation (Santos, 2000: 170). The modern state, as an exclusive unit of social intelligibility and political imagination, reduced law, which had previously been plural, diverse and dispersed, to a single monolithic type of law, namely state law. This reduction was safeguarded by scientifically legitimized codification processes (Santos, 1995, 2014).

The constitution has been predominantly conceived of as an expression of a united dualism, composed of 'the legal' and 'the political', a privileged place for perceiving the relationship between politics and law (Bobbio, 1984).² Constitutions are imagined as a more or less crystallized synthesis of the legal and political bases that uphold the life of a given community as a collective. Most approaches in the dominant field of Western legal studies are characterized by the technical-scientific reductionism of the constitution. This reductionism fails to take into account the political projects and divergent social forces interested in the success or failure of the constitution and ignores or devalues the asymmetric power relations that globally traverse past and contemporary constitutions and constitutionalisms.

The state, the law and the constitution, as well as the strong interconnections they establish, are the central pillars in the construction of the economic, social and political structure generated by the dominant modern-Western project. From the perspective of the epistemologies of the South that we have been proposing (Santos, 2014, 2018), this project is based on three main forms of domination: capitalism, colonialism and patriarchy. Thus, much of what is present in and around contemporary constitutions reproduces the capitalist (classist), colonialist (racist) and patriarchal (sexist) dynamics that characterize this project. Thinking about the state in this context involves, on the one hand, finding ourselves situated in the field of a legal sociology of absences – the sociology of absences is one of the main conceptual devices of the epistemologies of the South – and assuming a hermeneutic of suspicion in relation to the alleged neutrality and technical superiority attributed to the modern state and law, thereby positioning them within a colonial, capitalist and patriarchal civilizational project. On the other hand, it involves engaging with the sociology of emergences and identifying legal alternatives based on the wide range of legal maps of the world that pave the way for the construction of new utopias. These are supported by real experiences and knowledges which have been thought through and constructed by those who have personally suffered the effects of structural violence while engaging in political struggles against the various forms of oppression (Santos, 2014, 2018).³

When commencing with a study of the constitution, we are confronted, on the one hand, with the paradoxical conjunction between the polysemic and contentious nature of the term itself and, on the other hand, the constitutional homogeneity which produces abyssal exclusions. The polysemy results from the possibility of understanding, and even contesting, the constitution in different ways. For example, from some standpoints it is seen as a reflection of a minimum consensus on the basic norms governing community life, while others consider it from the viewpoint of dissent; there are those who see it as a mechanism for preserving a particular social agreement or *status quo* and others who see it as the basis for transformation or innovation; there are also those who consider it the foundation of ‘unity’ and those who, in contrast, interpret it as recognition of plurality and diversity beyond homogenizing unitarisms. In short, the same word can assume different and even contradictory meanings.⁴

Hence, the constitution is a disputed term.⁵ The origins, understanding, contours, potentialities and usefulness of the constitution, as well as the problems associated with it, are controversial. In this sense, its meanings depend to a large extent on the social actors who dispute them and the power relations synthesized in a given context that ultimately configure what is considered to be a constitution. It is a dispute which implies that the political, theoretical and epistemic positions and projects, and even the world views of the dominant social and political subjects, carry significant weight. The understanding of what is, or what may be, a constitution is structurally traversed by dynamics that reveal ethnocentrism and

the hegemony of the global North. Thus, what is considered part of the ‘minimum elements of validity’ of a constitution, as well as its purposes and objectives, is also traversed by abyssal dynamics (Santos, 2010a, 2014, 2018). This condition translates, on the one hand, into the invisible status of conceptions, experiences and practices that do not fit within the dominant Western ‘constitutional canon’, or the impossibility of these ‘other forms’ and ‘other experiences’ becoming known and valued. At best, they are reduced to mere ‘particularisms’, relevant only to thinking about the reality of countries and regions of origin, but not for thinking about constitutions or constitutionalism on a global level.⁶

1.2 The Hegemonic Constitutional Project

Constitutionalism, which establishes the limits and form of the state, is based on the ideas of unity, uniformity and homogeneity: one state, one nation, one law. The nation is the set of individuals who belong to the same geopolitical space and share a culture. However, the homogeneity of the nation state was artificially constructed, resulting from a violent rupture with the past. Although immersed in a fictional account of inclusion and homogeneity, the history of the relationship between vast social groups and the modern nation state is constituted by violence which targets different social groups or dissidents and a monocultural understanding that covers up the destruction or marginalization of nations, laws, cultures and identities that coexisted in the same geopolitical territory (Chatterjee, 1991, 1998; Yuval-Davis, 1993; Tully, 1995; Marx, 2002; Comaroff and Comaroff, 2003; Anderson, 2006; Roy, 2008; Santos, 2014, 2017).

Modern law is administered by the state, operating exclusively on a national scale and presiding over a bureaucratic and professional administration. Compatible with the fiction of the homogeneous nation, law is a globalized localism (Santos, 2008), that is to say, a Western initiative that acquired the status of universality through colonial power. In the words of Peter Fitzpatrick (1992), the law is a Eurocentric myth, allegedly immune to context and politics, which sustains the claim of Western superiority and linear historical narrative, progressing from disorder to order and combining the latter with the rule of law.

According to the author,

[M]odern law emerges, in a negative exaltation, as universal in opposition to the particular, as unified in opposition to the diverse, and as omniscient in contrast to the incompetent, and as controlling of what has to be controlled [...]. Law is imbued with this negative transcendence in its own myth of origin where it is imperiously set against certain ‘others’ who concentrate the qualities it opposes. Such others are themselves creatures of an Occidental mythology, a mythology which denies its own foundation by consigning myth in general to the world of these others. This combined denial of myth does not mean that

the mythology which operates in the West is qualitatively different from that attributed to these other ignorants.

Fitzpatrick, 1992: 10

For James Tully,

The great tragedy of the modern constitutionalism is that most European philosophers followed Hobbes and turned their backs on dialogue just when non-European peoples were encountered and dialogue and mediation were needed to avert the misunderstanding and inhumanity that followed.

Tully, 1995: 116

The jurist Kenneth B. Nunn, co-founder of the Center for the Study of Race and Race Relations, a law school centred on the issue of race, argues that Western European culture, when compared to others, is highly materialistic, competitive, individualistic, narcissistic and focused on the consumption of natural resources and material goods, and that law is part of a broader cultural effort that promotes European values and interests at the expense of everyone else (1997). Law is understood by Nunn to be a 'European enterprise' which affirms and celebrates the Eurocentric cultural experience, contributing to its hegemony:

Law contributes to Eurocentric hegemony in three concrete ways. First, law 'controls the beast' by organizing and directing white institutions and cultural practices. Second, law 'polices' white culture. That is, law operates to help determine which ideas and practices are valued in Eurocentric culture and which can be identified as 'threats' subject to the use of coercion or force. Third, law works to legitimate white institutions and practices by helping to place the imprimatur of universality on European practices and champion the desirability and inevitability of white dominance.

Nunn, 1997: 351

Although there are examples of social achievements through law in the history of the twentieth century, the truth is that it was conceived as an instrument for protecting private property and for collective submission to the terms of capitalist productivity as conceived by the bourgeoisie in the West (Abel, 1990; Santos, 2002, 2017; Castro-Gómez, 2005; Roy, 2008). It is characterized by a set of assumptions essential to the ambitions of this economic model, such as uniformity (applied invariably), universality (reproducible and predictable), territoriality (law is territorial and non-personal) and logical-formal rationality (borrowed from modern science) (Galanter, 1966; Wolkmer, 1994; Santos, 2000). Its allegedly rational, neutral, objective and fair language promotes a fictionalized natural order legitimizing the values and goals of capitalism.

In the book *Colonial Lives of Property*, Brenna Bhandar (2018) shows how the appropriation of indigenous lands was based on ideologies that claim European racial superiority and on legal narratives that equate civilized life with private property. The evolution of modern property laws and the justifications for the possession of private property 'were articulated through the attribution of value to the lives of those defined as having the capacity, will and technology to appropriate, which in turn was contingent on prevailing concepts of race and racial difference' (Bhandar, 2018: 4). For the author,

The colonial encounter produced a racial regime of ownership that persists into the present, creating a conceptual apparatus in which justifications for private property ownership remain bound to a concept of the human that is thoroughly racial in its makeup.

Bhandar, 2018: 4

Moreover, the link between capitalism and patriarchy has long been the subject of research work and feminist theories. In Silvia Federici's well-known study *The Witch and Caliban*, the author presents what the epistemologies of the South would call a sociology of the absence of the role of women. It advocates the importance of reading events not only from the point of view of production but also in terms of reproduction, and shows the intersection between women's history – the naturalization and devaluation of their role, the violence targeted at their bodies and the social struggles they have fought – that is, the history of the other (in another modern artificial dichotomy) and the history of capitalism (Federici, 2009; Federici, 2014).

The transformation of women's bodies into machines that produce workers required universal, formal, binding legislation and complicit institutions that would ensure abortion was penalized and would only recognize binary bodies and a bourgeois, heteronormative family design at the service of a single productivity (Peterson, 2013; Federici, 2014). It was this form of productivity that established itself as one of the five monocultures of modernity: the capitalist monoculture (Santos, 2014). Naturalizing the heteropatriarchal family model means denying the history of the power relations at the origins of capitalism and the construction of states. The type of relationships constituted in extended family networks was based on different kinds of relationship and logics of authority, respect and resources. As V. Spike Peterson argues,

[E]ffective centralization required a reconfiguration of social arrangements, which typically involved states establishing relatively independent heteropatriarchal 'family'/households as the basic socio-economic unit; the latter facilitated resource extraction, military conscription, regulation of property (including women), and centralized control more generally.

Peterson, 2013: 57–59

The modern legal paradigm survived the national independence processes, which failed to change the way the West viewed the colonies. The world order negotiated by the United Nations at the end of World War II was based on a Charter of Rights and a set of principles which reflected European history, even though they were granted universal validity. The model state law was presented as a neutral device, the universal archetype of a linear development project (Mattei and Nader, 2008; Roy, 2008; Madlingozi, 2010; Araújo, 2016). The 'other' could only aspire to independence and recognition by the Westphalian international order when it conformed to the only state model recognized, the nation state (Roy, 2008). Within the same project, civil society was created, in many contexts an entity even more artificial than the state itself. The many social processes (ethnic divisions, local cultures, legal pluralism, etc.) that were excluded from civil society were translated by the hegemonic powers into explanatory factors for the 'weakness' of civil society (Santos, 2000), the same type of approach that often resulted in the classification of states as fragile, failed or collapsed (Barros-Varela, 2017).

As Dianne Otto states, 'to become a member of the UN community and to obtain full international citizenship and sovereign legal personality, an entity must generally qualify as a state' (1996: 341). She continues: 'Decolonization repeated imperialism, but with a new legal and moral appearance' (1996: 343). Despite all their differences, the countries of Eastern Europe and those of the West converged in recognizing the Eurocentric canon and saw history as a global evolutionary movement, whether in the direction of global capitalism or international socialism. In both cases, Europe symbolized the most advanced stage of development (Otto, 1996: 340). The international principle *utis possidetis juris* (the inalterability of colonial frontiers), a construct as colonial as that of the nation state, ensured the continuity of highly artificial borders, ignoring the affinities and forms of organization that existed prior to colonial invasion (Roy, 2008; Otto, 1996).

In a text on the rule of law in African contexts, Makau Mutua summarizes the continuity of the colonial scenario in one paragraph:

Soon after Africa's independence, cadres of Western academics and policy-makers believed that Africa's new states would be 'civilised' by the rule of law. Western thought viewed pre-colonial Africa as pre-law, and thus argued that emergent states needed formal Western legal regimes to enter modernity. No credit was given to pre-existing African legal systems, which were often referred to as 'customary law', 'traditional', 'savage' or 'uncivilized'.

Mutua, 2016: 163

Contemporary legal transplants are fuelled by the disparity within modernity between experiences and expectations, an unbalanced form of management that results from the great unfulfilled promises based on the idea of progress and

abstract prognoses (Galindo, 2014). In this introduction, we will not detail the complexity resulting from these top-down processes which fail to recognize what exists and produce unexpected results. The excessive weight attributed to international agents and their impositions, marked in legal historiography, was called the 'diffusionist model of reception' because it is based on blindness to the complexity of legal encounters (Duve, 2014: 8, 9).

Colonialism is translated into academically validated, apparently neutral concepts, as is the case with 'transitional justice'. Mechanisms designed to depoliticize the past, the present and the future are hidden beneath the celebration of the rule of law. Transitional justice rests on a legality that promotes a less controversial version of the past. 'Transitional justice entrepreneurs' occupy the space dedicated to local voices and seek to reconstruct the world in the image of Western liberal democracies (Madlingozi, 2010). Sociopolitical claims tend to remain in the background in a debate that is now about criminal facts, in which clashes based on race and class are tempered by a legal language that brings victims and perpetrators face to face (Bowsher, 2018).

Our arguments are not concerned with the intentions of the people involved in these cases, which certainly vary. The purpose of this reading, and many others we have addressed, is to foreground a part of the narrative that the hegemonic version of modernity has rendered invisible. The monoculture of modern science, which has infected the sphere of law, has narrowed our perception of the world, alienating people and knowledges and reducing the political imagination to a very controlled sphere. Law has been increasingly contaminated by economics, in turn increasingly recognized as an exact science, promoting what Capra and Mattei (2015) call an 'obsolete mainstream view, rooted in the duopoly of property and state', which 'feeds ecologically destructive practices'. According to the authors, 'So-called economic laws produce major distortions because they are based on the assumption that it is natural and desirable for an institution to set growth targets that induce extractive individual behavior while discouraging virtuous practices' (Mattei and Fritjof, 2015: 8).

Neoliberal globalization has not been questioning the capitalist, colonial and heteropatriarchal model, despite the advances (and setbacks) in social struggles. The alleged neutrality of modern law has always been sustained through science oriented towards the domestication of nature and people, and this linear path has not been eroded. Ugo Mattei and Marco de Morigio refer to an 'imperial rule of law' which lies above the state, 'a dominant layer for the worldwide legal systems' (Mattei and Morigio, 2009). This law, presented as neutral, scientifically legitimated and produced in the interests of international capital by a huge variety of institutions, both public and private, has been fuelling important discussions on legal pluralism on a global scale, as well as global economic constitutionalism (Santos, 2002; Schneiderman, 2008; Michaels, 2009; Berman, 2012; Peters, 2015). The impact of global legal systems is not homogeneous, that is to say, it is not a

question of scale, but of power camouflaged beneath the idea of good economic governance (Baxi, 2013):

With all the profusion of General Comments of the UN human rights treaty bodies and the MDG, and the right to development talk, there exists no human right against fiscal and monetary policy regimes. Thus, there is no human right directed against price-rise (inflation) which mocks the smooth languages of the right to affirm, protect and promote socio-economic rights. There is no human right whatsoever against policies and programmes of 'structural adjustment' or 'devaluation' of national currency which ruins the everyday lives of millions of peoples in the global South.

Baxi, 2013: 41

In this context, what is the role of the constitution? What is the role of the state? The erosion of the state has been highly selective, considering only the components of the social state that regulate markets and promote distribution. The old values of private property, the individual, and contractual security are celebrated, and distribution practices are presented as an attack on the rule of law. More than ever, law assumes the form of a neutral technology, while political intervention is identified as a legal correction (Mattei and Morpurgo, 2009). The state is the instrument for applying neoliberal economics presented through technocratic language, cloaked in a neutral and universal appearance. In the case of classical liberalism, the state should have limited intervention; in the case of neoliberalism, the state must be regulated internally and externally by the logic of the market (Ferreira, 2016). A recent comparative study on austerity discourses in Europe concludes that

Since 2010, Europe has converged to a neoliberal vision in overcoming the crisis and promoting competitiveness, becoming increasingly aligned with international institutions such as the IMF in terms of structural adjustment and austerity measures. Therefore, for most countries of the EU, namely those under the Troika interventions, or others under IMF Stand-By Arrangements, the recipe has become similar.

Meneses et al., 2018

As Robert Knox points out, 'the anti-statist and "free market rhetoric" of the original theorists of neoliberalism is vastly at odds with the expansion and reconfiguration of state power that was needed to birth and secure it' (2017:93). In the same vein, Brabazon argues that

if the state is increasingly acknowledged – at least in academic circles – to have been restructured in the neoliberal period rather than restrained, this is

typically seen as a re-orientation of the state away from social concerns and toward facilitating market transactions: 'profit over people'.

Brabazon, 2017: 5

In this context, public law is modelled according to the principles of private and market law, as the public and the private merge within the concept of governance (Tzouvala, 2017: 132).

1.3 The Dilemmas of Critical Constitutionalism

Within the hegemonic project, constitutionalism can be understood as a field of legal and political knowledge anchored in the historical processes of Eurocentric modernity, in which the legitimate differences between the continental European and the Anglo-Saxon are accommodated (McIlwain, 1947: 1–22; Bobbio, 1986: 124; Fioravanti, 2001: 85–100; Comanducci, 2002: 90–93; Bovero, 2006: 22–23; Wittington, 2009: 1–2; Ferrajoli, 2011: 16–21; Medici, 2016: 29–30). When viewed from this perspective, constitutionalism can be considered a set of doctrines, namely an intellectual and political movement which aimed to build a series of ideas that would explain, and even legitimize, the centrality of the constitution as a way of restricting public power by imposing on governments respect for the rule of law over force, as well as limiting the exercise of power. This positioning is also constructed from the primacy of the individual over the community and the state, hence the importance of establishing some form of respect for the rights of the individual vis-à-vis state power. Based on the epistemologies of the South and the concept of the abyssal line, it can be affirmed that all these developments occurred in the metropolitan area and that modern constitutionalism comprised the juridification of relations of domination, violence and appropriation on the 'other side of the line', in the colonial zone. This is why the dominant modern-Western project, with strong roots in individualism and liberalism, necessarily coexists with the dynamics of capitalist, sexist and colonial oppression.

In limiting ourselves to more recent times, it is important to mention the constitutional designs after World War II: the neoconstitutionalisms. It should be emphasized that, in tracing the path of modern constitutional history, changes have affected the metropolitan area. This is why the debates taking place have paid very little attention to the colonial issue, even though much of the African continent remained under the colonial rule while they were in progress. The prefix 'neo' refers to the need to go beyond previous constitutional designs, which were not sufficient to prevent the atrocities committed during World War II. For this reason, neoconstitutionalisms coincide with the need to defend the constitutional principles of justice and, as a rule, do not deny the connection between law and morals, while defining fundamental rights as insurmountable limits for public

authorities (Dworkin, 1996; Comanducci, 2002: 96–112; Zagrebelsky, 2013; Alterio, 2014: 232–253). This relates to the aforementioned constitutional rigidity, which plays a key role in the expression of the ‘unbreakability’ of the protection of fundamental rights. It also explains the attention paid to guaranteeing fundamental rights by various means which are difficult to modify, precisely in order to ensure that this protection is maintained. Thus, guarantee-based constitutionalism is conceived of as a reinforced positivism (Ferrajoli, 2011: 24–34). The role of judges in ensuring constitutional supremacy and exercising constitutional control is central in this design for the constitutional system.

Another of the relevant contemporary proposals is founded on the so-called ‘popular constitutionalism’ which, instead of advocating the ‘closure’ of constitutional issues (as in ‘legal constitutionalism’), advocates opening up these issues to popular participation. It should be clarified that such participation is, as a rule, restricted by an understanding that limits it to the representation of the legislative power. The emphasis is placed on questioning the democratic legitimacy of the constitutional designs for legal constitutionalism (Kramer, 2004; Waldron, 2006, 2012), and it can be said that it provides for (1) a loosening of the constitution and its exercise; (2) the challenging of judicial supremacy and, in certain cases, even the challenging of some form of judicial control over constitutionality; (3) the extrajudicial interpreting of the constitution; (4) democratization and participation in political and economic institutions; and (5) recovering the relationship between law and politics (Alterio, 2014: 253–255).

In short, it can be said that popular constitutionalism focuses its attention on questioning several of the central postulates associated with positions that can be considered ‘elitist’ because they close constitutional issues to public debate and democratic challenges. However, it is necessary to question the extent to which popular constitutionalism ‘opens up’, since, as previously mentioned, several interpretations of this constitutionalism do not seem to question the fact that popular participation only occurs through the state legislative power, thereby excluding many other possibilities for participation in constitutional issues.

In addition to neoconstitutionalisms and popular constitutionalism, there are other variants which come under the category of the ‘constitutionalism of diversity’ (Uprimny, 2011), a reference to the social and cultural diversity in different regions of the world. Specifically in the case of Latin America, with its emphasis on the relationship between indigenous peoples and the state, a kind of constitutional progression⁷ was contemplated, which developed from a ‘multicultural constitutionalism’, far more embodied in the Western liberal paradigm, to a ‘pluricultural constitutionalism’ and finally a ‘plurinational constitutionalism’ (Yrigoyen, 2011). Obviously, these constitutional designs and reflexive proposals can have systemic impacts, at least in the case of plurinational constitutionalism, since while directly questioning colonial law, it also questions the foundations of the state, both in its nineteenth-century liberal form and the social form of the twentieth century (Yrigoyen, 2011: 139–141). However,

it is important to question how far these constitutional recognitions have effectively reconfigured the pillars of constitutionalism. From the perspective of epistemologies of the South, it is also important to determine the extent to which plurinational constitutionalism calls into question or denounces the abyssal line separating the metropolitan area from the colonial zone. It is necessary to devote increasing attention to establishing and regulating the exercise of public power and to verifying whether or not this design helps to address social problems that extend beyond the dominant modern–Western paradigm.

Another discussion that may be relevant to this theme involves questioning the purpose and social function of constitutions. In this regard, a ‘conservative constitutionalism’ would become evident, rather than an ‘aspirational constitutionalism’. The former intends that the constitution and constitutional dynamics should serve to ‘preserve’ a certain state of affairs and a certain agreement on the functioning of social relations. In this sense, constitutions resemble a ‘reflection of what really exists’. In contrast, aspirational constitutionalism does not view constitutions as a reflection of reality, but as a set of minimal bases that point towards what reality needs to be. This is a constitutionalism which resonates strongly in contexts where there is ‘a great dissatisfaction with the present and a strong belief in the possibilities of a better future’ (García Villegas, 2013: 77).

Finally, ‘transformative constitutionalism’, which is found in the global South and has a strong presence in Latin America, seeks to establish constitutional dynamics, evolving through instruments that aim to bring about social transformation and human emancipation, set against capitalist, colonialist and patriarchal oppression. In Latin America, this is known as new Latin American constitutionalism (NCLA). Since the 1990s, in different latitudes of Latin America, social mobilizations have emerged and developed, managing, through democratic means, to assume state power with the aim of transforming it, resulting in new constitutional texts with such distinctive characteristics that they may be considered pioneers of something different. For this reason, the expression NCLA is used by several authors (Gargarella and Courtis, 2009; Uprimny, 2011; Viciano Pastor and Martínez Dalmau, 2011). Other authors, focusing on the expression of a counter-hegemony, prefer the term ‘transformative constitutionalism’ (CT) (Santos, 2010b). NCLA began to be theorized mainly through constitutional law, while transformative constitutionalism takes the theoretical work of Boaventura de Sousa Santos as its gravitational centre. Both perspectives provide important elements, either for a structural analysis of the political implications of the content of the new constitutional texts or for thinking about counter-hegemonic social transformations, that is, the need for a new political and legal culture that seeks to overcome forms of sexist, colonial and capitalist systemic oppression.

These social processes find their maximum expression in the constitutions of Ecuador (2008) and Bolivia (2009).⁸ Understanding them as expressions of transformative constitutionalism requires placing special emphasis on plurinationality, decolonization, depatriarchalization and legal, cultural,

political and linguistic pluralism as principles that emerge when subalterns, namely those that are historically invisible, come to power with the aim of overhauling the state. They require new ways of understanding law and politics, both inside and outside the constitutions, which are often opposed to the liberal and Eurocentric legal culture that prevails in several countries in the global South.

Regarding the constitutions of Ecuador and Bolivia, textual recognition of the reality of legal pluralism entails the challenge of making visible what abyssal thinking has actively produced as invisible (Santos, 2010a) or, in other words, visualizing indigenous justices and understanding them as one of the cornerstones of the new plurinational states (Santos, 2007, 2010b, 2012). It also implies a change in ordinary justices, to enable an ecology of legal knowledges to emerge, built from an intercultural dialogue with indigenous justices (Grijalva Jiménez and Exeni Rodríguez, 2012). It is therefore necessary for intercultural translation to be produced not only in relation to the knowledge of indigenous justices and ordinary justice but also in relation to their practices (Bazurco Osorio and Exeni Rodríguez, 2012), in order to build a 'legal culture of conviviality', the ideal expression of legal pluralism as classified by Boaventura de Sousa Santos (Santos, 2012).

As with the 'constitution', 'constitutionalism' is expressed in multiple ways through contemporary reflections and realities. These expressions are not always compatible, given that they emphasize different aspects, focus on the various problems with different degrees of concern and attribute different levels of centrality to the various subjects. However, it can be argued that, as a whole, they represent a mosaic or collage of the constitutional reflections present today in various parts of the world.⁹ As previously mentioned, just as there have been voices and proposals which try to explain or justify constitutional projects in line with the dominant modern constitutional paradigm, there have also been several critical voices. Some criticisms, even within the dominant constitutional canon, recognize the great limitations of constitutional designs in addressing contemporary problems and the need to control powers affecting people's lives which exceed those which have been constituted (Grimm, 2016: 249–251). Others denounce the functional relationship between the dominant constitutional design and relations based on capitalist domination, arguing that it has coexisted alongside inequality and the exclusion of multiple realities and social subjects which the system considered disposable (De Cabo Martín, 2014). Finally, voices critical of constitutional North-centrism, emanating specifically from Africa and Latin America, have singled out the importance of extending beyond the dominant constitutional canons, encouraging the construction of refocused proposals, as a constitutionalism of the global South (Medici, 2016). The chapters included in this book are critical voices associated with the latter, with varying nuances.

1.4 The Chapters

The chapters are organized into three parts. The five chapters that make up the first part theoretically situate the discussion around the decolonization, decommodification and depatriarchalization of constitutions. The second part combines the perspectives of three South African authors with different experiences and approaches, comprising a reflection on the constitutional processes that came after apartheid. The third part contains six chapters, two by indigenous Ecuadorian authors, on the recent constitutional processes in Latin America.

The first chapter, by Issa Shivji, introduces the theme by asking the question: Do constitutions matter? The author believes there is a lack of clarity in the idea that constitutions are a terrain for struggle, yet stops short of rejecting this conviction, instead choosing to focus on lawyers outside elitist circles who are driven by a passion for social justice and the struggle for the rights, dignity and livelihoods of those who work. Shivji recognizes the limits of bourgeois law and constitutions, while also recognizing the possibilities and identifying the conditions by which radical lawyers can be involved in the struggle for the recognition of rights, thus keeping a passion for social justice and social transformation alive.

In Chapter 2, Asifa Quraishi-Landes outlines the plurality which formed the basis of the constitutional structure of Islamic societies before the European model of the nation state superimposed itself. The Islamic conception of law is structurally different from the Western one. Classical *sharia* does not constitute a singular monolithic code and, as such, is far removed from the process of configuring law in the strict Western sense, which only recognizes the centralist logic. The state has never held the exclusive role of producing and imposing law associated with *sharia*. Before colonial intervention, *sharia* was based on a non-centralist structure, accommodating legal plurality through two types of law, two branches of *sharia*, two components of a holistic rule of law structure and two sources of legitimacy charged with different purposes: *fiqh* (law not codified by the state but created by legal experts through a heterogeneous, plural interpretation of scripture) and *siyasa* (law based on the authority of the state, unrelated to personal life). In addressing a dimension of a history that has effectively been rendered invisible, Asifa Quraishi-Landes positions herself beyond the nation state, within the renowned 'many rooms' of the law. In this sense, her position poses a question that Western pluralists rarely manage to ask: What would a constitution look like if it started with the idea of legal pluralism as its founding principle, rather than as an add-on critique of existing legal monism? The author argues that the strong presence of legal pluralism throughout the history of Islamic law shows the extent to which it is possible to build a constitutional system without the premises of uniformity embedded in the nation state and where the balance between equality and difference can be achieved without subsuming every right to the authority of the state. In this sense, she proposes that modern Islamic constitutionalism

should be inspired by the deep legal pluralism of pre-colonial *sharia*, comprising two pillars: (1) state lawmaking (*siyasa*) based on the public good; (2) the plurality of *fiqh* (and other religious rights), available as a voluntary opt-out from state law.

In Chapter 3, Upendra Baxi reflects on old and new constitutionalisms, formulates a set of issues that deepen the debate on decolonizing constitutionalism and proposes theoretical instruments that consolidate the analysis. Recognizing the importance (and the enormous challenge) of studying constitutionalisms from a subaltern or worm's-eye view, Baxi engages with the proposal of the epistemologies of the South, analysing how the concept of abyssal line might be useful in addressing theories of constitutionalism. In this sense, a broad question is maintained as a common thread in the text: Do constitutions matter at all for what Franz Fanon called the 'wretched of the earth' or Boaventura de Sousa Santos called the abyssally excluded? The author recognizes the multiplicity of forms of subaltern constitutionalism and the fragility of the 'new constitutionalism' category, as well as acknowledging that comparative constitutional studies (COCO) compare the incomparable. Interpreting the Indian context, Baxi argues that constitutionalism itself and all 'new' constitutions are faced with contradictions which can be studied on the following levels: aspirational/institutional; normative/institutional; civilizational/cultural; material/symbolic or performative. Constitutional innovation has traditionally been attributed to the West, whose civilizational mission led to the spread of the four Cs – conquest, Christianity, commerce and civilization. Among the set of questions raised in the context of COCO, this study focuses on the following: How are we to grasp the varieties of postcolonial experience? Are the constitutionalisms of non-Euro American others always mimetic and never otherwise? Where can we place certain astonishing examples of judicial creativity in the global South? May we conceive of the world as a Western shopping mall or arcade from which countries in the non-West assemble their constitutions? Do history and context matter and if so, how? Can anomie and contradiction be transplanted, transferred and compared? What kinds of constitutionalism does a movement-led struggle produce? How do we reconcile the imperatives of the global market with those of elite or mass-conceived religion? Is constitutional secularism the best possible answer? How far may the constitutional courts impose their *demos* prudence over their jurisprudence? What may be the future constitutional promise and peril of this different modernity? For the author, what matters is perhaps not the way constitutions are written, but the contradictions of constitutionalism and, crucially, the forms of 'insurgencies' that characterize life under the constitutions.

In Chapter 4, Rosalva Aída Hernández Castillo combines a feminist and pluralistic approach to transformative constitutionalism, extending the boundaries of the Latin American debate beyond the experiences of Bolivia and Ecuador to include the voices of indigenous women who have been protagonists in internal and external political debates. Drawing on experiences in the Mexican states of Chiapas and Oaxaca – the former an autonomous entity not recognized by

the state, where Zapatista support bases pursue their own justice with no state intervention; the latter a space that has recognized legal autonomy in the context of the constitutional reforms that have taken place in Oaxaca within the last decade – Hernández identifies sites for legal and political dispute where resistance strategies are discussed and indigenous and gender identities are negotiated. By refuting an essentialist conception of local legal structures, she develops a sociology of emergences, highlighting the dynamic nature of indigenous constitutions and the possibilities that result from interlinked struggles.

In Chapter 5, Sara Araújo discusses the possibilities and limits of the concept of legal pluralism expanding the recognized legal reality and the possibilities of political imagination. Building on the challenges and conceptual instruments of the epistemologies of the South, she explores the extent to which theories and empirical studies of legal pluralism, as well as different recognition policies, have contributed to decolonizing the Eurocentric legal canon. By adding categories to Sally Engle Merry's widely accepted typology, five approaches to legal pluralism are defined: classical legal pluralism, new legal pluralism, global legal pluralism, instrumental legal pluralism and intercultural legal pluralism. The chapter concludes by discussing the possibilities of constructing a post-abyssal legal thinking through a sociology of emergences which addresses the diversity of legal maps of the world.

The second part brings together three distinct reflections on recent constitutionalism in South Africa. In Chapter 6, Heinz Klug introduces the discussion, arguing that it is not possible to understand the complexity of the present without considering the legal continuities of colonialism and apartheid, the legacy of anti-apartheid social struggles and the form which the process of democratic transition has assumed. The author begins by situating the discussion within some of the main concepts and theoretical developments associated with the state and constitutionalism in Africa, recognizing the common colonial legacy, as well as the historical, cultural and constitutional heterogeneity of the continent. Klug focuses on a set of conditions that result from continuities with the past, which marked the first 20 years of post-apartheid governance: social inequality; the preservation of apartheid in the public sector; the extension of non-democratic transition to local government; recognition of the traditional authorities; the limited role of the Truth and Reconciliation Commission. For the author, the constitution, 'the crowning achievement of that historic moment', represents an opportunity for social transformation, with the potential to act as an instrument for anti-corruption and anti-nepotism.

In Chapter 7, Albie Sachs presents an exercise in self-reflection regarding his work as a judge in the South African Constitutional Court. Sachs actively participated in the drafting of the democratic Constitution of the Republic of South Africa and was appointed a Constitutional Court judge by Nelson Mandela. In this text, which draws on his own experience, Sachs discusses the limits and possibilities of law as an instrument for social transformation. In

sharing cases in which he intervened as a judge and defender of the new post-apartheid constitutional order, the author reflects on transformative constitutional jurisprudence and the possibilities for establishing social and economic rights, as well as the construction of a true interculturality, respecting the right to equality and the right to difference. For the author, the constitution should function as an active source of regulation – combining common law and customary law, and allowing for emancipatory readings in situations in which constitutional principles are at odds with each other (such as dignity and private property, or the right to equality and the recognition of customary law).

In Chapter 8, Tshepo Madlingozi presents a highly critical reading of what he describes as neo-apartheid constitutionalism. The author links the concept of the abyssal line to the South African philosopher Mogobe Ramose's proposal for a post-conquest constitution. Seeking not to lose sight of the perspective of the historical victims of settler colonialism, Madlingozi is not optimistic with regard to the horizon of possibilities unlocked by the 1994 Constitution. Neo-apartheid constitutionalism, he argues, shifts the abyssal line without overcoming it, promoting a transition from settler domination to settler hegemony. The author examines the extent to which a constitution can embody the decolonizing project and its sensibilities. In deliberating on what remains to be deconstitutionalized in the world created by the colonizer, Madlingozi reflects on the possibilities of building a constitution that promotes epistemic justice, sustains its authority through Ubuntu philosophy and replaces the monoculture of constitutional law with intercultural dialogue.

The final part, which focusses on constitutional processes in Latin America, is introduced by Salvador Schavelzon. In Chapter 9, the author offers a detailed narrative of the constituent process in Bolivia, based on the ethnographic record of the debates within the Constituent Assembly and the identification of the translational challenges involving different civilizational, epistemological and ontological universes. A number of topics are addressed in this text, including the following: the issue of recognition for multiple historically excluded identities (namely class and ethnicity); problems with the process for approving the constitution; colonial continuities; challenges regarding the implementation or interpretation of the constitutional text, such as issues related to recognition of indigenous justice and demodiversity; and modern criticisms of plurinationality. Through the idea of a 'constituent silence', the author illustrates the difficulties inherent in constructing dialogues based on different world views when colonial hierarchies are not definitively questioned and the modern legal language retains the power to impose limits on the dialogue.

In Chapter 10, Raúl Llasag, a Quechuan jurist from Cotopaxi, views plurinational constitutionalism from a highly critical perspective, distinguishing between plurinationality from above, which is a Eurocentric continuity, and plurinationality from below, arguing that it cannot be built on the basis of modern-Western theories of constitutionalism or understood through colonial conceptions

of modern social sciences. For Raúl Llasag, plurinationality from above is not an end in itself but a transitional tool which must be monitored without losing sight of the initial proposal, namely plurinationality from below. This proposal does not focus on taking state power, but on exercising autonomy in the daily life of grassroots communities, and on expanding these bases beyond indigenous spaces with a view to simplifying life and recovering political, economic and epistemological autonomy.

In Chapter 11, Nina Pacari, a Quechuan jurist from Cotacachi and a former judge in the Constitutional Court of Ecuador, provides another critical reading of constitutional advances in Ecuador from the perspective of indigenous peoples. It is a testimonial and a critical reflection constructed from her experience as a jurist, an activist working for the recognition of indigenous peoples, and a member of the National Constituent Assembly, the National Assembly of Ecuador and the Constitutional Court. Pacari draws attention to the continuity of power structures based on Western hegemony imposed on the originary peoples and seeks to show the epistemic complexity underlying indigenous claims. She discusses the processes of deconstitutionalization, the construction of plurinationality, the recognition of legal pluralism and the challenges to the independence of the Constitutional Court, arguing that interculturality has to involve an epistemic dialogue in plurinational societies which will oblige the state to implement consultation procedures through an exercise in 'command obeying'.

In Chapter 12, Agustín Grijalva discusses the relationship between participation, (hyper)presidentialism and extractivism in the context of the NCLA, specifically analysing the case of Ecuador a decade or so after the great constitutional change. The 2008 Constitution nominally strengthened citizen participation in public management, monitoring and combatting corruption. However, the reality failed to correspond to the expectations provided by law. Grijalva introduces an important distinction between participation as legitimation and participation as democratization. In order to illustrate the difference, the author examines the popular consultation of 2011 convened by Rafael Correa, as President of Ecuador, and the blocking of other consultations, such as the one concerning the Yasuní-ITT project. In the end, Grijalva argues that extractivism is not just a model for economic policy, but also influences policy fields as diverse as participation, education, labour and the justice system. From a position compatible with that of other authors, Grijalva argues that the constitution is not the end, but rather the beginning of a process for social change. It must therefore be seen as a political program to be defended at any given moment.

Chapter 13, by Orlando Aragón Andrade, broadens the discussion on Latin American transformative constitutionalism, questioning the limits of the debate and the horizons of possibilities imposed by colonial legal terms. Extrapolating the terms of Eurocentric scientific research in assuming his dual role as a lawyer and militant academic, Andrade discusses the possibilities of building transformative constitutionalism from below on a national scale, based on a local Mexican

experience: the insurrection of the Pureecha people of San Francisco Cherán and the establishment of a new municipal government founded on local organizational principles. The author challenges the limits of abyssal legal thinking, proposing a broadening of the constitutional discussion through local legal diversity and the construction of an ecology of trans-scale legal knowledges. What makes constitutionalism transformative? Does Cherán's Constitution have the potential to become part of a transformative constitutionalism project? Is it possible to say that indigenous justices have their own constitutions? Can a local constitution challenge the hegemonic model of the nation state?

In the final Chapter 14, Boaventura de Sousa Santos shows the relevance of research on law and justice as a window to understanding the dynamics of social transformation. The indigenous struggles aimed at constructing plurinational societies are addressed in light of the author's extensive theoretical work in the sociology of law, together with his proposal for the epistemologies of the South, presenting an overview of the main concepts. Among the tensions he analyses, the following are the most salient: judicial monism and judicial pluralism; multicultural liberalism and interculturality; the nation and the plurination; Eurocentric political pluralism and intercultural political pluralism; dependent developmental capitalism and *Sumak Kawsay* or *Suma Qamaña*. The construction of a plurinational state will have to challenge the cognitive, economic, social and political injustice at the core of the nation state. This is a slow path which involves suffering and struggle and also requires transforming dualisms into ecologies of judicial knowledges. Santos concludes the chapter with a set of lessons derived from the processes that were studied, which can serve as beacons along this path.

Notes

- 1 On the monoculture of valid knowledge, the monoculture of linear time, the monoculture of social classification, the monoculture of the superiority of the universal and the global and the monoculture of productivity, see Santos (2018).
- 2 Although the author does not make explicit reference at this point to the constitution, he does refer to 'politics' and 'law' as being two sides of the same coin (Bobbio, 1984).
- 3 We will return to these concepts later when outlining the socio-juridical proposal of the epistemologies of the South.
- 4 Another reference to constitution and complexity can be found in Medici (2016).
- 5 One reflection on the constitution as a space that includes several 'fundamentally controversial concepts' can be found in Waldron (1994). In the same vein, see Ortega Soriano (2017).
- 6 An eloquent example is provided by the work *Constitutionalism: Past, Present and Future* published by the Oxford University Press in 2016. In this 400-page volume, Grimm makes less than ten references to constitutions and constitutionalisms of the state beyond the global North, although several years have elapsed since constitutions such as those of Ecuador and Bolivia, considered relevant from other perspectives on a constitutional present and future, were promulgated (Grimm, 2016: 249–251).
- 7 This progression should not necessarily be read in terms of 'evolutionism' or 'improvement' since, on many occasions, all these 'constitutionalisms of diversity' coexist in the same country, in the same region and, of course, in the world.

- 8 For further discussion on the similarities and differences regarding the premises of neoconstitutionalism and other constitutional developments, see Uprimny (2011) and Alterio (2014: 275–293).
- 9 For a more focused approach to debates on the reality of the United States of America, see Wittington (2009), where normative constitutionalism, descriptive constitutionalism and empirical constitutionalism are distinguished. For constitutional reflections aimed at a dialog between Europe and the Latin American region, see von Bogdandy (2015). Although the latter focuses on Latin America, reflecting on exclusion and inequality, he uses a comparative perspective in analysing the dynamics of institutions and law.

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