

DECOLONIZING CONSTITUTIONALISM

Beyond False or Impossible Promises

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

by Newgen Publishing UK

<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

- FIDH—Federación Internacional de Derechos Humanos (2015), *Criminalización de la Protesta Social Frente a Proyectos Extractivos en Ecuador*. Available at www.fidh.org/IMG/pdf/equateur666espagn2015hd_1_.pdf.
- Fung, Archon; Wright, Eric Olin (2003), *Democracia en Profundidad: Nuevas Formas Institucionales de Gobierno Participativo con Poder de Decisión*. Bogotá: Universidad Nacional de Colombia.
- Gargarella, Roberto (2014), *La Sala de Máquinas de la Constitución*. Buenos Aires, Katz Editors. DOI: <https://doi.org/10.2307/j.ctvm7bcjw>.
- Grijalva, Agustín (2010), 'Régimen Constitucional de Biodiversidad, Patrimonio Natural, Ecosistemas Frágiles, y Recursos Naturales Renovables', in Agustín Grijalva, Efraín Pérez and Rafael Oyarte (eds.), *Desafíos del Derecho Ambiental Ecuatoriano Frente a la Constitución Vigente*. Quito: Centro Ecuatoriano de Derecho Ambiental (CEDA).
- Grijalva, Agustín (2015), 'Nuevo Constitucionalismo, Democracia e Independencia Judicial', *Cálamo – Revista de Estudios Jurídicos*, 3: 27–38. Available at www.calamo.ec/number/3.
- Malacatus, Edwin (2016), *La Revocatoria del Mandato, como Derecho Establecido en la Actual Constitución y Legislación del Ecuador, Respecto a sus Alcances, Requisitos y Limitaciones*. Master's thesis in Law, Area of Constitutional Law, Universidad Andina Simón Bolívar, Quito.
- Noguera, Albert; Navas, Marco (2016), *Los Nuevos Derechos de Participación Derechos Constituyentes o Constitucionales?* Valencia: Tirant lo Blanch.
- Orrantía Parra, Daniela (2015), *Análisis Crítico de la Planificación Participativa en la Elaboración del Plan Nacional del Buen Vivir 2013-2017*. Master's thesis in Latin American Studies, Politics and Culture, Area of Social and Global Studies, Universidad Andina Simón Bolívar, Quito.
- Ortiz, Richard (ed.) (2017), *Reforma Electoral en Ecuador*. Quito: Udl.
- Ospina, Pablo (2013), 'La Participación Ciudadana en Ecuador (2009–2012)', in Gina Benavides and María Gardenia Chávez (eds.), *Horizonte de los Derechos Humanos – Ecuador 2012*. Quito: Universidad Andina Simón Bolívar, 147–161. Available at <http://hdl.handle.net/10644/4105>.
- Pásara, Luis (2014), *Independencia Judicial en la Reforma de la Justicia Ecuatoriana*. Washington: DPLF.
- Santos, Boaventura de Sousa (2010), *Refundación del Estado en América Latina*. Quito: Ediciones Abya Yala.
- Santos, Boaventura de Sousa; Grijalva, Agustín (eds.) (2012), *Justicia Indígena, Plurinacionalidad e Interculturalidad en Ecuador*. Quito: Fundación Rosa Luxemburg.
- Uprimny, Rodrigo (2011), 'Las Transformaciones Constitucionales Recientes en América Latina: Tendencias y Desafíos', in César Rodríguez Garavito (ed.), *El Derecho en América Latina: Un Mapa para el Pensamiento Jurídico del Siglo XXI*. Buenos Aires: Siglo Veintiuno Editores, 109–137.

Jurisprudence

Corte Constitucional del Ecuador, Sentencia Nro. 113-14-SEP-CC Case Nro. 0731-10-EP.

13

TRANSFORMING TRANSFORMATIVE CONSTITUTIONALISM

Lessons from the Political-Legal Experience of Cherán, Mexico¹

Orlando Aragón Andrade

13.1 Introduction

The aim of this chapter is to contribute to enriching the discussion on the transformation of constitutionalism, focusing on one of the most enlightening experiences of political-legal struggle recently encountered in Mexico. Drawing on the movement of the Purépecha community of San Francisco Cherán² and, in particular, my work as a community lawyer accompanying this struggle,³ I propose the existence of a different type of transformative constitutionalism to the one founded on the South American (especially Bolivian and Ecuadoran) experiences: a type of constitutionalism that has its foundations in lay knowledge and, being derived from an indigenous community, has been able to transform the very basis of the Mexican state, opening up new pathways to indigenous autonomy in Mexico.

It should be noted that the analysis presented in this work is the result of my dual role as a militant academic and as a lawyer in the legal and political processes explored here. For this reason, the following threads are based on the tensions that stem from the study, participation, application, observation and reformulation of the theoretical-political proposal of *subaltern cosmopolitan legality* (Santos and Rodríguez-Garavito, 2007) within the political-legal struggle of Cherán.

It is therefore necessary to outline the path followed for the development of my arguments. Regarding legal pluralism and the epistemologies of the South, I begin by analyzing the elements which characterize a constitution. I also examine some of the main points that provide transformative constitutionalism with emancipatory characteristics and, based on the experience of Cherán, raise the possibility of the existence of another form of transformative constitutionalism. I then set out the necessary conditions required for transformative constitutionalism on a local

level, or from below, to become transformational on a national scale. Finally, I conclude by reflecting on the limitations and potentialities of transformative constitutionalism from below.

13.2 The Constitution of Peoples without a Constitution: A Look at Constitutionalism from the Perspective of the Epistemologies of the South

On April 15, 2011, the recent history of the Purépecha community of San Francisco Cherán, in the municipality of Cherán, Mexico, changed radically. On that day, the Cheránense confronted illegal loggers and members of organized crime syndicates who, for several years, had been destroying their forests while subjecting them to an existence dominated by violence and fear. On the same day the movement for 'security, peace, justice and the reconstitution of the territory' began, driven by the need to protest that 'enough is enough' to the political parties which divided them and had allied themselves with organized crime and to reject the *modus operandi* and security institutions of the Mexican state due to their ineptitude and collusion with organized crime. Faced with this twofold assault on their community, in the midst of popular insurrection, the Cheránense reached a decision within their assemblies: a resounding 'no' to political parties and state police, while embracing a municipal government system based on their 'uses and customs' and a community militia founded by the Cheránense themselves.

From this new political consensus, one of Mexico's most outstanding examples of the process of indigenous struggle has been developing for more than five years, accompanied by a series of judicial victories in the most important courts in Mexico,⁴ resulting in reforms to constitutional texts and secondary laws. The impact of this political movement within the legal domain was so significant that it led to the recognition in law of the first indigenous municipality of Mexico, with the authority to elect its own municipal authorities and define its formation through a system based on 'uses and customs'.

So, what is the relationship between this new political pact of Cherán and our understanding of a constitution? At first glance, the answer is nothing. In general terms, a constitution is conceived of as a body of fundamental legal norms that structure and shape what is, quintessentially, the political organization of modernity: the nation state. In this sense, constitutions may have different characteristics (for instance, their content may be written or oral, defense mechanisms may vary, etc.), but all of them are limited to a definition of the nation state and are based on scholarly knowledge, as is the case with state law. For this reason, it is easy to understand that, even in many areas of legal studies, only the nation state as unit is considered capable of producing a constitution via a political pact formalized through a set of legal norms. However, this idea has been losing ground for some years now due to the emergence of new global political entities. The establishment of a constitution for the European Union may well be

the most eloquent example, illustrating that this set of fundamental legal norms is capable of changing to adapt to the global scales of postmodern capitalism.

Another fundamental element of the modern understanding of a constitution that has changed dramatically in recent years is that of popular sovereignty. In fact, this idea, anchored in a constitution and particularly in constituent power, has been called into question by the hegemony of various expressions of global legality and the increasing pressure that international financial bodies exert over national states (Santos, 2012; Negri, 2015). Consequently, it can clearly be seen that, in practice, sovereignty is no longer held by the popular will of the citizens of a given nation state but principally by the hegemonic hubs of capitalist financial power.

The prevailing idea that the constitution fails to correspond completely to the political dimensions of modernity can not only be perceived through analysis of the current situation. A brief review of the history of the West confirms the fact that, over the centuries, important changes have been made to the way in which constitutions are conceived (Fioravanti, 2001). If we add a post-colonial critique—elaborated through the *sociology of absences*⁵—to these considerations, the way in which constitutions are rendered invisible can be observed on different scales, at different times and through different cultures. Although they articulate their own laws and result from political pacts, from the perspective of legal *abyssal thinking*⁶ these constitutions emerge as if devoid of these characteristics because they are not presented in accordance with the formalities of the hegemonic Western tradition.

Consequently, the notion of a constitution or constitutions developed through the epistemologies of the South would have to take into account the limitations associated with the formulations of hegemonic legal thinking. Progress has been made in this respect via the idea of transformative constitutionalism, centered largely on the new constitutions of Bolivia and Ecuador. The two *magna cartas* brought into play a series of substantive innovations, to the extent of signaling a difference in the Eurocentric tradition of constitutionalism. These innovations include their plurinational nature, the creation of new subjects of law—such as nature—popular representation within the constituent process and the replacement of neoliberal multiculturalism with an intercultural commitment (Clavero, 2008; Gargarella, 2011; Santos, 2012).

Despite these undeniable gains achieved through the notion of transformative constitutionalism, I consider it necessary to question whether such achievements are sufficient for an understanding of constitutions from the perspective of the epistemologies of the South. After all, transformative constitutionalism, as it stands, retains several exclusionary elements characteristic of Western modernity: for example, it is centered on the state, is built around professional legal knowledge that excludes most citizens from becoming involved in its construction and application and preserves the formal characteristics of the Western tradition of a constitution. Any formulation of a constitution viewed through the epistemologies

of the South should, I believe, go further. As with other fields of knowledge, it should undertake a more radical rethinking of the law and the constitution.

The approaches to law embedded in theories of legal pluralism provide a good basis for initiating this task. It is widely acknowledged that in the 1980s the prevailing legal anthropology began to challenge the naturalized idea that the law is an exclusive attribute of the state and, in particular, the nation state. Based on this critique of 'legal centralism' (Griffiths, 1986), a series of empirically based studies were developed with a greater emphasis on other laws practiced by different human collectives that do not correspond to state law which, from the standpoint of hegemonic common sense, regulates the entire social life of a nation state.

In the case of Latin America, and more specifically in Mexico, interest has focused on the forms of justice practiced in indigenous communities in terms of the history of the region and the country. Despite the important contributions to academic and political fields provided by this research on indigenous peoples and communities, they have prospered with a fundamental problem in their midst which, in my view, can be overcome by applying the epistemologies of the South.

In fact, although studies in the field of legal anthropology in Mexico have highlighted the diversity of existing laws within the Mexican state, as well as their complex and sometimes paradoxical interactions with state law, they have reproduced the same epistemological fragility that accompanies most of the research on legal pluralism in the world, in trying to clearly delineate the aim of the study. Thus, from a pluralistic framework, it has not been possible to define law as no longer the exclusive domain of the state and to recognize its far wider and diverse scope (Tamanaha, 1993).

In an attempt to overcome this obstacle, important debates have opened up, the most celebrated in the field of legal anthropology being that of normativism versus processualism (Sierra and Chénaut, 2002). Several strategies have also been proposed in response to this challenge which have facilitated the analysis of these and other legal constructions, but have also made their limitations clear.

In the case of Mexican legal anthropology, the emphasis has been placed on conflict as the unit of analysis. This perspective, combined with processualism, focuses on how actors mobilize law in specific situations and at different levels of justice. The limitation of this perspective has already been pointed out, namely the fact that it is excessively instrumentalist and, by extension, emerges as disconnected from references and principles that condition and limit these decisions and practices (Martínez, 2007).

Thus, although many of these studies have made important contributions to the knowledge of Mexico's indigenous justices, they have also left important questions unanswered. More precisely, in terms of their approach to the notion of law, they have limited indigenous justices to strategic practices which they mobilize at their convenience. While confirming the existence of 'other laws', this

approach fails to articulate them in terms of certain basic principles that endow them with coherence.

Other authors have emphasized that indigenous justices possess general philosophical and ethical principles that are articulated from a normative standpoint, thus lending them coherence (López, 2014). Unlike other perspectives on indigenous justice, these approaches tend to vindicate principles that often seem timeless and essential, yet can also be challenged by the daily practices of the actors present in the communities.⁷

Beyond these two approaches, is it possible to consider that indigenous justices are not just about strategic practices which actors use at their convenience or are governed by timeless and essential normative principles? Is it possible, therefore, to consider that indigenous justice can be articulated through more contingent and political principles? Is it possible to affirm, as Boaventura de Sousa Santos (2015) has already suggested, that indigenous justices have their own constitutions? Leaving aside the relevance that indigenous struggles in Mexico may have, as their consensuses and political pacts can be labeled as constitutions, it seems clear that the legal analysis proposed via the epistemologies of the South endows these issues with unquestionable relevance. Before getting to the heart of the matter, it is worth clarifying that I do not intend to deny the two dimensions already problematized in the literature on indigenous justices, nor reject the need to work through these two levels to understand indigenous justices, but rather to point out that, just as these can be expressed through strategic practices or general normative principles, there is an intermediate level that rearticulates and hierarchizes the general normative principles at certain historical junctures on the basis of political pacts and consensuses adopted within the communities. These political pacts clearly depend on the challenges they face and consequently lead to the ordering and ranking of legal practices.⁸

For this reason, with regard to the question of whether indigenous justices can be considered constitutions, I advocate an affirmative response, if three elements of constitutions that are present in almost all the stages of their history are taken into account, namely: (1) They constitute the most important political pact of a collectivity, (2) they construct institutions which are compatible with this political pact, and (3) they contain the legal and political mechanisms required to defend this pact.

I have already presented the fundamental elements of the political pact established by the community of San Francisco Chérán in 2011, observing that it was structured around two pillars: a municipal government premised on 'uses and customs' and a security system based on its communitarian militia. The questions which determine how successful the outcome might be are the following: Have institutions been built that develop and strengthen this pact? Is the structure provided with mechanisms to protect this pact? From my experience of working with this community, I can once again answer in the affirmative.

During the months of insurrection in the city, which started in 2011, up to the inauguration of a new municipal government established in accordance with 'uses and customs' on February 5, 2012, the Purépechas of Cherán operated within the four neighborhoods that make up their community, using a new political model based on their old organizational forms. A series of committees were formed, entrusted with dealing with the needs of the community in the absence of the municipal government which had, to all intents and purposes, been dissolved a few days after the movement began. Sixteen committees were created: a general committee and others dedicated to specific areas such as honor and justice, education, the forest, press and propaganda, and food. The principles for forming the committees ensured that their composition depended on the assemblies of each of the four neighborhoods of Cherán. For this reason, all the committees were composed of members from each of the districts. In addition, the work of the members was undertaken *pro bono* as a service to the community.

On February 5, 2012, a similar logic was applied and, while still functioning under a judicially recognized government, representation for the municipality was entrusted to a series of councils led by the *Concejo Mayor de Gobierno Comunal* (CMGC), all appointed on an equal footing through the *fogatas* (large campfire meetings which represented the organizational cells of this structure) from each of the four neighborhoods of Cherán. The CMGC, which replaced the figure of the municipal president, is composed of twelve people: each ward elects three representatives to hold office for three years, without mediation from any political party or recourse to voter registration, using a system of public voting with no campaigning.

During the 2011 insurrection, the community reinstated the former representative body of the communitarian militia and invented a new body for justice unprecedented in any other Purépecha community, which became known as the Commission for Honor and Justice. By coordinating these two institutions, the community was able to build a communitarian security system in which the militia is responsible for order and security, while the Commission for Honor and Justice controls the functioning of judicial proceedings within the municipality. Both institutions, like all the councils in the new municipal structure of Cherán, are subordinate to the neighborhood assemblies and the General Assembly which, from 2011 to the present day, constitute the highest authority within the municipality.

It is the neighborhood assemblies that carry out the main function of defending or altering the political pact established in Cherán in 2011. In 2014, for example, various members of political parties attempted to promote a consultation process aimed at reinstating the system of electing political parties and the municipal council. This proposal was submitted for consideration by the neighborhood assemblies and was rejected, thus ratifying the agreement to be governed by 'uses and customs' established in 2011. However, only a few months later, the neighborhood assemblies determined that the original composition of the councils

which are part of the Cherán municipal government should be altered to promote two of the sectors that had played a decisive role during the 2011 uprising. As a result, the Council of Women and the Youth Council have been added to the existing councils since 2015.

In 2016, the government of the province of Michoacán, to which Cherán belongs, launched a campaign aimed at restoring police control in all municipalities. This led to the provincial government lobbying in the face of resistance from municipalities and a number of communities which had been attempting to devise alternative security schemes for several years. When the provincial government tried to do the same with the municipality of Cherán, the assemblies of the four neighborhoods deliberated and then ratified the communitarian security model initiated in 2011. Consequently, the municipality of Cherán distanced itself from the scheme referred to as 'single-command policing', leaving the provincial government with no choice but to accept the decision of the assemblies.

Following the case of Cherán, it should be noted that not only is it necessary to consider the various scales (local, national and global) in order to understand law, but the analysis of constitutions per se also requires this multi-scalar approach.

13.3 What Makes Transformative Constitutionalism Transformational? Plurinationality, Self-determination and Decolonization

Even assuming that the struggle in Cherán has succeeded in giving substance to a constitution on the basis of which its legal practices and political institutions are formulated, this does not necessarily mean that it is transformational in nature. For this reason, it is worth recalling the meaning of 'transformative' in the type of constitutionalism under analysis.

As has been argued, the principal force for transformative constitutionalism, emanating from the Bolivian and Ecuadorean experiences, stems from the nature of the demands of indigenous struggles which, due to their historical precedence and cultural autonomy, are capable of questioning the modern colonial state dominant in Latin America on the basis of this history (Santos, 2012). Consequently, it is the recognition of indigenous justice that gives meaning to this type of constitutionalism:

It is not about the recognition of the cultural diversity of the country or of a process that allows local and remote communities to resolve small conflicts from within, thus guaranteeing the social peace that the State could never guarantee for lack of material and human resources. It is, rather, the conception of indigenous justice as an important part of a political project of decolonizing and anti-capitalist vocation, a second independence that finally breaks the Eurocentric ties that have conditioned the processes of development over the past 200 years.

Santos, 2012:15

So, does the constitution of Cherán contain this power of transformative constitutionalism? My response is affirmative, at least in one important sense. In claiming the right to self-determination specifically based on an identity and a sustained autonomy that predates the Mexican state, Cherán has managed to create a rift at the base of the state, in the municipality, which clearly surpasses the mandate of neoliberal multiculturalism.

As with the Bolivian and Ecuadorean forms of transformative constitutionalism, Cherán's experience constitutes a robust recognition of, and approach to, legal and political pluralism. This is not the Oaxaca model of 'uses and customs' which, at best, is procedural in the manner in which municipal authorities are elected.⁹ the experience of Cherán represents a transformation to the structure, rationale and relationships of the municipal government through different rules, mechanisms, practices and logics based on their 'uses and customs'. This same difference has been ascertained in relation to other levels of government within the Mexican state.

It can be argued, however, that the constitution of Cherán is not endowed with the plurinational dimension of transformative constitutionalism evident in the Bolivian and Ecuadorean versions and that, as such, it lacks the potential this element confers. Nevertheless, I consider that the broader claim for the right to self-determination of indigenous peoples and communities expressed through the political-judicial struggle of Cherán has functioned in a manner equivalent to the requirement for plurinationality, to the extent that indigenous peoples and communities from other regions of Mexico have followed in their footsteps, including the two inter-ethnic municipalities of San Luis Acatlán and Ayutla de los Libres in the province of Guerrero and the four new indigenous municipalities of Xoxocotla, Hueyapan, Coatetelco and Tetelcingo in the province of Morelos.

In addition to these shared elements, it is important to note that the political-judicial struggle of Cherán corresponds to the precept outlined by Boaventura de Sousa Santos for the emancipatory character of state law. As Santos states, the law (and perhaps the same can be said for a constitution) is not in itself emancipatory or otherwise; instead, it is the social group or movement that propels, promotes and defends it (Santos, 2003).

On this point, the legal mobilization that has taken place in defense of Cherán's political pact and, by extension, its constitution is another element which seems to me to endow it with an emancipatory character. Cherán's struggle in the judicial and political field aimed to safeguard the political-social pact achieved via the emergence of the 2011 movement, but this has been generated within a broader context. The Cherán movement did not come about simply as a result of local factors, nor did it have an effect only on one or more indigenous communities: instead it occurred in the context of widespread problems for the indigenous peoples in other regions of Mexico and the mixed-race population in general. The plunder of natural resources, the violence, the states of exception, the ruling class's collusion with organized crime and the crisis of the electoral institutions were part of the national context in which the struggle in Cherán

emerged (Aragón, 2016), and largely explain the sympathy and solidarity expressed by broad sectors of Mexican society in relation to this movement.

Given this context, the legal and political battles waged by Cherán since 2011 are framed by a series of attempts by different groups and social sectors to bring about changes to the injustice and oppression that Mexican society in general is currently facing. In fact, within these struggles, the Cheránense have been liaising with indigenous organizations, artistic collectives, media, unions and committed academics, among many others (Aragón, 2013, 2015). For this reason, a reading of Cherán's struggles and contributions in terms of a counter-hegemonic mobilization of the law goes beyond the ethnic equation and includes elements of more widespread efforts calling for a fairer society.

One last point I wish to address in this section focuses on two strengths that feature in the Cherán constitution and which contrast directly with the South American experiences. I am referring, on the one hand, to its dynamic character that serves to maintain constituent power and, on the other hand, to the space it creates, enabling it to produce different political and legal practices and principles to those of state law.

As is readily acknowledged, the Bolivian and Ecuadorean constitutions of the first decade of the twenty-first century were the product of important social mobilizations that succeeded in conquering power in the two states after several years of struggle. The most relevant consequence of these triumphs of the progressive forces consisted precisely in formulating new constitutions that condensed their aspirations and demands into new political pacts formalized through constitutions.

This succession of events brought a new relevance and a unique innovative quality to the two new constitutions. However, the first results of this new process were not as favorable as expected. In both Bolivia and Ecuador, a deepening rupture developed between governments and the various social movements that had brought them to power. This led to a situation in which the old inertia re-established itself and new processes that initially seemed to have opened up via the new constitutions became blocked. In the final analysis, it must be remembered that the constitutions of Bolivia and Ecuador did not presume an outcome that would be achieved simply by promulgating the constitutions and waving a magic wand to change social realities: they were to be a starting point, opening up new possibilities for transformation (Santos, 2012).

In both countries, unexpected developments in relations between the governments and several of the social movements that had brought them to power and somehow succeeded in inscribing their aspirations in the constitution can be interpreted in theoretical terms on the basis of the ever-complex relationship between (transformative and even revolutionary) constituent power and (generally conservative) instituted power. In the case of the South American experiences, the constituent power that brought about this renewing and transforming energy seems to have frozen in the face of an instituted power which, for various reasons, has suppressed the achievements enshrined in the constitutional text.

In contrast, I have provided some examples of how the constitution of Cherán presents a very different dynamic through which the constituent power, permanently assigned to the assemblies, has sufficient strength to modify the political project or rein in its representatives if they consider that they are deviating in their function or performance.

Moreover, the South American experiences of transformative constitutionalism created a space (the Constituent Assembly) framed by a logic and subordinated to the principles of state law, not those of the communities. This situation has resulted in the establishment of a *contact zone* favoring a Eurocentric and colonial equilibrium.

For its part, the Cherán constitution maintains its own space—while remaining aware of state legality—which, in accordance with its own logic, facilitates the reproduction and reinvention of political and juridical practices and principles that are then mobilized in contexts of struggle to hybridize with state and international law in other judicial, legislative and political spaces.

This logic of articulation seems to build more advantageous *contact zones* for the Cherán constitution, in which its destabilizing potential is not confined or crystallized but is able to create fractures and contradictions in the legal framework and hegemonic constitutionalism of Mexico.

13.4 Can a Local-scale Constitution Challenge the Hegemonic Model of the Nation State in Mexico? The Ecology of Knowledges as a Trans-scale Instrument

Even if we accept that Cherán instituted a constitution via the 2011 movement and that its content is analogous to that of transformative constitutionalism, it can still be argued, as is often the case with *lazy reason* (Santos, 2002), that, due to its local character, it is simply irrelevant in the face of Mexico's hegemonic constitutional and political order.

I would like to begin my argument by stating that, in my experience, one precondition that would ensure that a constitution like Cherán's may eventually transcend a local context is the existence of a state of pressing need which cannot be resolved by legality and hegemonic politics. This condition applies to the legal-political struggle of Cherán, but also to the multiple communities, collectives, organizations and social movements of Mexico in general and the world at large that have come to learn from the Cherán experience.

It was precisely the confrontation with institutionalized corruption and insecurity that led the Cheránense to seek new forms, instruments and allies to restore a legitimate government and address the lack of security. Cherán walked tall, first by resorting to its past and adapting it to the needs of the present through a political and legal pact, but also by recourse to the counter-hegemonic use of state law via an alliance with the mixed-race lawyers of the *Colectivo Emancipaciones*,

thus broadening the movement and later strengthening the new political consensus established in 2011 in legal terms.

Hence, in September 2011, during the period of insurrection, Cherán went to the *Tribunal Electoral del Poder Judicial de la Federación* (TEPJF), the highest judicial body of the Mexican state in matters concerning political rights, to request recognition of its right to elect municipal authorities in accordance with a procedure based on 'uses and customs' rather than political parties. In addition, the Cheránense requested that they be allowed to overhaul the structure of the municipal authority beyond the tradition of municipal government inherited from colonial times and applied throughout Mexico, in order to adapt it to their organizational logic and collective authorities briefly described in the first section of this chapter (Aragón, 2013).

After winning this dispute, Cherán again needed to appeal to the courts following the reform of Article 3 of the Constitution by the province of Michoacán. Although it improved legal recognition of the indigenous peoples and communities of Michoacán, this amendment omitted the right to grant municipal governments the status of 'uses and customs' which Cherán had won a few weeks earlier through the TEPJF. The political logic of this constitutional reform was precisely to contain—through seemingly favorable legal recognition, but clearly framed within the contours of neoliberal multiculturalism—the transformative potential that Cherán had obtained by means of the TEPJF decision, in relation to the entire structure of the Mexican state.

Consequently, in 2014, it was necessary to initiate a second legal dispute, which was resolved on this occasion by the highest constitutional court in the Mexican state, the *Suprema Corte de Justicia de la Nación* (SCJN). The objectives of this new legal dispute were multiple. To begin with, it sought a strong political charter that would enable it to maintain a less disadvantaged and more visible relationship with a new provincial government openly hostile to the Cherán process. Secondly, in tandem with political advantage, it sought legal certainty for the political pact initiated in 2011 and to increase the recognition obtained through the TEPJF ruling and, by extension, its transformative potential. This second dispute was settled in favor of the municipality of Purépecha de Cherán and succeeded in setting a precedent in Mexico, and perhaps in Latin America, in annulling a constitutional reform for violating the right to prior, free and informed consultation of an indigenous community.

In addition to the proceedings in the highest judicial bodies of the Mexican state and the legal precedents that have proved fundamental for other indigenous peoples and communities, it is important to register here that all this was possible due to an *ecology of legal knowledges*¹⁰ in which the constitution of Cherán and its indigenous legal practices played a central role. Today, Cherán is recognized as the first indigenous municipal government in the history of the Mexican state, and many other municipalities and indigenous communities are following its path toward self-determination.¹¹

Elsewhere, I have explained in detail the legal strategy used in these two lawsuits that are considered paradigmatic in the legal history of Mexico, while also emphasizing that the formulation of both cases was carried out through a progressive hybridization of the practices of indigenous justice and the professional or technical legal knowledge of state law and the laws on international human rights and indigenous peoples (Aragón, 2013, 2015).

In the first of the processes, highlighting the example of the *ecology of legal knowledges*, it was necessary to explain to the TEPJF the existence of a municipality regulated in practice by its 'uses and customs'. At the same time, according to the rights enshrined in the political constitution of Mexico and, significantly, in international treaties, it had the right—together with the state allowing it to elect its authorities along different lines from the principles of political representation based on political parties—to be legally recognized as a government structure, also in accordance with its 'uses and customs'.

In the case presented to the SCJN, it was necessary to apply this progressive combination of scales of legality in order to argue that the Congress of the State of Michoacán had not followed the consultation process for the contested constitutional reform, in line with the 'uses and customs' of Cherán (which had been recently formalized and institutionalized) and that it had therefore violated their human rights, as guaranteed in the Mexican Constitution and in international treaties.

In addition to these two general approaches, it is relevant here to draw attention to the fact that these two lawsuits have created different *contact zones* associated with their development, which have facilitated different checks and balances in the *ecology of legal knowledges*. While in both cases the time spent formulating the legal arguments and the resolution of the dispute was dominated by a technical knowledge of state law, in the final judgment (and very clearly in the ruling of 2011), knowledge of indigenous justice was decisive throughout the entire judicial struggle in ensuring an outcome as favorable as possible with regard to the provisions laid out in the Cherán constitution of 2011.

In terms of technical knowledge, the first situation does not require further explanation, since recourse to a state court implies accepting and assuming in advance the formal logic by which it is governed and, consequently, its rules. On the other hand, with regard to the final judgment, particularly that of 2011, a relatively long phase was initiated in which a consultation process with the people of Cherán was ordered to ascertain whether, in fact, the majority of the population agreed with the change of political regime. The interpretation given by the community during the final judgment—presented before other state authorities that were obliged to participate in this process, in the absence of any regulation relating to this right at federal and provincial level—was based on the criteria established by the Inter-American Court of Human Rights (*Saramaka vs. Suriname*) in which it was anticipated that the consultation should be carried out

according to the 'uses and customs' of the community. With this point defined for the authorities involved in making a judgment, the knowledge of the Cheránense regarding their indigenous justice was of paramount importance to the strategic choice of practices that would ensure a swift and safe outcome for the political struggle that had been undertaken, and which ultimately sought to protect the political pact established months before.

Thus, instead of conducting a consultation process similar to those used in the electoral system based on political parties, with polls, a secret ballot, voter registration and so on, indigenous justice practices and means of political organization were chosen in accordance with the political agreement of 2011, that is, a consultation process held at the meetings of each of the four districts, with a public vote carried out by a show of hands, using traditional identification mechanisms such as an attendance list and recognition by neighbors, a tabled debate for assemblies and so on.¹²

One final example I wish to present to illustrate how the constitution of Cherán has been able to challenge the dominant legal and political order of the colonial state in Mexico is the initiative to reform Article 115 of the Constitution of Mexico, presented by the CMGC in April 2016 to the Senate of the Republic.

This task consisted of a legislative initiative developed in various assemblies by the Cheránense, their authorities and their lawyers. The proposal was in response to the inactivity of the legislators in the province of Michoacán and the Mexican state itself with regard to harmonizing the constitution with the provisions issued by the two highest constitutional courts concerning the judicial victories of Cherán. The initiative was built up from the political pact assumed by the community in 2011, applying a technical knowledge of the state laws and the human rights of indigenous peoples with the aim of including the indigenous municipalities, as well as their powers and obligations, in the Constitution of the Mexican state.

On the day of the presentation, five of the six senators from Michoacán, representatives from all the political parties, took the initiative upon themselves, having been joined by six other senators from Oaxaca, Guerrero and Chiapas. It would be remiss of me not to draw attention to the fact that Cherán was the first community to present a constitutional reform initiative to the Senate and, in just one day—the final day of the legislative work—succeeded in gaining the support of 10% of the Senate from across the three major political parties in Mexico.

13.5 The Limitations and Potential of Transformative Constitutionalism from Below

In comparison to the transformative constitutionalism based on South American experiences, the version emanating from Cherán's political-judicial struggle which I have set out to substantiate here—described as originating 'from below'—has

clear limitations. The most obvious is that, while the former experiences became the general reference for the interpretation of the law of the states of Ecuador and Bolivia, with all the ensuing depletion and deconstitutionalization, the general context in which the latter has proceeded is much more colonial and capitalist. This means that the struggle based on transformative constitutionalism from below is entirely subversive, that is, a struggle intended to increase the number of loopholes and contradictions present in the constitution of the Mexican state and hegemonic law, so that indigenous peoples and communities can employ them in their struggles for autonomy.

Another evident limitation is the absence, in the Cherán experience, of a robust approach to development, as has been the case with transformative constitutionalism in Ecuador and Bolivia. Although there are communitarian management initiatives for development in Cherán, it has not yet been possible to consolidate a sufficiently robust proposal that could override the neoliberal development model.

Yet, although this transformative constitutionalism from below has its limitations, it also possesses potentialities. The first emerges as the reversal of a limitation, since this type of transformative constitutionalism from below demonstrates that it is not necessary to have an ideal constitutional context in place on a national scale. Indigenous peoples can exercise their right to self-determination and, at the same time, transform the old structures of colonial nation states.

Secondly, unlike the South American approach, this transformative constitutionalism is stimulated from below by a vibrant social movement which, in times of struggle, builds an anti-colonial and transformative political undertaking through the constituent power permanently lodged in its assemblies that challenge Mexico's hegemonic constitutional and political system.

Thirdly, the thinking regarding the Cherán experience of transformative constitutionalism operates in *contact zones* where the balance between a knowledge of state and international law presents fewer disadvantages for the pursuit of indigenous justice. As outlined earlier, the different phases in the processes of political-legal struggle have allowed for different checks and balances in which, in many cases, the main role given to the *ecology of legal knowledges* was precisely that of indigenous justices.

Finally, this transformative constitutionalism from below constitutes a true laboratory for utopias in the field of law. On the basis of this real, day-to-day, concrete and practical work that has been developed for more than five years among the Cheránense, the mixed-race lawyers, the committed academics, the human rights organizations and all the indigenous or non-indigenous actors who have contributed (to a greater or lesser extent) to this process, as well as to the construction of this hybrid law, I attest to the possibility of building a much-needed new Mexico, founded on interculturality and solidarity between different struggles and in support of a more progressive knowledge.

Notes

* Translation by Neil Walker.

- 1 This work was carried out with the support of the PAPIIT AI303516 project at the National Autonomous University of Mexico.
- 2 The community of San Francisco Cherán is located in the heart of the Michoacán state region in an area known as the Purépecha Plateau. It is one of the largest of these indigenous people's communities in terms of territorial extension (20,826 hectares), a feature that allows it to be both a community and the seat of the municipality known only by the name of Cherán. The municipality of Cherán was created in 1861. At present, its population has risen, according to the 2010 Census, to 18,141 inhabitants divided mainly between the two communities that comprise the municipality: San Francisco Cherán, with 14,245 inhabitants, and Santa Cruz Tanaco, with 2,947.
- 3 The analysis of the lawsuits referred to in this chapter was carried out in collaboration with other lawyers from the *Colectivo Emancipaciones*, to which I belong.
- 4 In particular, in the case of protecting the political-electoral rights of the citizen, which was settled by the upper chamber of the *Tribunal Electoral del Poder Judicial de la Federación* (TEPJF) in 2011, reference SUP-JDC 9167/2011, and the constitutional dispute trial 32/2012, resolved in 2014 by the plenary of the *Suprema Corte de Justicia de la Nación* (SCJN). Both judicial precedents are considered of the highest order in terms of relevance in defending the human rights of indigenous peoples in Mexico.
- 5 Boaventura de Sousa Santos defined the sociology of absences as

research aimed at showing that what does not exist is, in fact, actively produced as non-existent, that is, as a non-credible alternative to what exists. Its empirical object is impossible from the point of view of the conventional social sciences. It is about transforming impossible objects into possible objects, objects that are missing into objects that are present.

Santos, 2010:37

- 6 This notion is understood through the proposal of the epistemologies of South as a system of visible and invisible distinctions, the invisible constitute the foundation of the visible. Invisible distinctions are established through radical lines that divide social reality into two universes, the universe 'this side of the line' and the universe of 'another side of the line'. The division is such that 'the other side of the line' disappears as a reality, becomes non-existent and is, in fact, produced as non-existent. Non-existent means not to exist in any relevant or understandable way of being.
Santos, 2009:160
- 7 María Teresa Sierra (2011) understood this dilemma of legal anthropology several years ago and, taking up Benda-Beckman's theoretical proposal, highlighted the need to combine the analysis of legal practices with the study of the ideologies of legal orders to account more fully for the inter-legality present in the indigenous regions.
- 8 In the case of Cherán, for example, the literature on the history of the community in the twentieth century shows a very different political pact from that of 2011. In earlier academic work, anthropologists and historians had conceived of Cherán as a community where the strength of chiefs, political parties, disputes between factions and worship of the figure of Lázaro Cárdenas del Río were the prevailing reality (Castile, 1974; Beals, 1992; Calderón, 2004). Despite this, it cannot be said that the general normative principles of the indigenous justices in Cherán were necessarily different from those in force today, but that, with the movement of 2011, these principles were recalibrated and adapted to a new political pact.
- 9 The two most important texts on elections according to 'uses and customs' in the municipalities of Oaxaca (Anaya, 2006; Recondo, 2007) note that, in general terms,

this recognition of indigenous communities and peoples results in the continuation of the old authoritarian regime of the PRI in that province.

10 For Boaventura de Sousa Santos,

The ecology of knowledge is based on the pragmatic idea that it is necessary to re-evaluate concrete interventions in society and in nature that different knowledges can offer. It focuses on the relationship between knowledge and hierarchies that are produced between them from the point of view that concrete practices would not be possible without these hierarchies. However, rather than subscribing to a unique, universal and abstract knowledge hierarchy, the ecology of knowledges favors hierarchies that depend on the context, in light of the concrete results intended or achieved by different practices of knowledge.

Santos, 2009:189

11 In section two of this chapter, I mentioned the case of two municipalities in Guerrero and four in Morelos which tried to follow the footsteps of Cherán. However, it would be a mistake to think that they are the only ones: in fact, Cherán's case represented a separation of the waters in the TEPJF, which since then has been producing a rich vein of jurisprudence on the self-determination of indigenous peoples and communities. The cases that have generated this new jurisprudence span almost the entire territory of the Mexican state, ranging from recognition of the traditional authorities of indigenous communities not provided for in the laws of the state through to recognition of the exercising of communitarian autonomy in disposing of the resources that correspond to the public budget.

12 It is clear that many of these forms are not indigenous in the sense of being essential but have been adapted and modified by indigenous communities through different experiences and historical processes to make them compatible with their forms of organization.

References

- Anaya Muñoz, Alejandro (2006), *Autonomía Indígena, Gobernabilidad y Legitimidad en México. La Legalización de Usos y Costumbres Electorales en Oaxaca*. Mexico DF: Ibero-American University/Plaza y Valdes.
- Aragón Andrade, Orlando (2013), 'El Derecho en Insurrección. El Uso Hegemónico del Derecho en el Movimiento Purépecha de Cherán', *Journal of Studies & Research on the Americas*, 7 (2), 37–69. Available at <http://periodicos.unb.br/index.php/repam/article/view/20220>.
- Aragón Andrade, Orlando (2015), 'El Derecho Después de la Insurrección. Cherán y el Uso Hegemónico del Derecho en la Suprema Corte de Justicia de México', *Sortuz: Oñati Journal of Emergent Socio-Legal Studies*, 7 (2), 71–87. Available at <http://opo.iisj.net/index.php/sortuz/article/view/702>.
- Aragón Andrade, Orlando (2016), 'Otra Democracia es Posible. Aprendizajes para una Democracia Radical en México desde la Experiencia Política de Cherán'. Conference presented at the University of California, Berkeley, on November 4, 2015, in the 'Mexico at the Crossroads' cycle.
- Beals, Ralph Larson (1992), *Cherán: Un Pueblo de la Sierra*. Zamora: The College of Michoacán.
- Calderón Mólgora, Marco Antonio (2004), *Historia, Procesos Políticos y Cardenismos*. Zamora: The College of Michoacán.
- Castile, George Pierre (1974), *Cherán: La Adaptación de una Comunidad Tradicional*. Mexico DF: The National Indigenist Institute.
- Clavero, Bartolomé (2008), *Geografía Jurídica de América Latina. Pueblos Indígenas entre Constituciones Mestizas*. Mexico DF: Siglo XXI.
- Fioravanti, Maurizio (2001), *Constitución. De la Antigüedad a nuestros Días*. Madrid: Trotta.
- Gargarella, Roberto (2011), 'Pensando sobre la Reforma Constitucional en América Latina', in César Rodríguez Garavito (ed.), *El Derecho en América Latina. Un Mapa para el Pensamiento Jurídico del Siglo XXI*. Buenos Aires: Siglo XXI, 87–108.
- Griffiths, John (1986), 'What Is Legal Pluralism?', *The Journal of Legal Pluralism*, 18 (24), 1–55. DOI: <https://doi.org/10.1080/07329113.1986.10756387>.
- López Bárcenas, Francisco (2014), 'Normas y Principios Jurídicos entre los Nuu' Savi', *Diarios de Campo*, 4–5, 42–47. Available at www.revistas.inah.gob.mx/index.php/diariodecampo/article/view/5722.
- Martínez, Juan Carlos (2007), 'La Crisis Interna de Santiago Amoltepec. Reflexiones sobre las Relaciones de Poder y la Formalidad en el Campo Jurídico en una Localidad Oaxaqueña', in Jorge Hernández-Díaz (ed.), *Ciudadanías Diferenciadas en un Estado Multicultural: Los Usos y Costumbres en Oaxaca*. Mexico: Siglo XXI/The Benito Juárez Autonomous University of Oaxaca, 229–249.
- Negri, Antonio (2015), *El Poder Constituyente*. Madrid: Traficantes de Sueños.
- Recondo, David (2007), *La Política del Gatopardo. Multiculturalismo y Democracia en Oaxaca*. México DF: Center for Research and Advanced Studies in Social Anthropology.
- Santos, Boaventura de Sousa (2002), *A Crítica da Razão Indolente. Contra o Desperdício da Experiência*. Porto: Afrontamento.
- Santos, Boaventura de Sousa (2003), 'Poderá o Direito ser Emancipatório?' *Revista Crítica de Ciências Sociais*, 65, 3–76. DOI: <https://doi.org/10.4000/rccs.1180>.
- Santos, Boaventura de Sousa (2009), *Una Epistemología del Sur. La Reinvention del Conocimiento y la Emancipación Social*. Mexico: Siglo XXI.
- Santos, Boaventura de Sousa (2010), *Refundación del Estado en América Latina. Perspectivas desde una Epistemología del Sur*. Lima: International Institute of Law and Society.
- Santos, Boaventura de Sousa (2012), 'Cuando los Excluidos Tienen Derecho: Justicia Indígena, Plurinacionalidad e Interculturalidad', in Boaventura de Sousa Santos and Agustín Grijalva Jiménez (eds.), *Justicia Indígena, Plurinacionalidad e Interculturalidad en Ecuador*. Quito: Abya Yala, 13–50.
- Santos, Boaventura de Sousa (2015), 'Para que Servem as Constituições?' Master Class at the Faculty of Economics of the University of Coimbra, April 10.
- Santos, Boaventura de Sousa; Rodríguez-Garavito, César (2007), 'El Derecho, la Política y lo Subalterno en la Globalización Contrahegemónica', in Boaventura de Sousa Santos and César Rodríguez-Garavito (coords.), *El Derecho y la Globalización desde Abajo. Hacia una Legalidad Cosmopolita*. Barcelona: Anthropos, 7–28.
- Sierra, María Teresa (2011), 'Pluralismo Jurídico y Interlegalidad. Debates Antropológicos en Torno al Derecho indígena y las Políticas de Reconocimiento', in Victoria Chenaut, Magdalena Gómez, Héctor Ortiz y María Teresa Sierra (coords.), *Justicia y Diversidad en América Latina. Pueblos Indígenas ante la Constitución*. Quito: FLACSO/CIESAS, 385–406. Available at https://biblio.flacsoandes.edu.ec/shared/biblio_view.php?bibid=126754&tab=opac.
- Sierra, María Teresa; Chenaut, Victoria (2002), 'Debates Recientes y Actuales en la Antropología Jurídica: Las Corrientes Anglosajonas', in Esteban Krotz (ed.), *Antropología Jurídica: Perspectivas Socioculturales en el Estudio del Derecho*. Barcelona: Anthropos/The Metropolitan Autonomous University—Iztapalapa, 113–170.
- Tamanaha, Brian (1993), 'The Folly of the "Social Scientific" Concept of Legal Pluralism', *Journal of Law and Society*, 20 (2), 192–217. DOI: <https://doi.org/10.2307/1410167>.