

Of Neo-Constitutionalisms, Lefts, and (De)Colonial Struggles. Thoughts from the Andes in conversation with Breny Mendoza

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The legal or constitutional normative changes are coming to be tools, not the solution.
Nina Pacari (2011)

As a historical indigenous woman leader, attorney, and now Magistrate in Ecuador's Constitutional Court, Nina Pacari speaks to the lessons learned, and to both the limitations and possibilities of constitutional transformation. In this sense, Breny Mendoza is correct in arguing: "social justice cannot be decreed."

Yet for those of us involved in Latin America in the present processes of sociopolitical transformation, the role of State, constitutions and law in helping to push social justice and build a radically distinct society cannot be denied. Still, they are certainly not enough. Moreover, as monocultural and westernized institutions historically conceived with relation to dominant interests, states, constitutions, and laws are always riddled with limitations and contradictions, even when reconceived in the realm of the "Left turn", decolonial struggles, and progressive politics.

The problem then, as we are learning in Ecuador and Bolivia, is mid-way between Breny's cautions of not expecting too much from constitutions, law, and State, including their capacity for structural change and for "decouple(ing) from the logic of neoliberal capitalism," and the hope, installed in the Constituent Assemblies and the Constitutions themselves. Such hope alludes to the possibility of transgressing and dismantling the coloniality of power and initiating an intercultural and plurinational social project. However, it does not assume or portend that decolonization can or should be written into law.

In what follows, I reflect on this problematic based on the experiences being lived today in Ecuador, and to a lesser extent in Bolivia, and in conversation with Breny's paper. The organization of these reflections is with regard to two interrelated themes: "Constitutionalism and Constituent Assemblies Otherwise," and "The State, the "Left", and the Decolonial," considering at the end what all this suggests for Breny's proposition of intersectional politics.

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Constitutionalism and Constituent Assemblies Otherwise

Constitutional assemblies and constitutionalism in Latin America have typically been spaces for party-based and party-controlled political reforms. However, they have also more recently, and in at least some countries, been spaces to bring to the fore historically negated and/or subalternized voices, concerns, and rights. Such was the case with the Colombian Constituent Assembly in 1990-91 and the Ecuadorian Assembly of 1997-98. Here the recognition of indigenous and Afrodescendant peoples'¹ ancestral rights, and judicial pluralism, as well as an attention to concerns of gender, opened a new phase of constitutional politics, in what some have referred to as multicultural constitutionalism. The problem, of course, is that such politics and reforms did not take seriously social movement demands, nor did they portend to push structural change. Rather, they were part and parcel of the multicultural logic of transnational global capitalism particularly prevalent in Latin America in the 1990s. The defining characteristic of this constitutionalism was its "inclusion" of those peoples historically excluded, an inclusion that, instead of altering, strengthened the structures and systems of power.

The recent constitutionalism in Ecuador affords a deep contrast to the previous model. Not only does it take distance from what President Rafael Correa has repeatedly called "the long neoliberal night", but also, and equally if not more importantly, thinks *with* Andean non-Western-centric logics and rationalities. The naming of *Pachamama*, the identifying of *sumak kawsay* or *buen vivir* (roughly translated as living well or collective well-being) as the philosophical and orientating force of the new social project, the recognizing of the rights of nature, and the positioning of ancestral knowledges as also "scientific" and as necessary components of education, among other advances, turn previous constitutions on their heads.²

Legal scholar-activists Boaventura de Sousa Santos (2010) and Ramiro Ávila (2011) refer to his new moment as "transformative neo-constitutionalism." As Ávila explains,

Neo-constitutionalism brings together the most innovative elements of contemporary constitutionalism that have been developing in Europe since the middle of the 20th Century and that mark an important distinction with judicial positivism and formalism. ..."Transformative" intends to

¹ In Colombia the recognition of Afro-Colombians did not occur with the Assembly and the subsequent Charter but rather two years later as a demand of Afro movements, and within law.

² Similar points can be argued with regard to the Bolivian Constitution although, as I have pointed out elsewhere, the Ecuadorian Charter is much more radical in its challenges to the Western paradigm (see Walsh, 2009, and Walsh, 2010).

demonstrate the advances of our own Andean constitutionalism that are totally novel to the contemporary frame. (p.16)

What is of fundamental importance here, in my mind, are the efforts engendered first in the Constitutional Assembly and later in the Charter, to challenge, transgress, and transcend the universalized Eurocentric and modern-colonial model. That is, not to simply “include” that which historically has been subjugated, denied and negated, but instead to “think with” these subjects, knowledges, and cosmic or life-visions. Of course it was the two-decade struggle of the country’s indigenous movement that laid the ground for the Assembly, for the challenges to the universalized, Western, and modern-colonial frame, and for the visible presence of knowledges and visions otherwise. As Breny argues, such context is certainly distinct from that of Honduras. Still, and as I will argue here, there is much to be learned from the Ecuadorian experience.

In its organization and practice, the Ecuadorian Constitutional Assembly worked pedagogically to engender, enable, and push this “thinking with”.³ The popularly elected Assembly women and men did not represent political parties but social and political movements and varied social sectors and regions of the country. Most were new to the political arena, were of a younger generation, and were there to contribute to the learning, thinking, and debate entailed in the shaping and making of the Constitution. Organization was through thematic *mesas* that endeavored to study the issues of concern with readings, discussions and debates, and invited presentations. Only with consensus and profound understanding did these *mesas* then propose to the plenary the articles for consideration. As one of the invitees and as an ongoing unofficial advisor to an Afro-Ecuadorian Assembly woman, I can attest to the sociopolitical, epistemic, and pedagogical significance of this practice and process.

It is in this sense that we can understand the call for a Constitutional Assembly by the Honduras Resistance Front and the hope attached to this call expressed by the Honduran playwright Rafael Murillo Selva and cited by Breny. That is to say, a Constituent Assembly that does not just write a new Charter but, in the process, contributes to and is part of the developing consciousness and transformation. Here the Constitution is not just a product; it is a medium and tool for change.

The fact that the Front has, as Breny points out, “chosen as its main strategy the refoundation of the country through a constitutional assembly that elaborates, with the direct participation of the people, a new constitution” should be understood, in my mind, as just that: a strategy. Moreover, it is a strategy that should not make the

³ However, this pedagogical practice was dismantled in the last few weeks of the Assembly. President Correa’s push to hurry up the approval process of the new Constitution and pass the articles with little or no debate resulted in a major shift of the processes heretofore engaged and the resignation of the then president of the Assembly and political-pedagogical leader Alberto Acosta.

Constitution the only vehicle of change, a vehicle, which we know, can be easily overturned by a right-wing change in government. It is a strategy that should work to build a long term project and perspective, overcoming the short-term action and vision characteristic of Latin American's social movements. And finally, it is a strategy that should proceed with caution in considering the agency and positioning of the State.

Here the experiences of both Ecuador and Bolivia afford important lessons about the State, but also about the so-called Left and the complexities of decolonial struggle.

The State, the "Left", and the Decolonial

The move from a weak to a strong State is a key component of today's progressive politics and constitutional and political transformations. In this transformation, the State is repositioned as *the* political social authority. The president embodies the State; as Ecuadorian president Rafael Correa has repeatedly proclaimed: "I am the State."

While much can be said about this authority and embodiment not only in Ecuador but also in both similar and different ways in Venezuela and Bolivia, I will highlight only a couple of concerns here. First is the concern of power. In today's practice of a strong State, there is not a new configuration of power or a critical revision of the models of thinking and exercising power, as Breny suggests should occur. Rather there is a consolidation of power that, in essence, reifies the State. It is the State that has the final say; participation of social sectors and community consultation are tokens in this regard. Here it could be said that in Ecuador, but in many ways in Bolivia as well, the State, despite its "progressive" stature, defies the Constitution and denigrates its process and goals.

An illustrative example is the Ecuadorian Mining Law passed several months after the popular approval of the Constitution. This law gives the freedom to prospect without community permission and calls for participation and consultation only after concessions have been granted, thus violating the consultative process described in the Charter's Art. 57:7 and the active community participation in decision-making present in Art. 395:3. It guarantees rights and access to mining companies over collective and ancestral rights (going against various Constitutional principles, including in the areas of collective rights, the rights of nature, and rights pertaining to biodiversity and natural resources), and it criminalizes those who disrupt mining activities. The recent conflict in Bolivia around the building of a Brazilian-financed highway through the indigenous and natural reserve of TIPNIS, an area already targeted for hydrocarbon exploration and exploitation, affords a

similar example.⁴ In both cases, power remains paternalistic, still engrossed in the paradigms of accumulation and progress; state-controlled neoextractivism is one of its central spheres.

The second concern has to do with the nature of this power and its present-day configurations. An example is the embodiment and configuration of the Ecuadorian State in the president, which recalls and reinstalls power in patriarchal form. Correa personifies the short-tempered macho male, the father figure who not only knows what is best for all, but who also punishes all who question, criticize, or cross him. The criminalization of social protest, the naming of the feminist ecological and the indigenous movements as “infantile”, the arrest of over 200 indigenous leaders under charges of State terrorism and sabotage, and the legal claims of verbal defamation and assault made by the president against critics, are illustrative.

What we are learning is that while a Constitution may, as is the case of Ecuador, give process, substance, and hope to transformation, to the dismantling of the colonial matrices of power, and to the construction of a new collective social project, government and/as State can coopt, signify, and define politics, law, and even change on its own terms. Moreover, it can call for the elimination of the collectivities that made possible the process and the radicality of the Charter, on the grounds that that they are, as Correa portends, obstacles to the “citizens’ revolution” and its project of progress and modernization.

Of course all this brings to the fore the questions of the decolonial and the “Left” that Breny highlights in her paper. The “turn to the Left”, as an ideological-political tendency, does not necessarily, nor typically, imply a decolonial project. In fact, the Left’s historical exclusion of women, indigenous, and African descended peoples in Latin America and its assuming as “natural” the trope and practice of heteronormativity, is demonstrative of its inability to see how the coloniality of power is foundational to the region and to the continued patterns of racialized, genderized, and sexualized domination and oppression. In this sense, neither Ecuador nor Bolivia’s governments can be described as decolonial. At least in Ecuador (and increasingly it seems in Bolivia), there is not only no commitment to decolonization, but, as many now argue, to what might be termed a Left perspective and project, although the meaning of “Left” itself these days, as Breny mentions, is also a matter for scrutiny and debate.

Constitutionalism in both Bolivia and Ecuador were in fact conceived less as leftist interventions and more as processes and projects that took distance from the West⁵ and opened paths towards interculturalization and decolonization. In this sense,

⁴ For a more detailed discussion of both problematics see Walsh (2011).

⁵ Walter D. Mignolo argues that given present-day politics in the global (dis)order, a better term to describe the shifts in Latin America today is “de-occidentalization”. See Mignolo (2011).

transformative neo-constitutionalism challenged the hegemony and ideology of the Western Right-Left binary. It gave place and space to *Pachamama*, to the still-present racialized-genderized colonial matrices of power, and to the subjects who have long struggled in its margins. And, in so doing, it spoke to lived realities in ways that no other political Charter in the world has done. The problem, as we have seen here, is, on the one hand, translating transformative neo-constitutionalism into practice and, on the other, assuming that government as/and the State takes such vision and practice as its own.

Final Reflections

Again taking up the concerns expressed in Breny's paper, the issue should not be one of simply "taking State power," whether that be by the "Left" or by, in the case of Honduras, the National Resistance Popular Front. What is more critically needed is the building of a radically distinct social project. That is, projects in which social movements do not become the State (thus losing their essence and agency as social movements), nor are eliminated by the State (as Ecuador is endeavoring to do), but are instead active participants in pushing what Breny refers to as "political methodologies." By this, I mean methodologies that work in alliance and from the bottom up, revealing, confronting, and transforming the existential, ontological, and epistemic dispositives of power that are reconstructed in daily life, including in spaces of "progressive" and movement-based politics: dispositives that dehumanize, silence, and violate despite enlightened laws, radical constitutional reform, counterhegemonic rhetoric, and so-called State refounding.

This is where the feminist intersectional coalition politics that Breny mentions at the close of her paper can play an especially important role. This role should involve not just guiding the constitutional process, since as we know neither social justice nor decoloniality can be decreed, but, more importantly, it should involve articulating and addressing the complex intertwinement of gender, race, class, and sexuality constitutive of the matrices of modern-colonial power lived in the particular specificity of these Americas of the South, from Honduras to the Andes, and beyond.⁶

In closing, it seems fitting to repeat Audre Lorde's famed words, re-spoken by Breny: "The master's tools will never dismantle the master's house." Yet, and in the context of the reflections presented here with relation to the processes and pedagogies of transformative neo-constitutionalism, it may be more fitting and useful to adjust the credo as Lewis Gordon and Jane Anna Gordon (2006) have done in a different but not totally dissimilar context: "Not only the master's tools."

⁶ Such concern has been the focus of Breny's work elsewhere. See for example Mendoza (2010).

As the experiences present and emergent in Latin America suggest, Constitutions are no longer just the tools of the dominant political forces grouped in the State. They are also the tools of those of us who struggle to build a more just social world, a radically distinct ethos, and a political-pedagogical praxis grounded in hope and a project of decoloniality. What we do with these tools, whether that be in the forthcoming processes in Honduras, or in the cases of Bolivia and Ecuador mentioned here, is the question that still needs to be concretely addressed.

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