

2014

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Recommended Citation

Monzón, José María (2014) "The Constitution as a Post-Colonial Discourse: An Insight Into the Constitution of Bolivia," *Seattle Journal for Social Justice*: Vol. 12: Iss. 3, Article 4.
Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol12/iss3/4>

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The Constitution as a Post-Colonial Discourse: An Insight Into the Constitution of Bolivia

José María Monzón*

I. INTRODUCTION

In a well-known phrase, Álvaro García Linera, current Vice President of Bolivia, said he saw himself as one of the last Jacobins and Evo Morales, the President of Bolivia, as Maximilien Robespierre.¹ I am not able to consider whether Morales can be seen as Robespierre, but the reference to Jacobinism really matters to Latin American and European jurists.² Jacobinism—the radical faction of the French Revolution—not only is vindicated by the words of García Linera, but also may be the ideology underlying the process which formed the new Bolivian Constitution of 2008. The current constitutional quarrels surrounding the recent constitutional reform in Bolivia show, on one side, a construction founded on the intense work of local and general assemblies that tried to enhance a strong democratic participation where indigenous peoples were active members,³ and, on the other, a search for constructing a new society.

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¹ ÁLVARO GARCÍA LINERA, LA POTENCIA PLEBEYA: ACCIÓN COLECTIVA E IDENTIDADES INDÍGENAS, OBRERAS Y POPULARES EN BOLIVIA, 9 (2009).

² See Roberto Viciano Pastor & Rubén Martínez Dalmau, *Fundamentos Teóricos y Prácticos del Nuevo Constitucionalismo Latinoamericano*, 48 GACETA CONSTITUCIONAL 307 (2011), available at <http://www.gacetaconstitucional.com.pe/sumario-cons/docsum/GC%2048%20%20Roberto%20VICIANO%20y%20Ruben%20MARTINEZ.pdf>.

³ For a discussion of the importance of a return to democratic forms of participation see MARCO APARICIO WILHELMI ET AL., POR UNA ASAMBLEA CONSTITUYENTE: UNA SOLUCIÓN DEMOCRÁTICA A LA CRISIS, (2012). Fernando Mayorga describes Evo Morales's discourse—as the current president of Bolivia—as a return to the codes of the revolutionary nationalism where the principal political actor is a reunion of diverse

I suggest this event—the Bolivian constitutional-building process—might be seen as an experiment of a revolutionary democracy whose roots can be traced to the Jacobin tradition. This is the objective of my paper: to demonstrate that the new Bolivian Constitution is the outcome of a revolutionary democracy and that its main consequence is the emergence of a constitution that can be named a post-colonial discourse.

In the next sections, I will focus on the foundations of the new Bolivian Constitution, analyzing it as an alternative and democratic way of constructing law. Firstly, I examine the Jacobin tradition for its importance in the nation-building process during the Latin American struggles for independence in the nineteenth century and its revival in the recent decade in the Bolivian constitution-building process. Secondly, I study the Marxist doctrine because it is a key constituent of the new Latin American constitutionalism, including the Bolivian Constitution. Thirdly, I consider the role of the indigenous movements and how they got together as these movements both cited political traditions and mixed these traditions with their ancestors' religious beliefs. Fourthly, I analyze the Bolivian Constitution—its premises and its problems—to construct an alternative society built to challenge the actual transnational capitalist goals. And finally, I explain why the new Bolivian Constitution might be taken as a post-colonial discourse.

II. HOW JACOBINISM INFLUENCED THE LATIN AMERICAN CONSTITUTIONALISM

The first remark I want to consider is the opinion that the political constitution has a strong symbolic power. To have a constitution means people have a body of legal rights and freedoms and that the government's power is limited. These are the principal reasons to take a constitution as the

identities and social movements. *El Gobierno de Evo Morales: Entre Nacionalismo e Indigenismo*, 206 NUEVA SOCIEDAD 4 (2006), available at http://www.nuso.org/upload/articulos/3390_1.pdf.

fundamental law or the paramount norm. So to have a constitution signifies that the rights of the individuals are protected and the separation of power through limited government power has been set up. This is what confers the constitution's symbolic power.

But the constitution might also be seen either as a colonial or as a post-colonial discourse. The former occurs when the constitution recognizes the political dominance of a foreign state, placing the supreme normative power outside its frontiers. The latter happens when the constitution affirms that the civil society is free from any external or internal dominance—an explicit recognition inserted in the Preamble of the Bolivian Constitution. In this case, we can speak of a constitution being a post-colonial discourse.

Although another distinction can be made—following what Argentinian-born jurist Gerardo Pisarello wrote. He speaks of an important difference that has deep roots in the politics of ancient Greece and Rome, and has relevant consequences for the modern philosophical and political analysis of the new Latin American constitutions. He mentions that there are anti-democratic constitutions and democratic-based ones.⁴ In other words, we could have a constitution that is oligarchic based. This distinction could explain the interest of many social movements—which include the indigenous ones—to construct a democratic-based constitution like the Bolivian Constitution. This distinction among anti-democratic constitutions and democratic-based ones could also give us another foundation to consider this new constitution as a post-colonial discourse.

According to these concepts, constitutions could be related to a certain kind of natural or social justice, for justice is intended to be the main criterion to guide the legal norms, and principally the constitution. Thus, it cannot be a surprise that when social uprisings emerge, the political

⁴ *See generally* GERARDO PISARELLO, *UN LARGO TERMIDOR: LA OFENSIVA DEL CONSTITUCIONALISMO ANTIDEMOCRÁTICO* (2011).

discourse emphasizes that justice is not enjoyed by the majority of the society.

I think these considerations suggest that the constitution-building process is the result of the close relationship between power and conservative or revolutionary elites. And that the concept of justice chosen to guide the constitution is what really matters because this concept explains how legal structures must be and why it is essential for society to follow this criterion. If I mention these issues, it is because they are—among others facts—the ones that prepared the French Revolution and the emergence of Jacobinism.

A. The Emergence of French Jacobinism

French Jacobinism is—perhaps—one of the most debated ideologies that emerged from the French Revolution. In plain terms, we can say it was one of the radical factions, the one whose major aim was to build a democratic republic and to end the privileges of the *Ancien Régime*. In search of these ideals, Jacobinism's adherents—one of them was Robespierre—tried to build a new society through the enactment of a full democratic constitution.

In 1793 the second French Constitution was enacted during one of the worst moments of the French Revolution—known as the Reign of Terror. According to French historian Jacques Godechot, it was the most democratic of all the French constitutions.⁵ This constitution could have been the culmination of the ideals of the Revolution, but it failed. It contained radical clauses, which stood as an important obstacle for its acceptance by the French society, mainly for the bourgeoisie,⁶ for example,

⁵ JACQUES GODECHOT, *LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789*, 73, 76–77, (1995).

⁶ Art. 18. Tout homme peut engager ses services, son temps; mais il ne peut se vendre, ni être vendu; sa personne n'est pas une propriété aliénable. La loi ne reconnaît point de domesticité; il ne peut exister qu'un engagement de soins et de reconnaissance, entre l'homme qui travaille et celui qui l'emploie.

it established that the law should protect the public and individual freedom from the oppression of those who govern (Article 9).⁷ It was the reaction to the French absolutist monarchy, but also to every attempt to extend a republic beyond its legal limits, giving to each member of the society the right to rebel against the government when it violates the law, the *most sacred right and the most indispensable obligation*, according to the French Constitution (Article 35).⁸

It should be remembered that the Terror arose when the Revolution was in danger, with enemies inside and abroad. The Committee of Public Safety was established to deal with these events.⁹ British historian George Rudé says the French Revolution engaged with both inflation and the demands of the war. Thus, extraordinary measures were taken by the revolution and the *Armée Révolutionnaire* was displayed as an instrument of the Terror and as a device to help support the ideals of the Revolution, Rudé observes.¹⁰ As Robespierre clearly noted, the enemies of the Republic had no right to legal process and could be condemned to death by a popular tribunal. There cannot be a constitution in times of war, Robespierre stated.¹¹

⁷ Art. 9. La loi doit protéger la liberté publique et individuelle contre l'oppression de ceux qui gouvernent.

⁸ Art. 33. La résistance à l'oppression est la conséquence des autres Droits de l'homme.

Art. 34. Il y a oppression contre le corps social lorsqu'un seul de ses membres est opprimé. Il y a oppression contre chaque membre lorsque le corps social est opprimé.

Art. 35. Quand le gouvernement viole les droits du peuple, l'insurrection est, pour le peuple et pour chaque portion du peuple, le plus sacré des droits et le plus indispensable des devoirs.

⁹ The Committee of Public Safety was as an executive organ of government during the Terror. See GEORGE RUDÉ, PARIS AND LONDON IN THE 18TH CENTURY: STUDIES IN POPULAR PROTEST 136, 162 (1974). See generally JACQUES GODECHOT, LA PENSÉE RÉVOLUTIONNAIRE 1780-1799 (1964).

¹⁰ See generally GEORGE RUDÉ, PARIS AND LONDON IN THE 18TH CENTURY: STUDIES IN POPULAR PROTEST (1974).

¹¹ LA RAZÓN DEL PUEBLO 119–20 (Horacio Sanguinetti, ed. 1972).

B. The Historians Problems Dealing with the French Revolution

These crucial and bloody facts were a problem for historians to justify. It was said that the Terror showed a relevant contradiction between the ideals of the Revolution and the practical needs of the radical revolutionaries. There is evidence that these facts categorized historians during the nineteenth century and the first decades of the twentieth century as either for or against Robespierre due to his influence in the political and legal construction of the Terror.¹² The dispute ceased when historians began to describe a complete understanding of that phase of the Revolution. This brought the idea that Robespierre was a contradictory political actor; that he was the Incorruptible and, at the same time, a crucial member of the Terror. His reasons for taking control of the Revolution, his activity in order to expose the monarchy as a dead subject, and his speeches to align the people with the goals of the Revolution demonstrate that he is neither the most evil nor the best man of the Revolution.

But, as political discourses of that period indicate,¹³ many of his contemporary political actors did not doubt that Robespierre's ideology was a safe guide to revolutionary leaders in America. For example, the *Libertadores*, like Bolívar in Venezuela, saw themselves as true adherents to Jacobinism fighting against the Spanish Crown, says Colombian Professor Malagón Pinzón.¹⁴ Jacobin doctrines were useful against Spanish

¹² “Presque toutes les études historiques consacrées à la période du Directoire font référence soit à la « terreur directoriale » soit à la « terreur fructidorienne »”, Howard G. Brown, *Mythes et Massacres: Reconsidérer la «Terreur Directoriale»*, ANNALES HISTORIQUES DE LA REVOLUTION FRANÇAISE, 325 (2001), 23, available at <http://ahrf.revues.org/434>.

¹³ See GODECHOT, *supra* note 5, at 14-15.

¹⁴ See Miguel Malagón Pinzón, *El Pensamiento Republicano de Bolívar en el Proyecto Constitucional de Angostura de 1819 y en la Constitución Boliviana de 1826*, 27 REVISTA DE DERECHO UNIVERSIDAD DEL NORTE 98, (2007), available at <http://www.redalyc.org/redalyc/pdf/851/85102705.pdf>.

dominance, but in the end, the Latin American *Girondins*—those who followed this conservative faction of the French Revolution succeeded in building the independent Latin American states. Only in recent decades has Jacobinism experienced a revival in one of the most forgotten regions, Bolivia, as will be observed in the next sections.

III. THE MARXIST CONSTITUENT OF THE LATIN AMERICAN NEW CONSTITUTIONALISM

Marxism is a foundational doctrine in order to comprehend the Latin American new constitutionalism.¹⁵ Karl Marx's texts¹⁶ explain that the constitution reflects the social hierarchy and the values of a given society,¹⁷ principally the values that expound the elites' goals.¹⁸ Marx went to the Jacobin sources to develop this doctrine. We may see his interest in the Jacobins in *The Eighteenth Brumaire of Louis Bonaparte*, written in 1852, in which he spoke of the French Revolution as a stage of the communist revolution, though it could also be viewed as a bourgeois revolution.

French historian Albert Mathiez considered Marx's interest and devotion to write—in a forgotten and classical publication—about the crucial relationship between the French Jacobinism, Robespierre's government, and the Russian Revolution.¹⁹ In order to understand his assertions, I think it is useful to analyze the Communist Manifesto because this work presents

¹⁵ See generally KARL MARX & FRIEDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY (1848).

¹⁶ See generally THESES ON FEUERBACH (1845) and THE GERMAN IDEOLOGY (1845-1846).

¹⁷ See generally THE GERMAN IDEOLOGY (1845-1846) and LAWRENCE FRIEDMAN, LAW AND SOCIETY: AN INTRODUCTION (1977).

¹⁸ "Law, morality, religion are ... bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests." MARX & ENGELS, *supra* note 15, at 424.

¹⁹ See generally ALBERT MATHIEZ, LE BOLCHÉVISME ET LE JACOBINISME (1920).

plausible reasons to agree with the relationship between the French Revolution and Marxism.

A. What the Communist Manifesto Teaches

Marx and Friedrich Engels gave us a brief text to guide the mind of those who dared to make a social revolution, stating what a proletariat revolution was and why it would succeed.²⁰ In a preface written by Engels in 1888, he wrote the fundamental proposition of the Manifesto was that

in every historical epoch, the prevailing mode of economic production and exchange, and the social organization necessarily following from it, form the basis upon which it is built up, and from that which alone can be explained the political and intellectual history of that epoch; that consequently the whole history of mankind (since the dissolution of primitive tribal society, holding land in common ownership) has been a history of class struggles, contests between exploiting and exploited, ruling and oppressed classes; That the history of these class struggles forms a series of evolutions in which, nowadays, a stage has been reached where the exploited and oppressed class—the proletariat—cannot attain its emancipation from the sway of the exploiting and ruling class—the bourgeoisie—without, at the same time, and once and for all, emancipating society at large from all exploitation, oppression, class distinction, and class struggles.²¹

In this fragment there are two phrases I wish to explain because they clarify what the indigenous movements learned from the Marxist texts and why—at the same time—they reject Marxism as being another European

²⁰ “The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a Communistic revolution. The proletarians have nothing to lose but their chains. They have a world to win.” See MARX & ENGELS, *supra* note 15, at 434.

²¹ *Id.* at 416.

viewpoint, like the viewpoints that supported European colonialism in Latin America.

The first phrase is the Marxist assertion that “the whole history of mankind . . . has been a history of class struggles, contests between exploiting and exploited, ruling and oppressed classes.” And the second assertion is that the proletariat cannot attain its emancipation from the sway of the exploiting and ruling class without emancipating society from all forms of exploitation, oppression, class distinction, and class struggle.

The first sentence of the preface does not take full account of the diverse colonial situations. The main concern of Marx and Engels was India, as many of their works show, because the British occupation, conquest, and colonization of India were seen as an important example to help explain the modern model of colonial dominance.²² Marx and Engels thought as Europeans, conceiving that only a higher civilization could help to fulfill the conditions for a proletariat revolution. This thought restricted their perspective of study, ignoring many geographical regions outside the civilized world and thus far from their political interests. For example, Marx and Engels ignored the situation of the indigenous peoples in Latin America. Their situation was different from their European model.

Though there are sound economic foundations that Marx and Engels used to explain colonialism in general terms that are useful to explain colonialism in Latin America, they did not pay attention to what actually happened in that large region. They did not see the anthropological basis derived from Spanish and Portuguese colonialism: the conception that the indigenous peoples from Africa, slaves, and the freedmen cannot be seen as equals to the white conquerors. It is true that there were intense debates

²² See Karl Marx’s works: *THE BRITISH RULE IN INDIA, THE EAST INDIA COMPANY-ITS HISTORY AND RESULTS, THE INDIAN QUESTION- IRISH TENANT RIGHT, THE FUTURE RESULTS OF BRITISH RULE IN INDIA* (1853).

about the need for equal treatment for both Spanish and Portuguese *conquistadores* and *colonizadores*, as well as for the indigenous communities. The Spanish society on both sides of the Atlantic Ocean—institutions and individuals—did not agree as a whole with this anthropological perception.²³

In the second phrase, concerning the role given to the proletariat, it is clear that Marx and Engels were writing in the context of an expanding capitalism, where the industrial worker, the proletarian, was to have a significant political role in the future revolution. But the situation in Latin America was not comparable. Latin American countries were in a period of civil wars and of conflicts among states. They were far from the problems that accompanied the rise of industrialization in Europe. But what is more important to the focus of this article is the fact that their constitutions reflected the ideals and goals of the local elites, and were far from being live texts directed to effectively protect the rights of the citizens. This observation uses the well-known distinction between the constitution as a paper and the constitution as a living text, noticed by German socialist Ferdinand Lassalle while debating the German law and the emperor's powers in the nineteenth century.²⁴ The constitutions of that period were oligarchic-based.

Thus, Marx and Engels's European perspective is not an entirely adequate perspective to explain indigenous movements; both authors had cultural limits that prevented them from noticing what was taking place beyond the European imperial borders.²⁵ Consequently, it is understandable

²³ See generally FRANCISCO DE VITORIA, RELECCIONES SOBRE LOS INDIOS Y EL DERECHO DE GUERRA (1795).

²⁴ See FERDINAND LASSALLE, ¿QUÉ ES UNA CONSTITUCIÓN? 4-29 (1862).

²⁵ Pablo Stefanoni on commenting García Linera's works, writes that García Linera looks for an adaptation of the Marxist doctrine to the reality of Bolivia. He neither followed the Christian-Guevarista ideology nor the old and traditional left.

why they both failed to speak of the unfair and largely unrecognized situation that Latin American indigenous peoples faced.

Besides their ignorance of cultural dynamics outside of Europe, Marx and Engels also failed to take account of the debate on slavery within Jacobinism and its unexpected outcome: the independence of Haiti, where afro-descendants emancipated themselves after a violent revolution.²⁶ This event has a special significance for Latin American constitutional history, for it shows how a revolution can precede a full constitutional transformation. Total or partial constitutional reforms are not enough when fundamental rights and freedoms are denied. Consequently, if a philosophy has to be the foundation of a new constitutionalism, Marxism is the one which can best provide for a sound basis because a whole constitutional reform not only implies an entire metamorphosis of the social system it also requires the transformation of the system of values. This revolution can reconcile Marxist texts and indigenous movements' goals, in that both search for a radical change, through revolution if needed.

B. The Way to Reconcile Marxist and Jacobin Texts and Indigenous Movements' Goals

Marxism and indigenous movements—as said before— both look for a radical social change. By taking elements of the Marxist doctrine from an indigenous standpoint, the indigenous movements can sustain their political positions on a more global platform. But this does not mean that indigenous movements forget their religious beliefs. The Bolivian Constitution clearly stakes its meta-constitutional validity on the prevalence of the indigenous viewpoint, which is thought to replace the Christian religion brought by the

²⁶ See Franklin W. Knight, *The Haitian Revolution*, 105 AM. HIST. REV.1 (2008), available at http://www.unifi.it/offertaformativa/allegati/uploaded_files/2009/200007/B012057/KnightHaiti.pdf.

Spanish *conquistadores*. This is how the Bolivian constituent power chose to challenge the dominant system of knowledge born in the European and North American frontiers.

This choice might explain why the indigenous movements in Bolivia found relevant elements for the construction of their new society in the Jacobin and the Marxist doctrines without taking them as a whole comprehensive vision of the world. In this way, they reconcile different cultural traditions, and take from them what is necessary to attain a new form of emancipation, an emancipation that breaks with the pro-occidental and pro-capitalist cultural dominance in Latin America.

French historian Albert Mathiez²⁷ in his book about the relationship between Jacobinism and Marxism suggested that an intellectual and factual bridge could be built between.²⁸ First, he found both radical movements were dictatorships: born from both civil wars and wars with foreign enemies.²⁹ Second, social class was a main focus of both movements.³⁰ Third, they acted through terror and taxes to gain extensive support.³¹ And finally, they had as their main proposal the transformation of the universal society.³² As Marx and Engels stated

If the proletariat during its contest with the bourgeoisie is compelled, by the force of circumstances, to organize itself as a class, if, by means of a revolution, it makes itself the ruling class, and, as such, sweeps away by force the old conditions of production, then it will, along with these conditions, have swept away the conditions for the existence of class antagonisms and of

²⁷ ALBERT MATHIEZ was one of the main French historians to vindicate French revolutionary MAXIMILIEN ROBESPIERRE.

²⁸ See ALBERT MATHIEZ, *LE BOLCHÉVISME ET LE JACOBINISME* 3 (1920).

²⁹ *Id.*

³⁰ See ALBERT MATHIEZ, *LE BOLCHÉVISME ET LE JACOBINISME* 3-4 (1920).

³¹ See *id.* at 6 (1920) citing LOUIS- ANTOINE DE SAINT-JUST (“Ce qui constitue une République, c’est la destruction totale de tout ce qui lui est opposé.”).

³² See MATHIEZ, *supra* note 30, at 7 (1920) (“la fin c’est... la bonheur des masses”).

classes generally, and will thereby have abolished its own supremacy as a class.³³

This sentence illustrates that many Marxist elements are found in the indigenous movements in Bolivia: (1) the war against internal and external dominance: the Bolivian Preamble affirms that the current Constitution is the outcome of long and historical struggles against colonialism and neoliberalism; (2) ethnicity as a consciousness of group: the Bolivian Constitution clearly protects the indigenous tradition and the identity of the many communities living in Bolivia, using ethnicity as the new concept to construct multi-national societies;³⁴ (3) the proposal to transform society by transforming the state and the law: the Bolivian Constitution asserts that it has been founded as a *plurinacional* and communitarian state,³⁵ and (4) these goals can be achieved through an entire *democratization* of the social structures in the aftermath of the revolution.³⁶ Nonetheless the indigenous goals go far beyond the limits of the Marxist theories; they seek to truly re-found Bolivia on the unique terms defined by the Bolivian Constitution.

IV. THE ROAD TO THE INDIGENOUS BASED NEW LATIN AMERICAN CONSTITUTIONALISM

I think the ideologies and historical facts mentioned before help to explain the arguments that the social revolutions such as the indigenous movements in Latin America try to make. These movements aim to discuss the bases of the contemporary way of living taking capitalism as the factory of the social inequalities and as their principal enemy. So they look to

³³ See MARX & ENGELS, *supra* note 15, at 429.

³⁴ Art. 3 establish that Bolivia comprehends Indian nations, intercultural communities and afro-descendant peoples.

³⁵ Preamble of the Constitution and Art. 1.

³⁶ Art. 182 establish that judges –including those of the Supreme Tribunal- will be elected by universal suffrage.

constitutional reform to transform the cultural system³⁷ and consequently the legal system.³⁸

There is evidence that these movements rely on the Latin American philosophy—or maybe the theology—of liberation, whose main argument is the quest for emancipation from the internal state of dominance.³⁹ This new version of the Marxist theories was transplanted to Latin America by political thinkers like Peruvian Marxist politician and agitator José Carlos Mariátegui, the key author of what has been called the indigenous Marxism.⁴⁰

This context explains why the indigenous movements, a new collective social actor, form a significant element of the original constituent power in Bolivia. The end of the internal state of dominance can only be achieved through the action—if needed violent action—of collective actors like the indigenous movements.

A. The General Context of the Bolivian Constitution-Building Process

I think there is enough empirical evidence to demonstrate the constant social conflicts in the last century profoundly affected Latin American societies. During the military dictatorships in the 1960s and the 1970s,

³⁷ The new context born with the constitutional reforms in Bolivia and Ecuador opened the gates to a multi-cultural and multi-ethnic education, and at the same time to a special relationship with nature, bringing to the present the ancient indigenous beliefs of the Andean region. See Constitución del Ecuador art. 10, available at http://www.asamblea.nacional.gov.ec/documentos/constitucion_de_bolsillo.pdf

³⁸ Pablo Stefanoni notes a plebeian nationalism is born in Bolivia. See *El Nacionalismo Indígena en el Poder*, 19 OSAL, REVISTA DEL OBSERVATORIO SOCIAL DE AMÉRICA LATINA 37, 38 (Enero-Abril, 2006), available at <http://biblioteca.clacso.edu.ar/subida/clacso/osal/20110327104527/5stefanoni.pdf.ori>

³⁹ See ENRIQUE DUSSEL, *TEOLOGÍA DE LA LIBERACIÓN: UN PANORAMA DE SU DESARROLLO* (1995); *INTRODUCCIÓN A LA FILOSOFÍA DE LA LIBERACIÓN, CON ENSAYO PRELIMINAR Y BIBLIOGRAFÍA POR GERMÁN MARQUINEZ ARGOTE* (1979).

⁴⁰ José Carlos Mariátegui's principal work is *SEVEN ESSAYS OF INTERPRETATION OF PERUVIAN REALITY* (1928).

political elites thought it was necessary to suspend the constitution's validity in order to fight the expansion of communism.⁴¹ In the 1980s these elites believed it was essential to return to the constitutional system, causing a wave of democratization to appear. Military dictatorships were replaced by neoliberal regimes, which understood the benefits of living under a constitutional order; however, the threshold of equality rested as one of the main issues of the political discourse of the indigenous movements.⁴²

In the juridical context, legal norms concerning important economic issues regarding the development of capitalism were the result of lawyers and economists works who sometimes received their degrees from universities in other states—mainly the United States or Europe—which led to sound legal protection for global markets and foreign investments. Thus, a complex structure of international organizations and experts determined the conditions of human life in Latin America.

To Latin American authors and politicians the activities mentioned before helped to sustain the internal and external structures of dominance, and the expansion of the cultural imperialism.⁴³ In fact, for many social movements such as the indigenous ones, local political elites have drawn constitutions according to capitalism's needs.⁴⁴

⁴¹ See generally ERIC HOBSBAWM, *THE AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914-1991* (1994).

⁴² For many authors the purpose of the political activity of the social movements, especially the indigenous movements, is to demonstrate that they are not *passive individuals* and that their revolt means a new emancipation from the actual conditions imposed by US imperialism. See, e.g., PUEBLOS INDÍGENAS, ESTADO Y DEMOCRACIA (Pablo Davalos ed., 2005); Aníbal Quijano, *Estado-nación y Movimientos Indígenas en la Región Andina: Cuestiones Abiertas*, 19 OSAL, OBSERVATORIO SOCIAL DE AMÉRICA LATINA 15, available at http://biblioteca.clacso.edu.ar/clacso/osal/20110327050057/02_QUIJAN.pdf.

⁴³ See Armand Mattelart, *Notas al Margen del Imperialismo Cultural*, 6 COMUNICACIÓN Y CULTURA EN AMÉRICA LATINA 6, 7 (1978).

⁴⁴ See César A. Rodríguez Garavito, *Globalización, Reforma Judicial y Estado de Derecho en Colombia y América Latina: el Regreso de los Programas de Derecho y*

Finally, this constitution-building setting has only been achieved with frequent *coups d'état* and military dictatorships. Gross violations of human rights were made in order to defend societies from the artificial evils of democracy, as well as from the menace of communism.⁴⁵

B. The Particular Context of the Bolivian Constitution-Building Process

Bolivia's history is not very different from Latin America's. It had been ruled by oligarchic regimes and by military dictatorships. So when indigenous movements began to fight for their rights and their lands, their struggle challenged the inherited political and legal culture whose sources were mainly European: the Napoleon Code; Spanish legal thought and institutions; Roman law; and, in the last decades of the twentieth century, American legal thought, along with the proposed legal reforms developed by the World Bank in Latin America.⁴⁶

Thus, it is not strange to observe the reappearance of Jacobinism and of Robespierre in the current Bolivian constitutional process. According to García Linera, the role the Jacobins had is now filled by the indigenous

Desarrollo in ¿JUSTICIA PARA TODOS? SISTEMA JUDICIAL, DERECHOS SOCIALES Y DEMOCRACIA EN COLUMBIA (2005).

⁴⁵ See generally DUSSEL, *supra* note 39; INTRODUCCIÓN A LA FILOSOFÍA DE LA LIBERACIÓN, CON ENSAYO PRELIMINAR Y BIBLIOGRAFÍA POR GERMÁN MARQUEZ ARGOTE (1979).

⁴⁶ See PETER DESHAZO & JUAN ENRIQUE VARGAS, JUDICIAL REFORM IN LATIN AMERICA: AN ASSESSMENT (2006). Victoria Harris writes,

The necessity of legal and judicial reform to facilitate market-led development has been widely promoted by the World Bank since the early 1990s. Despite its articles of agreement prohibiting it from becoming involved in the political affairs of states, the Bank's foray into governance reforms - to which legal and judicial reforms have been central - tells a different story ... Bank-led reforms are market-focused, including training for lawyers and judges and the formulation of contract and property rights laws. Legal reforms have been executed by circumventing democratic processes undermining accountability, setting a worrying precedent.

Consolidating Ideology In Law? Legal and Judicial Reform Programs at the World Bank, (July 2007) 1, available at <http://www.brettonwoodsproject.org/2007/07/art-554671/>.

social movements. Following the World Social Forums, sociologist Boaventura de Sousa Santos opined that indigenous movement can be seen politically as counter-hegemonic struggles.⁴⁷ Like Jacobinism, modern indigenous struggles look for the end of the today *Ancien Régime* and the advent of a new alternative way of living: the *sumak kawsay* and the *suma qamaña*—the conceptions of life of the Andean indigenous communities.⁴⁸

The emergence of this new Jacobinism brought about the development of similar movements. For example, about the *Zapatismo* in Chiapas, Mexico; in Ecuador it was born the Confederation of Indigenous Nationalities of Ecuador (CONAIE), and in Chile the *Mapuches* movement emerged.⁴⁹

These movements reveal the struggle of the indigenous peoples for holistic constitutional reforms as well as new concepts of citizenship. These facts suggest that the classical notion of the state has transformed. If these circumstances imply a return to the premises of the French revolutionary democracy, then the common view of the legal academy on what happens outside the American and European legal perspective must be abandoned. So in order to replace the colonial perspective that subordinated the indigenous communities, an epistemological move, a change that has been called the epistemic insurgence, must be made. This viewpoint has two main topics. The first topic is the opposition to the European and the capitalist perspectives that helped to support the colonial state. To fight these concepts, the indigenous movements propose an alternative philosophy. By doing this they find the pillars of the meta-constitutional principles that support the new constitution. The second topic is the return

⁴⁷ See Boaventura de Sousa Santos, *El Foro Social Mundial y la Izquierda Global*, 240 EL VIEJO TOPO (2008), at 47.

⁴⁸ See José María Tortosa, *Sumak Kawsay, Suma Qamaña, Buen Vivir*, (2009), available at <http://www.fundacioncarolina.es/es-ES/nombresproprios/Documents/NPTortosa0908.pdf>.

⁴⁹ See generally Santos, *supra* note 47, at 41.

to indigenous ancestors' religious beliefs, the *sumak kawsay* and the *suma qamaña*, which are the comprehensive perspectives that see the forgotten harmony between nature and human beings.

V. THE EMERGENCE OF THE CONSTITUTION OF BOLIVIA

Following the works of García Linera, one might say that there is not a democratic-based constitution unless a political discourse of resistance is previously completed and accepted by the indigenous population.⁵⁰ So the first issue that must be dealt with to explain the actual Bolivian Constitution is the exercise of the original constituent power.

A. *The Way to the New Constitution*

The constitution-building process may have begun with two successive uprisings—first with the so-called *Guerra del Agua* and second with the *Guerra del Gas*. Thomas Kruse theorizes that the first conflict arose as a result of a contract dispute between the transnational corporation Aguas del Tunari and the Department of Cochabamba. The dispute concerned the use of potable water and the improvement of sewage by a private contractor. The law favored the *dolarización*⁵¹ which meant an increase in water tariffs. The new tariffs could not be paid by the less-favored portions of the population. Violence rose and President Hugo Banzer had to revise the contract, expressing his concern for the problems with the contract—mainly the high tariffs and the right to the free use of rainwater. The activism of social movements was a crucial factor to change the contract. This activism showed an evident absence of the traditional political parties and syndicates in this process.⁵² A similar situation developed in 2000, with the *Guerra del*

⁵⁰ See GARCÍA LINERA, *supra* note 1, at 193–209.

⁵¹ *Dolarización* signifies that the American unit is the measure used to set the tariffs.

⁵² Thomas Kruse, *La "Guerra del Agua" en Cochabamba, Bolivia: Terrenos Complejos, Convergencias Nuevas* in SINDICATOS Y NUEVOS MOVIMIENTOS SOCIALES EN AMÉRICA

Gas. The indigenous movements associated both events with the adoption by the Bolivian government of neoliberalism and economic globalization.⁵³

We might consider these two events as preparation for the victory of the first indigenous Bolivian president—Evo Morales—and also as the beginning of an overwhelming presence of the indigenous movements in the decision-making process for a new constitution.⁵⁴ These events represented the acceptance of a horizontal and all-inclusive participation by the whole citizenship based principally on recognition of indigenous ethnic groups that would soon be codified in the new constitution. García Linera refers to this phenomenon as the construction of a new collective and popular identity.

This new Jacobinism involves the decolonization of political power and of culture. Pablo Dávalos suggests that decolonization means that both elements of the society must be set free from the dominance of US and European imperialism.⁵⁵ The distrust of the professional politicians and of the syndicates helped to establish new forms of political participation, a decentralized one founded on *ayllus*.⁵⁶

B. What the Bolivian Constitution has established

The Bolivian Constitution begins to define Bolivia as a state with the following characteristics: *unitarian*, *social*, *plurinational*, *communitarian*,

LATINA, ENRIQUE DE LA GARZA TOLEDO, COMP. (2005), at 158, available at <http://docencia.izt.uam.mx/egt/publicaciones/libros/nvosactores/capituloiv.pdf>.

⁵³ Raúl Prada Alcoreza, *Perfiles del Movimiento Social Contemporáneo. El Conflicto Social y Político en Bolivia. Las Jornadas de Septiembre-Octubre de 2003*, 12 OSAL, REVISTA DEL OBSERVATORIO SOCIAL DE AMÉRICA LATINA 35, 37 (Septiembre- Noviembre, 2003), available at <http://biblioteca.clacso.edu.ar/gsd/collect/clacso/index/assoc/D3632.dir/4d1prada.pdf>.

⁵⁴ The Bolivian Constitution now forbids this type of contract. See CONSTITUCIÓN POLÍTICA DEL ESTADO, art. 20 (Bolivia).

⁵⁵ See Pablo Dávalos, *Movimiento indígena ecuatoriano: Construcción política y epistémica*, in ESTUDIOS LATINOAMERICANOS SOBRE CULTURA Y TRANSFORMACIONES SOCIALES EN TIEMPOS DE GLOBALIZACIÓN (Daniel Mato ed., 2001), at 337.

⁵⁶ *Ayllus* means the resurgence of the *ayllu*, the old clan, a religious and economic entity.

intercultural, decentralized, and democratic. It has political and administrative autonomies. It is founded on political, economic, legal, cultural, and linguistic pluralism. There is a special guarantee of the free self-determination of the nations and original peoples, including the right to autonomy, self-government, and own culture, as well as the recognition of their institutions and the recognition of their own territorial entities. The Bolivian Constitution built a direct, participative, representative, and communitarian form of democracy with whole equality of men and women.⁵⁷ The Constitution takes a giant step toward a full non-patriarchal conception of democracy. It means the new Constitution emancipates women from the male-*macho* dominance. It is a way to subvert also the ancient indigenous cultures.

This legal context demanded a different understanding: the *suma qamaña*, an old Andean conception of life that includes communion with cosmos and nature. Its presence encourages other forms of knowledge: another kind of epistemology to challenge the European culture compulsorily transplanted with the European conquest of Latin America. The Bolivian Constitution prefers to speak of the sacred Mother Earth—Pacha Mama—which has different faces and allows a comprehension of everything as being part of a living and nurturing nature.⁵⁸

The modern Bolivian Constitution—like the French Constitution of 1795—includes a legally-protected code of ethics whose main moral rules are: *ama qhilla*, *ama llulla*, *ama suwa* (do not be weak, do not be a liar, do not be a thief); *suma qamaña* (live well); *ñandereko* (live a harmonic life); *teko kavi* (live a good life); *ivi maraei* (maintain land without evil); and

⁵⁷ CONSTITUCIÓN POLÍTICA DEL ESTADO, art. 8 § 2 (Bolivia). See also *id.* at art. 3.

⁵⁸ *Id.* at Preamble.

qhapaj ñan (lead a noble path or life).⁵⁹ These provisions replace the Christian ethics brought to the country by Spanish dominance.⁶⁰

In the words of García Linera, we face a plebeian and nationalist indigenous movement.⁶¹

VI. PRAXIS AND THEORY OF A POST-COLONIAL CONSTITUTIONALISM

The post-colonial legal discourse has four principal components: time, memory, history, and consciousness. Post-coloniality is a perspective born to express the end of the internal and external dominance derived from the capitalist hegemony.

Firstly, ancient pre-Columbian religions reappear and bring back the old traditions of the *amautas*—the wise men of the communities.

To understand what it means to actual indigenous communities, we might divide Latin American history into four periods: (1) the pre-Columbian period; (2) the Spanish and Portuguese conquest; (3) the independence and the start of the new Latin American states with the construction of the oligarchic regimes; and (4) the final emancipation that ends with internal colonialism and the oligarchic-based constitutions. These historical periods are enunciated in the Preamble of the Bolivian Constitution to show how the struggle of the indigenous peoples led to a new state, for example, through the war of indigenous leader Tupac Katari in 1780.

Secondly, the collective memory of the people is a relevant element to creation of the new state. The process of recreating the state that began with independence from the Spanish crown did not conclude until the new constitution was completed in 2008 as an outcome of the seemingly never-

⁵⁹ *Id.* at art. 8.

⁶⁰ *Id.* at art. 4.

⁶¹ See GARCÍA LINERA, *supra* note 1, at 331–412.

ending indigenous movements. Memory brings with it the old ways of living, the *suma qamaña*.

Thirdly, the constitutional debate implies a redefinition of history as a history born with the *epistemic insurgence* that redefines the way to perceive the world, with nature as the main concern. It also means the rebirth of a new ethnic consciousness.

And finally, the meta-constitutional principles underlying the constitutional texts are part of a new consciousness founded on the *amautas*' teachings. This tends to break with the old social order and give birth to a new society free from every form of dictatorship, colonialism, neocolonialism, and imperialism. These principles promote the defense of human, economic, social, cultural, and environmental rights, and also reject all forms of racism and discrimination, as the constitutional clauses state.⁶²

I cannot guess what will be the future of this constitutional reform and re-foundation of the state. Post-coloniality is a word that includes many meanings. The Bolivian Constitution, as a pro-democratic legal text, is a serious challenge to traditional legal thought and institutions, as Jacobinism and Marxism once challenged the then-prevailing legal norms, and has the same problem as the Jacobin and Marxist movements: the urgency of dealing with day-to-day problems.

⁶² CONSTITUCIÓN POLÍTICA DEL ESTADO (Bolivia), arts. 4, 8–10.