ISSN:2588-0837

RFJ

REVISTA FACULTAD DE JURISPRUDENCIA
PONTIFICIA UNIVERSIDAD CATOLICA DEL ECUADOR

NO. 14 DECEMBER 2023

SOCIAL MOVEMENTS AND LAW

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RFJ REVISTA FACULTAD DE JURISPRUDENCIA

RFJ

Revista Facultad de Jurisprudencia
Pontificia Universidad Catolica del Ecuador

Number 14
December 2023
Social Movements and Law
Pontificia Universidad Catolica del Ecuador

ISSN: 2588-0837
DOI: 10.26807/rfj.vi14

Pontificia Universidad Catolica del Ecuador
www.puce.edu.ec

QUITO, ECUADOR
2023

Publications Center of the Pontificia Universidad Catolica
del Ecuador Quito, Ecuador

www.edipuce.edu.ec

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Coordinating Unit: Research Area of the Free Legal Clinic of the Faculty of Jurisprudence of the Pontificia Universidad Catolica del Ecuador

Design and layout

Lic. Rachel Romero Medina

Style correction

Gabriel Ortiz Armas

PRESENTATION

Revista Facultad de Jurisprudencia (RFJ) is a scientific publication that is issued biannually, supported by the Publications Center and under the auspices of the Research Directorate of the University. Its main focus is the analysis of the legal phenomenon from various disciplines, with a commitment to academic excellence.

Each issue of the RFJ is structured with a monographic section called "Dossier", which addresses specific topics of legal relevance, and an open section that welcomes varied contributions in the legal field. This format allows addressing both specialized issues and those of general interest in the legal field.

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The editorial proposal of the RFJ is aligned with the mission of the Pontificia Universidad Catolica del Ecuador (PUCE). It seeks not only to promote the advancement and understanding of the Rule of Law, but also to contribute in a rigorous and critical manner to the protection of human dignity and the preservation of cultural heritage. Through the publication of quality scientific articles, the RFJ is committed to being an active agent in the promotion and strengthening of these values not only at the local level, but also at the national and international level. In this sense, the journal stands as a key instrument for the dissemination of legal knowledge and the promotion of critical reflection on fundamental issues for society and human development.

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The RFJ carries out a rigorous review and selection process of the articles received, the duration of which varies between six and twenty-four months. The Editorial Management team carries out an initial evaluation, considering the scientific quality, the relevance to the themes of the journal and the timeliness of the results. The Editorial Committee, composed of the Editorial Board and the Management Team, provides support to the journal's processes.

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The text must be typed with space and a half, in Garamond font size 12, with footers in Garamond font and size 10. The document must have a length of between 7,000 and 15,000 words and be preceded by a brief summary of the work. in Spanish and English that does not exceed 250 words. Both summaries must indicate the objective, methodology, results and conclusions. In addition, five or six key words should be included to identify the main topics addressed in Spanish and English.

Graphics, maps and pictures must be sent in a minimum resolution of 266 dpi in jpg or gif format. Annexes to the document should be attached to the tables, indicating the place where they will be placed within the text. All these resources must be numbered consecutively in Arabic numerals and clearly indicate the corresponding source(s). In tables, only horizontal lines should be used in accordance with APA seventh edition standards.

a. **For original articles (Dossier and open section):** Articles related to the major thematic areas (within legal science) that the RFJ journal generally addresses. That is, original documents that deal with investigations of various types where the law has significant significance will be accepted. The articles submitted for this section will not be less than 4000 words or twelve pages (the count must include all the words that appear in the text proposed by the authors: their names, titles, summary, others). They must be relevant, original and not subject to evaluation processes by any other publication. In order to ensure the high quality of the published content, they will be sent by the RFJ for evaluation anonymously (double blind). They must contain an introduction, development section (with subtitles) and conclusions

b. **For original translations:** Translations related to the main thematic areas covered by the RFJ. In this section, papers that

address relevant research that were originally written in another language will be accepted. Translations submitted for this section must not be less than 4000 words or twelve pages (the count must include all the words present in the text proposed by the authors, including their names, titles, abstract, among others). They must be relevant, original and not subject to review processes by any other publication. In order to guarantee the high quality of the published content, the RFJ will send the documents for evaluation anonymously (blind peer review). Translations must have the authorization of the original author and their publishing house if applicable. The RFJ team will be able to assist the author in the process of obtaining authorization to publish the translation.

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The footnotes must be numbered in consecutive order and are used in an extraordinary manner and only for clarifications, comments, discussions, submissions by the author and must go on their corresponding page, in order to make it easier for the reader to follow up. reading the text.

SECTION II

Original translation

RFJ REVISTA FACULTAD DE JURISPRUDENCIA

CAMBIAR EL VIENTO

NOTAS HACIA UNA DEMOSPRUDENCIA DEL DERECHO Y LOS MOVIMIENTOS SOCIALES

En memoria de la profesora Lani Gunier (1950-2022)

PRESENTACIÓN DE LA EDICIÓN EN ESPAÑOL

La perspectiva crítica de una persona surge cuando sus necesidades materiales se experimentan desde la irracionalidad de las relaciones sociales y económicas existentes, en lugar de experiencias individuales de desventaja aislada. Al reunir a las personas para desafiar las fuerzas que definen su posición social, los movimientos sociales generan la inteligencia crítica que permite a sus participantes ver el orden social y la estructura institucional que lo define como espacios creados en lugar de una jerarquía inevitable o natural. Si puede ser creado, puede ser cambiado, y se puede imaginar un orden diferente.

Una de las funciones cruciales de los movimientos sociales es crear un espacio donde pueda tener lugar el compromiso crítico y donde la irracionalidad de las relaciones sociales y económicas existentes pueda desafiarse a través de la política. El sistema legal es una expresión del equilibrio actual de poder, pero debido a que tiene una forma legal, también está sujeto a la política.

Como mi coautora y querido amiga intentó demostrar, este trabajo examina el papel de los movimientos sociales en la transformación de las normas legales o, dicho de manera más audaz, en la creación del derecho. Los movimientos pueden lograr ese resultado de varias maneras. Pueden producir cambios a través de la política normal o incluso la política constitucional. Pueden hacerlo a través de las instituciones habituales de gobierno o mediante la transformación gradual del significado de los principios fundamentales del sistema jurídico al cambiar cómo se interpretan. Argumentos legales que alguna vez se consideraron marginales pueden volverse centrales. Incluso la comprensión de nuestra relación constitucional entre los miembros de la sociedad puede volverse inestable hasta que se logre un nuevo equilibrio de poder.

Los movimientos sociales pueden generar una atracción gravitatoria con la ley al ser reguladora de las relaciones socioeconómicas y políticas. Afectan los fundamentos normativos en los que se basa la ley y también pueden transformar la ley misma. Al desafiar los fundamentos sobre los cuales se distribuye el poder y cuestionar la neutralidad de las instituciones a través de las cuales se realiza la distribución, los movimientos sociales pueden

plantear preguntas legales generalmente consideradas como resueltas. Lo que diferencia a los movimientos sociales de simples grupos de interés es esta función.

El ensayo que sigue describe lo que consideramos una función central de una sociedad democrática: la capacidad del pueblo para decidir por sí mismo qué normas deben regir sus relaciones sociales y económicas. El ensayo también identifica el estudio de una rama de la creación del Derecho previamente ignorada. Al avanzar la idea de la demosprudencia, sugerimos que estudiar el impacto de los movimientos sociales en el Derecho nos permite entender la democracia y el Derecho en sí mismo de una nueva manera.

Permíteme cerrar diciendo unas palabras sobre mi coautora. Haber tenido una compañera intelectual como Lani Guinier es un regalo inconmensurable. Discutimos sobre el concepto e incluso sobre la etiqueta "demosprudencia", pero siempre llegábamos a un acuerdo final. Lani fue una defensora valiente y una académica audaz. Tenía la visión de tomar la comprensión del Derecho de las personas sujetas a él y preguntarse cuando esas visiones debieron ser las que prevalezcan. Lani interrogó a los teóricos y cuestionó sus argumentos, recopilando así las partes que soportaban su análisis para ponerlas al servicio de entender la naturaleza y la función de la democracia. Fue una profesora brillante, y juntos, enseñamos a cientos de estudiantes que nos obligaron a pulir nuestras opiniones. El ensayo a continuación es, en muchos sentidos, el prefacio de un libro sobre el papel de los movimientos sociales en la creación de cambios legales sostenidos en el tiempo. Espero terminar ese libro como nuestro proyecto conjunto final. No pasa un solo día sin que extrañe a Lani.

Gerald Torres
Connecticut, 2023

RFJ REVISTA FACULTAD DE JURISPRUDENCIA

CAMBIAR EL VIENTO. NOTAS HACIA UNA DEMOSPRUDENCIA DEL DERECHO Y LOS MOVIMIENTOS SOCIALES[1]

Lani Guinier[2] *& Gerald Torres*[3]

Translation: *David Cordero-Heredia*[4] *Pontificia Universidad Catolica del Ecuador*

ABSTRACT (Tomado del artículo original en inglés)

This essay was influenced by a class on Law and Social Movements that Professors Guinier and Torres taught at the Yale Law School in 2011. This essay was also informed by numerous conversations with Bruce Ackerman regarding his book that is under review in this Symposium[5]. While we are in fundamental agreement with Professor Ackerman's project, as well as the claims he makes as to the new constitutional canon, we supplement his analysis with the overlooked impact of the lawmaking potential of social movements. In particular, we focus on those social movements that were critical to the legal changes that formed the core of Professor Ackerman's book. The strong claim that we are making is that the social movements of the civil rights era were actually sources of law. The weaker claim is that these social movements deeply influenced the formal legal changes represented by the statutes and Supreme Court decisions that framed the constitutional moment so convincingly illustrated by Professor Ackerman. In order to make the stronger claim, we demonstrate how social movements made some legal conclusions not just more likely, but for all intents and purposes, inevitable. The way the Court interpreted existing racial justice jurisprudence and was responsive to the constitutional understanding represented by non-elite actors in the civil rights and social justice movements that had their high water mark in the 1950s and '60s.

1 Este artículo fue publicado en inglés con el título "Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements" en el número 123 de The Yale Law Journal de junio de 2014 (123 Yale L.J. 2740 2013-2014). En general se respeta el estilo de citación del texto original basada en The Bluebook. Las fuentes legales más importantes y los libros citados que no cuentan con traducción en español fueron citados manteniendo su nombre original.

2 Lani Guinier (1950-2022) enseñó en la University of Pennsylvania Law School desde 1988 donde permaneció cerca de una década. En 1998 se unió a la Harvard Law School convirtiéndose en la primera mujer afroamericana en convertirse en profesora de carrera (tenured) en dicha institución en donde llegó a ser profesora titular y acreedora de la posición *Bennett Boskey Professor of Law.*

3 Gerald Torres es profesor titular de Justicia Ambiental en la Yale School of the Environment y profesor titular de derecho en la Yale Law School. Antes de unirse a Yale fue profesor en Cornell Law School en donde fue acreedor a la posición Marc and Beth Goldberg Distinguished Visiting Professor, en la University of Texas Law School donde fue acreedor a la posición Bryant Smith Chair y en la University of Minnesota Law School.

4 Profesor de Derecho de la Pontificia Universidad Católica del Ecuador, visiting fellow del Latin American and Caribbean Studies Program de Cornell University. La traducción de este texto se realizó gracias a varias conversaciones con el Profesor Gerald Torres. Ana Cecilia Navas Sánchez y Ramiro Ávila Santamaría revisaron la traducción original y ayudaron a mejorarla significativamente. Este trabajo está dedicado a la vida y obra de la Profesora Lani Guinier cuyas clases y textos inspiraron a varias generaciones en la búsqueda de la justicia social.

5 NT: The volume 123, number 8 of The Yale Law Journal was a symposium on *The Meaning of the Civil Rights Revolution*. "A symposium of essays on the origins and status of the civil rights project fifty years after the Civil Rights Act of 1964, using Bruce Ackerman's We the People: The Civil Rights Revolution (2014) as a focal point and a foil". All the essays of the symposium are available in: https://www.yalelawjournal.org/collection/the-meaning-of-the-civil-rights-revolution

RESUMEN

Este ensayo fue influenciado por una clase sobre Derecho y Movimientos Sociales impartida por los profesores Guinier y Torres en la Facultad de Derecho de Yale en 2011. Además, este ensayo se vio enriquecido por numerosas conversaciones con Bruce Ackerman sobre su libro que está siendo revisado en este Simposio[6]. Aunque estamos fundamentalmente de acuerdo con el proyecto del Profesor Ackerman, así como con las afirmaciones que hace sobre el nuevo canon constitucional, complementamos su análisis con el impacto, a menudo pasado por alto, que los movimientos sociales pueden tener en la creación del derecho. En particular, nos centramos en aquellos movimientos sociales que fueron fundamentales para los cambios legales que constituyeron el núcleo del libro del Profesor Ackerman. La afirmación principal que sostenemos es que los movimientos sociales de la era de los derechos civiles fueron fuentes de derecho. La afirmación secundaria es que estos movimientos sociales influenciaron profundamente los cambios legales formales representados por las leyes y decisiones de la Corte Suprema que enmarcaron el momento constitucional tan convincentemente ilustrado por el Profesor Ackerman. Para respaldar la afirmación principal, demostramos cómo los movimientos sociales hicieron que algunas interpretaciones del derecho no solo fueran persuasivas, sino, en todos los aspectos, inevitables. La forma en que la Corte Suprema de los Estados Unidos interpretó la jurisprudencia existente sobre justicia racial y la recepción que tuvo de comprender la constitución desde la visión de actores que no pertenecían a las élites dejó una marca distintiva en el trabajo de la Corte en las década de 1950 y 1960.

PALABRAS CLAVE: Derecho y movimientos sociales, movimiento de los derechos civiles, justicia social, movimientos sociales, acción colectiva, demosprudencia.

KEYWORDS: Law and social movements, civil rights movement, social justice, collective action, demosprudence.

RECEIVED: 28/06/2023
ACCEPTED: 15/12/2023
DOI: 10.26807/rfj.vi14.494

6 NT: El volume 123, número 8 de *The Yale Law Journal* fue dedicado a un simposio sobre *El significado de la Revolución de los Derechos Civiles.* "Un simposio de ensayos sobre el origen y esl estatus del proyecto de los derechos civiles cincuenta años después de la promulgación del Acta de Derechos Civiles, se utilizó el libro de Bruce Ackerman *We the People: The Civil Rights Revolution (2014)* como punto focal y de articulación". Todos los ensayos de este simposio se encuentran disponibles en: https://www.yalelawjournal.org/collection/the-meaning-of-the-civil-rights-revolution

INTRODUCCIÓN

> *Siempre he dicho que hay una forma sencilla de reconocer a un congresista. Son unas personas que van por ahí con su mano levantada y su dedo índice extendido, caminando, como buscando algo. Mientras caminan se meten el dedo índice en la boca y lo vuelven a levantar, lo hacen una y otra vez. Tratan de descubrir en qué dirección sopla el viento.*
>
> *No puedes cambiar a una nación remplazando a un político con el dedo ensalivado por otro. Pero sí puedes cambiar una nación cambiando el viento. Cuando la dirección del viento cambia es sorprendente lo rápido que los políticos lo hacen. Mira lo que pasó en Selma, Alabama, y como solo cinco meses después se aprobó la Ley del Derecho al Voto[7]. El presidente Jhonson le había dicho a Martin Luhter King que la aprobación de esa ley tomaría cinco años. King dijo que no podía esperar y organizó las manifestaciones de Selma.*
>
> *Nosotros debemos ser cambiadores del viento. No lobistas, sino cambiadores del viento. ¿Cómo debemos unirnos para tejer juntos – a través de nuestro trabajo, a través de nuestras vidas - un movimiento que obligue a los políticos a responder por sus acciones?*
>
> Reverendo Jim Wallis[8]

En su nuevo libro fundamental, *We the People: The Civil Rights Revolution*, Bruce Ackerman sostiene que en Estados Unidos se aprobaron varias leyes de nivel constitucional. Estas leyes aprobadas en la segunda mitad del siglo veinte, serían en la práctica enmiendas constitucionales modernas y que son "expresiones privilegiadas de la soberanía popular"[9]. Al igual que el Profesor Ackerman, creemos que la revolución de los derechos civiles fue "uno de los ejercicios más exitosos en la política constitucional en la historia de los Estados Unidos de América"[10]. Sin embargo, en la narrativa jurídica, se les otorga un rol protagónico a los abogados y las cortes que participaron en estos cambios. Incluso los abogados activistas, cuyas metas coinciden con los más altos valores de su profesión y de nuestro sistema democrático, tienden

7 NT: en inglés *Voting Rights Act*

8 Krista Tippett, Transcript for Jim Wallis—The New Evangelical Leaders, Part I, On Being (Nov. 29, 2007), https://onbeing.org/programs/jim-wallis-the-new-evangelical-leaders-part-i/

9 NT: En inglés "We the People", o Nosotros el Pueblo, es la frase con la que inicia la Constitución de los Estados Unidos de América. La frase es utilizada en la academia legal norteamericana como referencia al principio de la soberanía popular.

10 3 Bruce Ackerman, We The People: The Civil Rights Revolution 9 (2014).

a pensar principalmente, o a veces solamente, en que sus herramientas profesionales prácticas cuando se trata de influir en la reforma normativa. Esos abogados se concentran en la idea de que crear cambios sociales y económicos se consigue expandiendo o reinterpretando los cánones jurídicos, muchas veces defendiendo y reinterpretando la jurisprudencia existente. El objetivo del ejercicio del Profesor Ackerman es "que la gente con formación jurídica use un pequeño número de textos para generar un entendimiento más profundo y amplio sobre la forma en que ocurren la negociación que implica el ejercicio del poder."[11]

El Profesor Ackerman nos insta a estudiar a la política y a los cambios profundos forjados por los actos legislativos, administrativos y judiciales; y, a entender esas leyes, decretos ejecutivos y decisiones como parte de la historia constitucional real de la época moderna. Una fijación obsesiva en las decisiones judiciales provoca que el observador pierda de vista otros escenarios en donde ocurren los cambios jurídicos reales. Sin embargo, personas como el Profesor Ackerman, con un rol enorme en la identificación de los cánones legales, frecuentemente pasan por alto la importante contribución que en la materia tiene el activismo de los movimientos sociales. La "Segunda Reconstrucción"[12] puede tener a la decisión de la Corte Suprema de los Estados Unidos en el caso de Brown vs. Board of Education[13] como su principal referencia, pero fueron las acciones concertadas de gente movilizada las que le dieron a los cambios legales que siguieron a *Brown* el peso y valor constitucional que ostento en su momento y en la actualidad. Las iniciativas legislativas y administrativas, que habrían sido consideradas normalmente como infra constitucionales, adquirieron peso constitucional a través de la acción concertada de la Corte Suprema de los Estados Unidos y de los ciudadanos movilizados que demandaron esos cambios.

Nuestro ensayo concuerda en gran parte con el libro del Profesor Ackerman: es el pueblo en combinación con la élite legal quienes modifican lo que entendemos como jurídicamente vinculante dentro de nuestra Constitución. Nosotros sostenemos que los movimientos sociales fueron

11 *Id.* página 8.

12 NT: El término reconstrucción es utilizado en la historia de los Estados Unidos para referirse al período posterior a la guerra civil de secesión y se refiere a los cambios legales, sociales e institucionales que ocurrieron a raíz del fin del nacionalismo confederado y de la esclavitud. La segunda reconstrucción se refiere al período de auge del movimiento de los derechos civiles que buscaron eliminar los regímenes racistas de segregación, en este contexto el caso *Brown v. Board of Education* (1954) de la Corte Suprema es un hito para el movimiento por haber declarado inconstitucional la segregación en las escuelas.

13 347 U.S. 483 (1954).

fundamentales para que los cambios que registra el Profesor Ackerman ocurran, pero además fueron los que sostuvieron los cambios culturales que hicieron posible que esos cambios legales se sostengan en el tiempo. Creemos que el papel que juega el activismo de los movimientos sociales es una fuente de derecho al mismo nivel de otras como la ley o la jurisprudencia. En consecuencia, nuestra meta es crear un espacio analítico que permita una comprensión integral del proceso de creación de las normas jurídicas como un trabajo de ciudadanos y ciudadanas movilizadas en conjunto con, y no por separado de, los y las profesionales del Derecho que participan en estos procesos. Nuestro objetivo es comprender mejor y reconocer el importante rol que juegan las personas ordinarias que logran cuestionar normas injustas a través de su determinación y el ritmo que hacen sus pies marchando por las calles.

El papel que juegan en las reformas normativas los y las profesionales del derecho, desde jueces a legisladores y abogados, es esencial. Sin embargo, el Movimiento de los Derechos Civiles creció en efectividad en las décadas de 1950 y 1960 en su meta de ayudar a expandir el canon constitucional colocando sus botas en la calles. Fue la movilización de personas ordinarias con la intención de jugar un rol significativo en el cambio normativo local y nacionalmente las que tuvieron un efecto decisivo.[14]

En consecuencia, este ensayo argumenta que los movimientos sociales[15] han jugado un papel clave en redefinir el significado de democracia al

14 Levels of Power, Powercube, http://www.powercube.net/analyse-power/levels-of-power (visitado por última vez es 29 de diciembre de 2023). El análisis del *power cube* de John Gaventa se construye sobre las formas, los espacios y los niveles de poder. Las formas se refieren a las maneras en las cuales el poder se manifiesta, incluyendo sus formas visibles, ocultas e invisibles. La dimensión espacial del *power cube* se refiere a los potenciales escenarios para participación y acción poder, incluido lo que Gaventa llama espacios cerrados, abiertos (en donde la participación no solo es permitida, sino que se incentiva) y reclamados. La dimensión de los niveles de poder del *power cube* se refiere a las diferentes capas del proceso de toma de decisiones y de la autoridad ostentada por los actores en una escala vertical que incluye lo local, lo nacional y lo global.

15 Para obtener una definición de movimientos sociales y su distinción de los grupos de interés, consulta *infra* la sección B de la Introducción. Nuestra definición de movimientos sociales se inspira en SIDNEY TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS 1-9 (2da ed. 1998). La política conflictiva implica un repertorio de acciones, discursos y metas visionarias que cuentan una historia que (1) aprovecha aperturas históricamente contingentes, (2) moviliza la voluntad popular (no solo en términos de encuestas, sino también en términos de "la voluntad de actuar"), (3) se basa en redes de solidaridad social y (4) encuentra lugares de resistencia narrativa para trasponer/transportar quejas en causas que resuenen con las narrativas de justicia de la cultura más amplia. La política conflictiva involucra a oponentes a lo largo del tiempo y cambia el significado del derecho, no solo sus reglas. Id.; consulta CAUSE LAWYERS AND SOCIAL MOVEMENTS (editado por Austin Sarat y Stuart A. Scheingold, 2006); MICHAEL MCCANN, LAW AND SOCIAL MOVEMENTS 508 (2004); CHARLES TILLY & SIDNEY TARROW, CONTENTIOUS POLITICS (2007).

crear las condiciones necesarias para una genuina "comunidad basada en el consenso". Nosotros contrastamos dos visiones. Por un lado está la caracterización de James Madison[16] del rol del pueblo: "Una vez que [el pueblo] ha establecido un gobierno, no debe pensar en otra cosa que no sea la obediencia, dejando el cuidado de sus libertades a la sabiduría superior de sus gobernantes."[17] En el otro lado está Frederick Douglass: "Nosotros, el pueblo -no nosotros, la gente blanca; no nosotros, los votantes registrados; no nosotros, la clase privilegiada; excluyendo a todas las otras clases; sino nosotros, el pueblo … los hombres y mujeres, los humanos que habitamos los Estados Unidos de América, somos quienes ordenamos y establecimos esta Constitución."[18] La autoridad, el derecho y el poder para gobernar nunca son totales, sino que se han confiado a varias instituciones democráticas.

Como lo hizo Martin Luther King Jr., creemos que con frecuencia que la decidida acción organizada de los movimientos sociales es la forma por la cual "nosotros el pueblo" (entendiendo el pueblo como aquella grupo que refleja una genuina comunidad basada en el consenso) descubrimos y legitimamos los principios en los que que supuestamente descansa nuestra democracia. Utilizamos la metáfora de los "transformadores del viento" para poner a prueba una hipótesis compuesta de cuatro partes:

1. Para aquellas personas interesadas en el cambio social, es útil mirar el proceso de creación del derecho desde la perspectiva de la movilización popular, como la que generan los movimientos sociales y otras formas sostenidas de política contenciosa[19] y acciones colectivas que sirven para

16 NT: James Madison fue el cuarto presidente de los Estados Unidos de América y una de las figuras más importantes en la redacción de la Constitución y de la Carta de Derechos.

17 James Madison, Who Are the Best Keepers of the People's Liberties?, NAT'L GAZETTE, Dec. 20, 1792, reprinted in 6 THE WRITINGS OF JAMES MADISON, 1790-1802, página 120 (Gaillard Hunt ed., 1906), http://oll.libertyfund.org/titles/madison-the-writings-vol-6-1790-1802.

18 Frederick Douglass, Speech on the Dred Scott Decision (May 14, 1857), in Two SPEECHES BY FREDERICK DOUGLAsS 40 (Rochester, N.Y., C.P. Dewey 1857), http://www.libraryweb .org/~digitized/books/Two Speeches-byFrederick Douglass.pdf; ver además Frederick Douglass, Unconstitutionality of Slavery (Mar. 26, 1860), in SELECTED ADDRESSES OF FREDERICK DOUGLASS: AN AFRICAN AMERICAN HERITAGE BOOK 75, 96 (2008) ("[¿Qué queremos? Queremos esto: mientras la esclavitud ha gobernado la tierra, ahora debe reinar la libertad; mientras hombres proesclavistas han ocupado asientos en la Corte Suprema de los Estados Unidos y le han dado a la constitución una interpretación proesclavista en contra de su lectura clara, permitamos con nuestros votos colocar hombres en esa Corte Suprema que decidirán y que reconocerán que esa constitución no es esclavitud.").

19 NT: traducción literal del concepto "contentious politics" que se usa generalmente en la literatura en inglés sobre movimientos sociales para hablar de una forma de hacer política, o de buscar cambios sociales, mediante la protesta social. Este conjunto de actos que pueden ser considerados como protesta social son llamados "acciones colectivas" (collective actions) cuyo uso sí es frecuente en la literatura sobre movimientos sociales en español.

hacer más democráticas las instituciones formales y aquellas que controlan la cultura legal.

2. Una de las funciones más importantes del Derecho es su poder de trasladar experiencias vitales en narrativas sociales e individuales sobre rectitud y justicia. Aunque las cortes y los abogados son actores importantes en la creación de estas narrativas al darles forma al discurso jurídico, los movimientos sociales y otros grupos de ciudadanos legos organizados juegan un papel importante en la creación colectiva de interpretaciones autoritativas del derecho.[20]

3. La teoría liberal legal sostiene, como uno de sus postulados fundamentales, que los movimientos sociales alcanzan sus objetivos cuando sus demandas son traducidas al leguaje del derecho. Desde esta perspectiva, la forma más efectiva para lograr cambios sociales es a través del litigio y las reformas legislativas. Es así como, bajo la influencia del liberalismo legal, los abogados y abogadas activistas tradicionalmente han venido dirigiendo sus esfuerzos al litigio y al cabildeo por políticas públicas o reformas legales. Nosotros proponemoslo contrario : para que el cambio legal refleje un verdaderocambio social, se debe tomar en cuenta y comprometerse con con fuentes alternativas o contenciosas de poder. que estén disputando el poder. Un cambio así, en cierta medida, trasformará también la cultura.[21]

4. No queremos minimizar la importancia de las reformas normativas, especialmente de aquellas que tienen una dimensión constitucional.[22] Nuestro punto principal es que tales cambios normativos (y, en gran medida, los cambios jurisprudenciales) toman del pueblo la fuerza para sostenerse en tiempo.[23]

20 Ver, STANLEY FISH, Is THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980); JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM (1990).

21 Ver Thomas B. Stoddard, Bleeding Heart: Reflections on Using the Law to Make Social Change, 72 N.Y.U. L. REv. 967 (1997). Los conservadores críticos del movimiento por la justicia social temen a la transformación cultural más que a cualquier otra cosa. Ver, e.g., "A COUNTRY I Do NOT RECOGNIZE": THE LEGAL ASSAULT ON AMERICAN VALUES (Robert H. Bork ed., 2005).

22 Ver 3 ACKERMAN, supra nota 10

23 Id.; ver además, CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS NAMED AND UNNAMED (1997). Ambos de estos destacados académicos constitucionales tratan el Preámbulo no como un excedente, sino como una parte integral y legalmente significativa de la Constitución, no como una mera formalidad de los "Fundadores". Cuando argumentamos a favor de un cambio social legítimo y duradero, queremos dejar claro que nuestro énfasis está en un cambio que mejore la democracia. Al decir "mejora de la democracia", nos referimos a la creación tanto de

Durante la segunda mitad del siglo veinte, las personas interesadas en impulsar cambios sociales progresistas a menudo voltearon su mirada a las cortes, en gran medida porque las instituciones políticas regulares los excluían, especialmente a negros y otras minorías estigmatizadas o políticamente débiles.[24] Ellos vieron a la Corte Suprema de los Estados Unidos como la única institución federal, en la democracia constitucional norteamericana, que podría defender los derechos básicos de las minorías numéricas, estigmatizadas o débiles políticamente. Estos agentes del cambio progresista confiaron en los principios liberales de la democracia constitucional para defender y expandir el rol del control constitucional en la protección de derechos individuales de la parcialidad e injusticia de la política mayoritaria o de otras fallas de los procesos democrático.

Académicos como Michael Klarman, Larry Kramer, Gerald Rosenberg y Mark Tushnet han cuestionado este énfasis en el cambio social centrado en la actividad judicial.[25] También quienes se oponen al rol de las cortes en el cambio legal han criticado la legitimidad del control constitucional desarrollando argumentos conocidos como la "objeción contra mayoritaria".[26] Otros sostienen, como los hace Gerald Rosenberg, que las cortes ofrecen

grupos responsables como de comunidades interpretativas alternativas y autorizadas. Estos cambios entrelazados mejoran la democracia al otorgar agencia a aquellos que de otra manera estarían excluidos o marginados por la estructura convencional de la política electoral. El cambio social que mejora la democracia nos recuerda que las comunidades genuinas de consentimiento son lo que justifica la democracia.

24 Un contraejemplo es el movimiento laboral, especialmente durante el período del New Deal, cuando los sindicatos laborales lograron llamar la atención de los tres poderes del gobierno. Las ramas políticas normales incluso pudieron disciplinar a una reticente Corte Suprema amenazando la supremacía de la misma, como se refleja en el "cambio a tiempo que salvó a los nueve". Sin embargo, el neo-Lochnerianismo que está presente hoy en día muestra que, sin un cambio cultural profundo, ninguna victoria política está realmente asegurada. Ver, e.g., JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011); TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA (2012).

25 Ver, e.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004) (El argumento es que el caso Brown v. Board of Education puso los problemas raciales en la atención pública, pero al mismo tiempo energizó la oposición conservadora.); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2005) (El argumento sostiene que el significado y la legitimidad de la Constitución se basan en la comprensión del pueblo y no están sujetos a la supremacía judicial); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (El argumento es que un cambio social duradero no se produce ni se mantiene a través de litigios); MARK TUSHNET, THE NAACP's LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987) (Examinando la relación entre el pueblo y sus abogados).

26 Ver ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986).

una "esperanza vacía", un batalla ganada, pero una guerra perdida.[27] Para Rosenberg las victorias legales son como cintas atrapamoscas que atraen a los activistas que buscan cambios sociales para que cedan su agencia para que sean las cortes quienes lideren el movimiento por el cambio social. Las cortes, sostiene Rosenberg, por su parte, están institucionalmente constreñidas a jugar ese rol.[28] Siguiendo esta línea crítica, Michael Klarman sostiene que las sentencias paradigmáticas de la Corte Suprema de Estados Unidos han desatado reacciones sociales negativas, al movilizar a aquellos que se disienten con las decisiones de la Corte,[29] lo que menoscaba la habilidad de la Corte de hacer efectivos sus fallos. Otros autores resaltan la toma ideológica y política de la función judicial por parte de jueces conservadores insensibles a las demandas por la tutela de derechos individuales cuando los demandantes son personas socialmente excluidas o minorías políticamente débiles.[30] De hecho, el libro del Profesor Ackerman es una crítica sustentada a la esta visión centrada en la Corte y el litigio.

Algunos van más allá al cuestionar la eficacia del liberalismo legal como una agenda filosófica válida. La perspectiva liberal de la democracia constitucional se enfoca en derechos individuales, le preocupa más los procedimientos que los conceptos materiales de justicia y tiende a confundir los principios del sistema con el ejercicio del poder. Cuando las "reglas justas" son consideradas de manera independiente de los "resultados justos", los grandes problemas sociales son "secuestrados por lo abogados" más que reparados.[31] Tanto en términos legales como populares, la búsqueda del debido proceso reemplaza a la tarea más difícil en la práctica legal, esto es el compromiso sustantivo con la justicia. Además, el desarrollo de los derechos legales, generalmente vinculados a la propiedad y los negocios, no viene acompañada de una atención equivalente a las garantías para proteger los derechos fundamentales. No existe claridad sobre el alcance de dichos

27 Ver ROSENBERG, supra nota 25.
28 Id.
29 KLARMLAN, supra nota 25
30 Ver, ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION (2008).
31 En otro contexto, y en una expresión algo desenfadada de este proceso, la antropóloga legal y corporativa Jane Anne Morris sugiere que la regulación ambiental simplemente regula a los ambientalistas. Ver, JANE ANNE MORRIS, GAVELING DOWN THE RABBLE: How "FREE TRADE" IS STEALING OUR DEMOCRACY (2008). Es por esto que la oposición al oleoducto Keystone es más importante como una herramienta de movilización que como un punto de intervención judicial o legislativa. Ver, e.g., BILL McKIBBEN, OIL AND HONEY: THE EDUCATION OF AN UNLIKELY ACTIVIST (2013).

derechos (lo cual afecta la efectividad de sus garantías) ni si serán adecuados para resolver los problemas sociales que supuestamente abordan.[32]

Aun cuando los derechos legales concedan a quienes sufrieron una violación de acciones judiciales individualistas para alcanzar reparación, el alcance de tales derechos pueden ser manipulada en el futuro por abogados hábiles o jueces conservadores con el fin de legitimar el *status quo.*[33] Al mismo tiempo, la discusión sobre los derechos legales colocan el daño en contextos específicos (derecho civil) que hace que las vías judiciales de reparación sean vulnerables a cambios inspirados por los grupos de interés, usando siempre las necesidades de los grupos de poder como el baremo de lo que debe decir y hasta donde debe llegar el Derecho. Si ser hombre blanco otorga privilegios, entonces las mujeres quieren lo que los hombres tienen, los negros quieren lo que los blancos tienen, pero ningún grupo se cuestiona si las preferencias y prebendas que disfrutan los hombres o los blancos son realmente la medida de una verdadera democracia. *¿Es la meta simplemente reducir las inequidades que sufre* un determinado en grupo dentro de un sistema que sigue siendo fundamentalmente inequitativo, injusto o ilegítimamente jerárquico?

A pesar del creciente consenso académico respecto a que los cambios sociales no empiezan ni terminan en las cortes,[34] la mayoría de los profesores de derecho constitucional continúan desarrollando análisis centrados la jurisprudencia y otras fuentes formales del Derecho. Los defensores del liberalismo legal, por ejemplo, reclaman en su defensa que los derechos fundamentales han tenido un importante efecto simbólico en la sociedad. Los derechos muestran a aquellos que son excluidos por la sociedad, que ellos también son titulares de los mismos y que son parte de dicha sociedad.[35]

32 De esta manera, el litigio, por ejemplo, puede transferir el poder al abogado como técnico y limitar la capacidad del abogado para comprender las demandas de los clientes, que se traducen principalmente en principios legales.

33 Ralph Bunche articula una versión sustancial de este argumento en un artículo publicado en 1935: Se deposita una fe extrema en la capacidad de los instrumentos del gobierno democrático para liberar a la minoría de la proscripción social e igualdad cívica. La falacia inherente de esta creencia radica en la falta de apreciación del hecho de que los instrumentos del Estado son simplemente reflejos de la ideología política y económica del grupo dominante, y que el brazo político del Estado no puede separarse de su estructura económica predominante, de la cual debe ser inevitablemente siervo. Ralph J. Bunche, A Critical Analysis of the Tactics and Program of Minority Groups, 4 J. NEGRO EDUC. 308, 315 (1935).

34 NT: aquí el uso de "cortes" se podría entender como el conjunto de instituciones estatales facultadas para la creación e interpretación del Derecho.

35 Cf PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991) (Argumentando que los derechos son un mensaje simbólico poderoso de pertenencia a grupos marginados o excluidos).

Sin embargo, el discurso de derechos hace más que dar a las personas un sentido de dignidad, los derechos pueden movilizar e inspirar a los grupos sociales a la acción, como ocurrió con el Boicot a los Buses de Montgomery o en las acciones de estudiantes en las "sentadas"[36] a inicios de la década de 1960.[37]

Los derechos pueden proveer, además, una agenda para la movilización de grupos sociales al traducir las exigencias locales en causas más generales. Representantes del liberalismo legal resaltan que casos como el de *Brown v. Board of Education* habrían tenido efectos a largo plazo, no solo a nivel de reforma normativa, sino además como detonante de un gran cambio cultural.[38] La estrategia liberal, cuya epítome fue el Fondo de Educación y Defensa Legal del NAACP,[39] consistía en cambiar las normas vigentes mediante las diferentes instituciones estatales con la esperanza de que todos esos cambios normativos logren transformaciones culturales.[40] El problema fue que el enfoque necesario en la doctrina y las normas desviaban el tiempo, la energía y los recursos del arduo trabajo de lograr cambios culturales. Como lo menciona el Profesor Ackerman, la estrategia de sector por sector, institución por institución, caracterizada por *Brown*[41] (aún si se lo predica como un compromiso con principios generalizables), fue importante pero insuficiente en el proceso crítico de establecer la agenda activista del movimiento de los derechos civiles.

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36 NT: En el texto original "sit-in demostrations", se refiere a una forma de protesta en donde estudiantes de varios lugares de Estados Unidos viajaron a los estados en los que se mantenía la segregación racial para participar en actos en los que permanecían o ingresaban en lugares en donde estaba prohibido el ingreso de personas negras. El resultado de este tipo de actos era generalmente el arresto de los manifestantes.

37 Ver, e.g., CHARLES M. PAYNE, I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE 236, 236-64 (1995); Francesca Polletta, The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961-1966, 34 LAW & Soc'Y REv. 367 (2000).

38 Ver Stoddard, supra nota 21.

39 NT: NAACP son las siglas de la Asociación Nacional para el Progreso de las Personas de Color (National Association for the Advancement of Colored People), una de las organizaciones no gubernamentales más influyentes en el Movimiento de los Derechos Civiles en Estados Unidos.

40 Ver Derrick A. Bell, Jr., Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 YALE L.J. 470 (1976).

41 NT: Se refiere al caso *Brown v. Board of Education.* La estrategia sector por sector se refiere a que la sentencia de *Brown* tuvo impacto únicamente en la segregación racial en el ámbito educativo, mas no proscribió la segregación en sí misma la cual continuó en espacios públicos y privados de las sociedades del sur de los Estados Unidos de América.

Este ensayo, busca ir más allá del debate sobre el liberalismo legal como filosofía o como justificación del rol del control y las garantías constitucionales[42] en la protección de los derechos de las minorías. En lugar de eso proponemos un nuevo paradigma que llamamos: demosprudencia. La demosprudencia es el estudio del equilibrio dinámico de poder entre la creación normativa y los movimientos sociales. La demosprudencia se enfoca en los efectos legitimantes de la acción democrática para producir cambios sociales, legales y culturales. Aunque la participación en una democrática participativa y con rendición de cuentas de los representantes electos generalmente implica ciudadanos y ciudadanas movilizadas y enfocadas en influir en una elección específica, la aprobación de una reforma legal aislada, o en conseguir una victoria judicial, nosotros nos enfocamos en procesos integrales, en la interacción entre creación normativa y movilización popular que tiene por objeto buscar cambios sociales, económicos y/o políticos significativos y sostenibles. En otras palabras, buscamos entender, analizar y documentar aquellos movimientos sociales que extienden el potencial democrático de la participación política y que, la hacerlo, producen cambios sociales y legales duraderos.

Mientras la jurisprudencia examina como ciertos derechos "discretos e insulares" de las minorías son protegidos por los jueces y juezas que interpretan el Derecho usando formas ordinarias de doctrina legal y constitucional,[43] la demosprudencia explora como las minorías políticas, económicas y sociales no pueden confiar solamente en decisiones judiciales para solucionar sus problemas. En lugar de ceder su agencia a los abogados y abogadas, los movimientos sociales deben encontrar la manera de integrarlos no como líderes, sino como compañeros en su activismo político. Tomando prestada una frase de la teoría social, los proponentes de cambio social progresivo para ser defensores deben defenderse a sí mismos y convertirse en defensores de otros. El objetivo central de nuestra investigación consiste en entender los roles que juegan los movimientos sociales en producir cambios sociales y legales duraderos.

42 NT: En el texto original se usa el término "*judicial review*" que constituye una forma de control constitucional difuso (ya que permite expulsar normas inconstitucionales del sistema jurídico) pero también de garantía constitucional de derechos ya que las cortes resuelven en casos concretos en donde se discute la aplicación de los derechos constitucionales de las personas.

43 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) "([El] prejuicio contra minorías discretas e insulares puede ser una condición especial, que tiende seriamente a restringir el funcionamiento de los procesos políticos en los que normalmente se confía para proteger a las minorías, y que puede requerir una investigación judicial correspondientemente más exhaustiva").

A. ¿Qué es la demosprudencia?

Como método, la demosprudencia exige formular dos preguntas fundamentales: (1) ¿cómo y cuándo las minorías (políticas, económicas o identitaria) débiles o en desventaja se movilizan para proteger sus derechos en una democracia de mayorías? Y, (2) ¿tiene la movilización de estos mandantes[44] el efecto de mejorar la democracia? Con mejorar la democracia, nos referimos a abrir espacios a aquellos previamente excluidos o marginados y permitirles participar de forma efectiva en los procesos de toma de decisiones que afectan sus vidas.[45] La demosprudencia es entonces el estudio de las relaciones entre los movimientos sociales y el Derecho en la creación de significados con autoridad en el marco de un sistema político democrático.[46]

A diferencia de la jurisprudencia, que analiza el trabajo de los jueces actuando en lugares formales como las cortes, o de la *legisprudencia*,[47] que produce literatura secundaria sobre como el trabajo de cuerpos legislativos es una fuente importante del proceso de conformación del Derecho,[48] la demosprudencia se enfoca en las formas en que las constantes acciones colectivas, llevadas adelante por gente común, puede alterar permanentemente las prácticas democráticas cambiando a la gente que crea el Derecho y el

44 NT: En el texto original se una la palabra "constituencies" que se utiliza para designar a un grupo de personas que pueden votar en una circunscripción territorial para designar a sus representantes en las instituciones públicas (especialmente a cuerpos parlamentarios, pero no sólo reducida a los mismos). Su uso se relaciona con el vínculo político que existe entre el votante (mandante) y el oficial electo (mandatario) y que permite al primero exigir rendición de cuentas al segundo.

45 Nos preguntamos: ¿la interacción entre los movimientos sociales y la elaboración de leyes brinda a minorías discretas e insulares (o grupos que de otra manera han sido relativamente silenciados) la oportunidad de participar directamente, en lugar de a través de representantes, en la toma e interpretación de decisiones que afectan sus vidas? En particular, contrastamos el efecto demosprudencial de la movilización de la base con las dificultades contramayoritarias que algunos asocian con la revisión judicial para proteger los derechos de minorías discretas e insulares.

46 Por democracia nos referimos a algo similar a lo que Robert Maynard Hutchins, ex presidente de la Universidad de Chicago, expresó en una entrevista de 1962: "Cada miembro de la comunidad debe tener un papel en su gobierno. La verdadera prueba de la democracia es hasta qué punto todos en la sociedad participan en una discusión política efectiva".ROBERT M. HUTCHINS & JOSEPH P. LYFORD, THE POLITICAL ANIMAL: A CONVERSATION 2 (1962).

47 La jurisprudencia se ocupa predominantemente de la pregunta sobre la aplicación e interpretación de la ley por parte del juez. La legisprudencia utiliza las herramientas y perspectivas de la teoría legal para estudiar la legislación y la regulación, es decir, la creación de la ley por parte del legislador. Julius Cohen introdujo este término para describir el estudio teórico del aspecto legislativo (en oposición al judicial) de la filosofía legal. Julius Cohen, Legisprudence: Problems and Agenda, 11 HOFSTRA L. REv. 1163 (1983); Julius Cohen, Towards Realism in Legisprudence, 59 YALE L.J. 886 (1950); Ver también, Luc J. WINTGENS ET AL., LEGISPRUDENCE: A NEW THEORETICAL APPROACH TO LEGISLATION (Luc J. Wintgens ed., 2002); William N. Eskridge, Jr. & Philip P. Frickey, Legislation Scholarship and Pedagogy in the Post-Legal Process Era, 48 U. PITT. L. REV. 691, 693 (1987).

48 Ver, Eskridge & Frickey, supra nota 47.

contexto en que es creado.[49] Los académicos de la jurisprudencia se centran en el análisis de normas vinculantes emitidas por las autoridades judiciales e interpretada por juristas; los académicos de la *legisprudencia* miran al legislador como el actor principal del proceso de creación del Derecho.

Por el contrario, los académicos de la demosprudencia prestan atención a la dinámica de los mandantes quienes exigen cuentas al poder a través de su participación en política contenciosa[50] y otras formas de creación de significado jurídico que permiten exigir cuentas al sistema democrático.[51] Los mandantes son aquellos actores que integran los grupos que sostienen a líderes políticos y élites en el lugar institucional que les permite gobernar y crear política pública, es decir, en el ejercicio del poder público. Usamos el término "mandantes del cambio"[52] para referirnos a aquellos grupos que, sin estar comprometidos en principio con ninguna persona o líder en particular, comparten una visión de cómo debería cambiar la sociedad que usan para medir la legitimidad de quienes están en uso del poder estatal.

Debemos estar claros en que la demosprudencia no es una filosofía de izquierda o de derecha, tampoco es la filosofía de la suma de preferencias no mediadas (como el proceso de iniciativa populista o el mercado). Por el contrario, la demosprudencia representa un compromiso filosófico con el poder de crear Derechos en el marco de una democracia participativa significativa. Es verdad que desplegamos el mecanismo interpretativo de la demosprudencia para examinar movimientos sociales que representan a aquellos que no eran parte de la "comunidad del consenso" y que cuestionan la legitimidad de normas que tuvieron origen en un período en que los excluían o que siguen excluyéndolos. También estamos interesados en movimientos sociales en donde la principal apuesta sea el avance de la democracia, pero

49 La palabra "cambiando" en esta oración es ambigua, pero intencionalmente así. Queremos decir que puedes cambiar a las personas que tienen el poder y, como resultado, empoderar a aquellos que son miembros de la oposición movilizada, o puedes transformar la comprensión de los roles y las obligaciones de las personas en el poder sin cambiar realmente a los individuos que ocupan esos roles..

50 NT: Política contenciosa es un término utilizado en la literatura de movimientos sociales y ciencia política para referirse a aquellas interacciones políticas que ocurren fuera de los marcos institucionales (política convencional) y que tienen relación con la protesta social y otras formas de acción colectiva.

51 El término "mandantes dinámicos" proviene de Michael Grinthal, Power with: Practice Models for Social Justice Lawyering, 15 U. PA. J.L. & Soc. CHANGE 25, 45 (2011). El termino " política contenciosa " viene de Sidney Tarrow. Ver, TELY & TARRow, supra nota 15. "Uno de nosotros ha desarrollado aún más el concepto de 'demosprudencia'. Lani Guinier, Courting the People: Demosprudence and the Law/Politics Divide, 89 B.U. L. REV. 539 (2009); ver Lani Guinier, The Supreme Court, 2007 Term-Foreword: Demosprudence Through Dissent, 122 HARV. L. REV. 4, 40-41 (2008).

52 NT: En el texto original se utiliza el término *constituencies of accountability.*

creemos que es importante analizar las capacidades y estrategias en el campo de participación democrática y creación de significados de los movimientos sociales conservadores de las décadas de 1980 y 1990, además de los procesos de creación democrática de significados de los movimientos de los derechos civiles y de los derechos de las mujeres de las décadas de 1960 y 1970. Por ejemplo, aun cuando el movimiento por derechos de propiedad es conocido comúnmente por su agenda conservadora, algunos elementos de sus acciones están enfocados en mejorar la confianza que tenemos de que el gobierno trabaje para el bien común y no al servicio de intereses corporativos particulares. Esperamos alentar un mayor debate sobre los efectos de los movimientos sociales en los procesos de creación normativa (y no solamente en los momentos electorales) incluyen a abolicionistas, sufragistas, cristianos evangélicos, defensores de derechos de propiedad o los movimientos por el derecho a portar armas de hoy en día. Con esta perspectiva, vale la pena explorarlos a través de los lentes de la demosprudencia ya que se puede sostener que estos movimientos también expanden el coeficiente de legitimidad democrática.

Como metodología, usamos el término demosprudencia para incitar análisis empíricos, comparativos e históricos de movimientos sociales cuyo fin haya sido (o sea) el cambio político definido en términos mucho más amplios que simplemente ayudar a la elección de un candidato o influir en el resultado de un proceso electoral.[53] En otras palabras, la demosprudencia no es primordialmente el estudio de las campañas electorales, más bien, la demosprudencia involucra un tipo particular de desafío, lo que Sidney Tarrow llama "política contenciosa".[54]

La demosprudencia como metodología es parte de una literatura secundaria sobre Derecho y estudios jurídicos en permanente evolución, estos trabajos analizan el rol de ciudadanos movilizados en la creación de nuevas normas, en el cambio de los significados de las normas existentes y en la producción de una comprensión más democrática del funcionamiento del poder en el ámbito de la democracia representativa. Esta empresa enfatiza su estudio de las herramientas que los movimientos sociales usan para para crear

53 Ver, e.g., TOMIKO BROWN-NAGIN, THE COURAGE To DISSENT: ATLANTA AND THE LONG HISTORY OF THE CtVIL RIGHTS MOVEMENT (2011) (Documentando los objetivos complejos de los movimientos sociales en el período inicial de los derechos civiles).

54 Ver supra notas 15 y 51 para ver la definición de Sidney Tarrow sobre política contenciosa, distinta de la política ordinaria y electoral.

Derecho y del rol de la gente común cuyas luchas y compromisos colectivos influyen en el proceso de creación de normas. Sostenemos que el poder de los grupos sociales se puede encontrar en la política tradicional, pero juega un rol más importante en la política constitutiva[55]. La demosprudencia es, por su naturaleza, como un baño ácido para remover la corrosión que aísla la esfera de lo estatal del poder legitimante del pueblo, excepto cuando ese poder popular es enmarcado en política electoral partidista o de la representación de las élites.

La demosprudencia, como práctica, está entrenada para enfocarnos en los abogados, abogadas o personas con exposición pública que funcionan como fuente de autoridad moral y legitimidad democrática al facilitar la interacción entre movimientos sociales y las instituciones formales que crean normas jurídicas. La demosprudencia es, entonces, una vía para examinar cómo estas personas representan a los movimientos sociales para crear normas jurídicas. En lugar de enfocarnos en las múltiples maneras en que abogados y abogadas guían a activistas de movimientos sociales por los entramados del sistema legal, queremos enfocarnos en las maneras en que activistas de movimientos sociales junto a comunidades movilizadas pueden cambiar el pensamiento sobre el contenido del Derecho y, en consecuencia, el horizonte de lo posible y lo sostenible. Tomando prestada la terminología de Thomas Stoddard, enfatizamos el rol de los cambios culturales, no solo como cambios normativos, sino como fuentes de cambio social duradero.[56]

A través de este proceso pretendemos involucrar a académicos, activistas, creadores de políticas públicas y personas comunes en un gran diálogo sobre la interacción entre la cultura legal y la movilización popular, para reemplazar la concepción del Derecho centrada en las cortes, o el legislativo, con una que se centra en las relaciones entre creación normativa y movimientos sociales. Esta es una conversación sobre como abogados activistas trabajando con activistas de movimiento sociales crean nuevos significados para la creación

55 NT: el termino original en inglés es "constitutive politics" y se refiere a aquel aspecto de la política que busca transformaciones sociales generales como normas constitucionales, marcos jurídicos y sobre todo las concepciones culturales. El término proviene de la división que hace Hannah Arent de la actividad política: la política funcional (functional potics), la política constitutiva (constitutive politics) y política performativa (performative politics). Ver, Christopher Holman, Politics as Radical Creation. Herbert Marcuse and Hannah Arendt on Political Performativity, Universiy of Toronto Press, Toronto, 2013, p. 92.

56 Ver Stoddard, supra nota 21.

normativa y, en consecuencia, desafían los centros de poder existentes en beneficio de la democracia.

Por ejemplo, la demosprudencia puede estudiar las acciones de las personas y abogados públicas que se convierten en agentes de cambio y que intervienen en: 1) activar la participación dinámica de la comunidad, 2) crear significados y nuevas formas de comprender lo social y 3) expandir las fuentes de autoridad que incluyan mandantes del cambio social.[57] Estas personas públicas son actores morales ideales que exigen rendición de cuentas al poder y al propio sistema democrático.

La demosprudencia como práctica legal implica la transformación de la relación abogado/cliente para crear oportunidades para exigir rendición de cuentas, tanto a nivel externo (estado) como interno (movimiento social). Dicha transformación depende de un proceso de participación y de intercambio de poder entre abogado y cliente. Nuestra concepción del rol de la búsqueda de cambio social incluye estrategias de asociaciones horizontales de poder que se fundamentan en la tesis de la obligación social de David Wilkins,[58] la visión de la práctica crítica de la profesión legal de William Simon,[59] la teoría Lucie White sobre la práctica legal en las tres dimensiones

57 En un nivel, los compromisos y responsabilidades profesionales de todos los abogados deberían organizarse en torno a su papel como ciudadanos públicos. Por ejemplo, el Preámbulo [6] de las Reglas Modelo de Conducta Profesional establece que "[c]omo ciudadano público, un abogado debería buscar la mejora de la ley, el acceso al sistema legal, la administración de justicia y la calidad del servicio prestado por la profesión legal. Como miembro de una profesión aprendida, un abogado debería cultivar el conocimiento de la ley más allá de su uso para los clientes, emplear ese conocimiento en la reforma de la ley y trabajar para fortalecer la educación legal. Además, un abogado debería fomentar la comprensión del público y la confianza en el estado de derecho y el sistema de justicia porque las instituciones legales en una democracia constitucional dependen de la participación y el apoyo popular para mantener su autoridad... "Todos los abogados deberían dedicar tiempo y recursos profesionales y utilizar su influencia cívica para asegurar un acceso igualitario a nuestro sistema de justicia para todos aquellos que, debido a barreras económicas o sociales, no pueden costearse o asegurar una asesoría legal adecuada. Un abogado debería ayudar a la profesión legal en la consecución de estos objetivos y colaborar en la autorregulación del colegio de abogados en beneficio del interés público."MODEL RULES OF PROF'L CONDUCT pmbl. [6] (2013); ver también id. pmbl. 71 ("Un abogado debería esforzarse por alcanzar el más alto nivel de habilidad, mejorar la ley y la profesión legal, y ejemplificar los ideales de servicio público de la profesión legal."); id. pmbl. [8] "Las responsabilidades de un abogado como representante de clientes, funcionario del sistema legal y ciudadano público suelen ser armónicas."); id. pmbl. [13] ("Los abogados desempeñan un papel vital en la preservación de la sociedad. El cumplimiento de este papel requiere que los abogados comprendan su relación con nuestro sistema legal.").

58 David Wilkins, Fragmenting Professionalism: Racial Identity and the Ideology of Bleached Out Lawyering, 5 INT'L J. LEGAL PROF. 141 (1998) (Destacando la tensión entre la norma legal de "profesionalismo despojado de color" y las obligaciones sociales de un abogado).

59 William H. Simon, Visions of Practice in Legal Thought, 36 STAN. L. REV. 469 (1984).

de poder,[60] el análisis del cambio social que deviene de la relación cambio cultural versus cambio normativo de Thomas Stoddard,[61] la taxonomía de los modelos del Derecho y la organización social de Mike Grinthal,[62] las reflexiones críticas sobre el Derecho y la organización social de Scott Cummings e Ingrid Eagly,[63] y el concepto de movilización estratégica de recursos de Marshall Ganz.[64] Ni el abogado, ni su cliente pueden fijar por su cuenta los términos de su asociación, los definen juntos llevando así la democracia a la práctica.[65]

El *demos* en demosprudencia son aquellas personas que están colectivamente movilizadas con dos fines: cambiar la sociedad y constituirse en mandantes del cambio que exigen respuestas a sus representantes (incluso a aquellos en las elites, que no fueron elegidos pero toman decisiones con impacto público). El *demos* en demosprudencia no es "la comunidad" a nivel micro, tampoco son los que se proclaman "representantes de la comunidad", cuando esos hombres y mujeres son personas acaudaladas que representan sus propios ideales en lugar de los de aquellas personas que dicen representar.[66] El *demos* son, por tanto, grupos de personas (que pueden o no tener la proximidad geográfica como razón de su organización) constituidos en mandantes del cambio, es decir personas que sostienen una idea más que

60 Ver, e.g., Lucie E. White, To Learn and Teach: Lessons from Driefontein on Lawyering and Power, 1988 Wis. L. REv. 699.

61 Ver Stoddard, supra nota 21; ver además Doug Nejaime, Winning Through Losing, 96 IowA L. REV. 941 (2011) ((Argumentando que, independientemente de su resultado, el litigio puede brindar una oportunidad para la movilización). Pero ver, Catherine Albiston, The Dark Side of Litigation as a Social Movement Strategy, 96 IowA L. REV. BULL. 61 (2011) (Argumentando que a veces el litigio produce desmovilización).

62 Grinthal, supra nota 51.

63 Scott L. Cummings & Ingrid V. Eagly, A Critical Reflection on Law and Organizing, 48 UCLA L. REV. 443 (2oo1); ver además Doug Nejaime & Scott Cummings, Lawyering for Marriage Equality, 57 UCLA L. REV. 1235 (2010) (analizando diversas aproximaciones al litigio en favor de la igualdad en el matrimonio).

64 Ver también Stephen Wexler, Practicing Law for Poor People, 79 YALE L.J. 1049, 1053 (1970) ("La pobreza no será detenida por personas que no son pobres. Si la pobreza se detiene, será detenida por personas pobres. Y las personas pobres solo pueden detener la pobreza si trabajan juntas en ello. El abogado que quiere servir a las personas pobres debe poner sus habilidades al servicio de la tarea de ayudar a las personas pobres a organizarse a sí mismas.").

65 Una de las formas en que las personas expresan la democracia es a través del proceso de reflexionar y aprender de experiencias compartidas. Esta práctica de autorreflexión es estimulada por y a menudo culmina en la creación de nuevas historias. Estas historias sistematizan el conocimiento creado por la participación colectiva, la toma de riesgos colectiva y la acción colectiva. Estas historias transforman la disposición de las personas para actuar cuando fomentan relaciones, resaltan las contingencias de elecciones pasadas e iluminan posibilidades futuras.

66 Ver Eric Lipton, Half of Congress Members are Millionaires, Report Says, N.Y. TINEs, Jan. 9, 2014, http://www.nytimes.com/2o14/ol/10/us/politics/more-than-half-the-members-of -congress-are-millionaires-analysis-finds.html.

aún funcionario público o a un candidato.[67] La demosprudencia tampoco se enfoca en la política entendida en sentido amplio o en ella como una construcción abstracta. No es la teoría o práctica de los disturbios callejeros o de las turbas reunidas para ejecutar linchamiento, ni es simplemente el estudio de las elecciones, sean estas enfocas en elecciones de representantes, referendos o plebiscitos. La demosprudencia es el estudio de cómo estas comunidades (grupos de mandantes construidos y movilizados) se unen para producir un cambio social duradero. Estos grupos tienen éxito cuando (1) cambian las normas que regulan las instituciones sociales, (2) transforman la cultura que controla los significados de dichos cambios normativos, y (3) afectan la interpretación de dichos cambios normativos al establecer las bases de una naturalización de dichos cambios dentro de la estructura doctrinal del Derecho y del análisis legal. Este proceso puede ser observado y analizado sector por sector, institución por institución.[68]

La *demosprudencia* no es una adversaria de la jurisprudencia, es más bien el análisis de cómo el poder social circula y encuentra su expresión en el Derecho. Los académicos de la demosprudencia examinan las expresiones colectivas de resistencia (sea a través de contra narrativas o de movilizaciones que buscan modificar paradigmas) que ponen a prueba la naturaleza democrática de las instituciones formales de creación normativa estudiadas por los académicos de la jurisprudencia y de la *legisprudencia*.

67 Diferenciamos "mandante" (*constituency*) de "comunidad". Ver Marshall Ganz, Organizing Notes: What Is Organizing?, HARY. KENNEDY SCH. OF Gov'T (2013), http://www.hcs.harvard.edu/summercamp/wp-content/uploads/2013/06/What-Is-Organizing-203.pdf (Argumentando que el término "constituency" se refiere a una población que puede "unirse" en nombre de preocupaciones comunes.); John McKnight, Services Are Bad for People: You're Either a Citizen or a Client, ORGANIZING, Spring/Summer 1991, página 41. Además, Brittny-Jade Saunders señala que a menudo, como en el contexto legislativo, los constituyentes y sus intereses son representados por un defensor, formulador de políticas, líder de movimiento u organización en particular. Sin embargo, idealmente, los constituyentes no son receptores pasivos de la generosidad de estos actores, sino que son participantes activos en los procesos que moldean su destino. Las constituyentes organizadas son capaces de responsabilizar a los líderes por sus acciones u omisiones. También son cruciales para la vitalidad de los movimientos sociales y políticos. Desempeñan un papel vital tanto al movilizarse -contribuyendo con ideas e inspiración que influyen en los líderes- como al ser movidos -para cambiar su forma de pensar y tomar medidas. Académicos y profesionales del cambio social han distinguido entre "clientes" o "consumidores", que dependen de los proveedores de servicios, y constituyentes que son capacitados a través de sus relaciones con otros actores para ejercer "voz" y ejercer mayor influencia en sus mundos sociales y políticos. Achievement of Progressive Social Change 5 (Mar. 12, 2008) (unpublished student paper, Harvard Law School) (on file with authors).

68 Ver 3 ACKERMAN, supra nota 10. Como demuestra el Profesor Ackerman, la transformación racial de la cultura estadounidense no se llevó a cabo de un solo golpe, sino en múltiples ataques al poder racializado, sea cual sea su manifestación: la segregación escolar, la discriminación en la vivienda, el acceso y la igualdad de voto, las uniones íntimas (como en el caso Loving v. Virginia, 388 U.S. 1 (1967)), y el empleo.

La demosprudencia busca respuestas en la gente cuando está organizada como grupos de mandantes activos y no sólo como individuos portadores de preferencias individuales aisladas. Estamos más centrado en el Derecho y en la potencialidad de creación de significados de los grupos de mandantes movilizados. Al mismo tiempo, queremos mantener el enfoque del rol de los movimientos sociales en impulsar la democracia, mientras nos mantenemos críticos respecto a los movimientos sociales que no se involucran en el potencial democrático en la sociedad.

La demosprudencia se expande más allá de la búsqueda de cambio social centrado en el litigio, el cual es conducido con frecuencia por las élites nacionales, sin embargo, no es una crítica al litigio estratégico *per se*, pero sí a la tendencia de que el litigio desenfoque a los movimientos sociales de crear teorías de cambio social.[69] De hecho, las preguntas sobre el rol de las cortes en este proceso son intencionalmente dejadas en un nivel secundario. En lugar de esto, la pregunta principal será: ¿cómo las cortes y los movimientos sociales se influencia mutuamente para interpretar el significado del Derecho?

El poder de los movimientos sociales proviene de su habilidad de articular desafíos colectivos mediante el montaje de redes sociales, fines comunes y marcos culturales compartidos. Los movimientos sociales pueden expandir la capacidad de las personas previamente excluidas o marginadas de la política hacia la construcción de narrativas sobre el significado de las normas constitucionales, a pesar de su debilidad numérica o política en una democracia de mayorías. En particular, acudir al recurso de la relación entre movimientos sociales y Derecho puede expandir el campo en que las

69 El litigio es una táctica esencial para los movimientos sociales. Sin embargo, con demasiada frecuencia, los litigantes utilizan el poder estatal al servicio de un principio en lugar de utilizar el principio al servicio de la resistencia al poder estatal u otras concentraciones de poder que socavan la democracia. Las causas se convierten en agravios; las comunidades de responsabilidad son desmovilizadas. El litigio, especialmente el litigio de alto riesgo a menudo genera tanto movilización como reacciones adversas en cierta medida. Esto es especialmente cierto en una cultura política como la nuestra, donde se entiende que la ley media entre culturas profundamente diferentes a través de un discurso universalizador. Este proceso universalizador es especialmente complejo cuando se presume que la ley desempeña esa función en gran medida a través de la dinámica de neutralidad (ya sea expresada a través del lenguaje de los derechos o a través de las limitaciones institucionales en el ejercicio del poder estatal). Ver, e.g., TUSHNET, supra nota 25, página 138-66. But see Michael W. McCann, Reform Litigation on Trial, 17 LAw & Soc. INQUIRY 715, 715-16, 729-43 (1992) (revisanto a ROSENBERG, supra nota 25) (Argumentando que el litigio estratégico puede ser más efectivo para provocar cambios de lo que algunos críticos sugieren y discutiendo enfoques "de arriba hacia abajo" versus "de abajo hacia arriba", así como análisis "centrados en la corte" versus "centrados en la disputa"). Por lo tanto, nuestra crítica al litigio, que desarrollaremos más en el contexto de los movimientos de derechos civiles y de los trabajadores agrícolas, se basa en el fracaso de muchos abogados de causas para formular su estrategia en conjunción con los ciclos de movilización.

instituciones formales de la sociedad (por ejemplo, cortes, cuerpos legislativos, etc.) funcionan para crear canales más efectivos para desarrollar expandir el sentido de democrática.

B. Los movimientos sociales son diferentes a los grupos de interés

Como esperamos demostrar a través de los ejemplos del Boicot a los Buses de Montgomery, el Partido Demócrata por la Libertad de Mississippi (MFDP por sus siglas en inglés), y el Sindicato de Trabajadores Agrícolas en California (UFW por sus siglas en inglés), los movimientos sociales son una manera por la cual las minorías, en democracias mayoritarias, protegen sus derechos al crear espacios de construcción de la Constitución en los que pueden forjar nuevas interpretaciones de lo que se considera el *status quo*. Desde dichos espacios, los movimientos sociales desafían, y, si tienen éxito, cabían las normas vigentes, creando una narrativa alternativa del sentido de la Constitución. El objetivo de la demosprudencia es entender las formas en que los movimientos sociales permiten a quienes han sido silenciados de los procesos de la política mayoritaria a abrir espacios de incidencia en las prácticas de toma de decisiones de una sociedad democrática.

Queremos dejar claro que los movimientos sociales no son lo mismo que grupos de interés, aunque en ocasiones pueden existir coincidencias. Para nosotros, la principal diferencia es que los grupos de interés enfocan su atención en las élites y están compuestas en gran medida por ellas o por quienes están cercanos a ellas. Los grupos de interés tienen la tendencia a participar en política convencional al tratar de influir, de maneras convencionales, en la gente que se encuentra en ejercicio del poder estatal. En cambio, un movimiento social amplifica las voces colectivas de las protestas políticas y de las visiones morales desde la perspectiva de aquellos cuyas necesidades son ignoradas cuando usan los canales regulares de la política. Los movimientos sociales se caracterizan además por estar centrados en la política contenciosa practicada por actores cuya "composición originaria… tiende a no tener poder, no tener riqueza y no tener fama."[70] Los movimientos sociales aparecen cuando personas comunes unen fuerzas para confrontar a las élites, autoridades y otros opositores para cambiar el ejercicio y la

70 Michael McCann, Law and Social Movements, in THE BLACKWELL COMPANION To LAW AND SOCIETY 506, 5o9 (Austin Sarat ed., 2004).

distribución del poder. Los movimientos sociales "están animados por la aspiración radical de alcanzar visiones de una sociedad diferente y mejor."[71] Los movimientos sociales construyen solidaridades a través de "una serie de interacciones sostenidas entre quienes ejercitan el poder y aquellas personas que exitosamente reclaman ser los voceros de grupos de mandantes que carece de representación formal," así como a través de estructuras organizativas e identidades compartidas que sostiene la acción colectiva.[72] Los movimientos sociales tienden a participar en "tácticas disruptivas y simbólicas como protestas, marchas, huelgas u otras que detienen o interfieren en las prácticas sociales regulares."[73]

Estos movimientos suelen surgir como fuentes de poder local y autoridad moral. Estos grupos se constituyen como mandantes del cambio y comunidades alternativas de interpretación autoritativa[74] que combina recursos locales (redes, información, relaciones y símbolos culturales) para sustentar su participación en el proceso de creación normativa en una visión moral que fuerce a sus abogados y a la sociedad a lidiar con problemas de justicia sustantiva. Mientras crecen, los movimientos sociales utilizan con más habilidad la función de traducción del Derecho, al crear narrativas que tiendan un puente, como sugiere Robert Cover, entre la experiencia vital y una visión alternativa basada en un nuevo concepto de justicia.[75]

Los movimientos sociales pueden finalmente ser exitosos al cambiar la opinión pública.[76] O las minorías – a través de los movimientos sociales – pueden atraer más simpatizantes, influenciar a las mayorías políticas y así tener éxito en la política convencional mediante una desproporcionada y concentrada atención en ganar acceso a los órganos legislativos o al

71 Id. página 509.

72 Ver TILLY & TARROW, supra nota 15, página 4. Sidney Tarrow define los movimientos sociales como constituidos por cuatro elementos: (1) desafíos colectivos, basados en (2) propósitos comunes y (3) solidaridad social en (4) interacción sostenida con élites, oponentes y autoridades. Los movimientos sociales son "grupos que poseen una organización con un propósito, cuyos líderes identifican sus objetivos con las preferencias de una base no movilizada que intentan movilizar en acción directa en relación con un objetivo de influencia en el sistema político". Id.

73 McCann, supra nota 70, página 509.

74 NT: En el texto original se utiliza la frase *alternative authoritative interpretative communities*. El concepto se refiere a la construcción colectiva de significados del derecho a las que se busca dar autoridad mediante la participación del movimiento en la política contenciosa.

75 Robert M. Cover, The Supreme Court, 1982 Term-Foreword: Nomos and Narrative, 97 HARY. L. REv. 4, 19 (1983).

76 Ver Robert Post & Reva Siegel, Roe Rage: Democratic Constitutionalism and Backlash, 42 IARV. C.R.-C.L. L. REv. 373 (2007); Reva B. Siegel, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA, 94 CALIF. L. REV. 1323 (2006).

ejecutivo (por ejemplo, el movimiento de derechos de las mujeres liderando la aprobación de la Décimo Primera Enmienda a la Constitución de los Estados Unidos o el rol del movimiento Derecha Cristiana en la elección de George W. Bush como presidente del mismo país).[77] La demosprudencia es un intento de comprender como trabaja esta dinámica recursiva, los movimientos sociales influyen en la creación normas que luego dan forma a la agenda de los movimientos sociales. Sin embargo, es crucial reconocer que muchos de los movimientos sociales no alcanzan las victorias que buscan en sus propios términos o en términos convencionales.

Sin embargo, aun cuando fallen en sus metas, los movimientos sociales pueden crear una valiosa ventana al proceso de creación normativa al abrir el debate sobre conceptos de justicia sustantiva, no solo de debido proceso. Los movimientos sociales, de izquierda o de derecha, ayudan a narrar nuevos significados sociales, a menudo a través de su interacción y resistencia a, comprensiones más convencionales. En contraste, la reforma normativa dirigido por abogados está atada a precedentes judiciales y a la normativa vigente por lo que depende de comprensiones convencionales como punto de partida.[78] El litigo, por ejemplo, intenta reivindicar principios legales previamente establecidos en un caso concreto. La reforma legislativa, por otra parte, a menudo busca nuevos principios a través de la aprobación de una nueva ley. Sea a través del litigo o de la reforma legislativa, estos principios son frecuentemente capturados en el lenguaje de derechos para expresar el estado actual de los compromisos duraderos que asumimos unos con otros.[79] Sin embargo, la declaración de un nuevo derecho delimitado

77 Nuestra referencia al movimiento de sufragio femenino a fines del siglo XIX y principios del siglo XX como un movimiento de una "minoría" no ignora, por supuesto, el porcentaje numérico de mujeres; simplemente limita el movimiento a un subconjunto de mujeres y sus partidarios masculinos que trabajaban para obtener el derecho al voto para las mujeres.

78 Ver Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 843 (1992) (""La libertad no encuentra refugio en una jurisprudencia de duda. Sin embargo, 19 años después de nuestra afirmación de que la Constitución protege el derecho de una mujer a interrumpir su embarazo en sus primeras etapas, esa definición de libertad todavía se cuestiona"). (citing Roe v. Wade, 410 U.S. 113 (1973))); Jeremy Waldron, Stare Decisis and the Rule of Law: A Layered Approach, 111 MICH. L. REV. 1 (2012). Sin embargo, incluso esta obligación central está actualmente en disputa. Ver, e.g., Jeffrey Toobin, Clarence Thomas's Disgraceful Silence, NEW YORKER: DAILY COMMENT (Feb. 21, 2014), http://www.newyorker.com/online/blogs/comment/2014/02/clarence-thomas-disgraceful-silence.html; Editorial, Clarence Thomas's Brand of Judicial Logic, N.Y. TIMES, Oct. 22, 2011, http://www.nytimes.com/2011/10/23/opinion/sunday/clarence-thomass-brand-of-judicial-logic.html.

79 Por supuesto, esta es solo una definición de "derechos", pero es un intento de capturar el contenido social de los derechos en lugar de simplemente la experiencia individual de tener un "derecho". Estamos utilizando "derechos" como alguien que no es experto en derecho podría entenderlos. Por "contenido social", nos referimos a la comprensión compartida de lo que convencionalmente, por expertos legales, se podría describir como categorías hohfeldianas. Ver, e.g., Wesley Newcomb Hohfeld, Fundamental

por la legislación o por un precedente judicial no garantiza que este sea autoejecutable, ni que modifique la cultura.[80]

Por sí mismos, los derechos –aunque estén claramente establecidos- no ofrecen un camino para salir del pantano: ellos inspiran a la gente para defender su dignidad, pero no necesariamente se articulan con la creación de política pública que los hagan efectivos, ni con una visión de una mejor sociedad.[81] Para ser sostenible y persuasiva, una declaración de derechos necesita estar tan conectada a garantías judiciales, así como a la experiencia vital de aquellos para quienes dichos derechos fueron creados cambiando así las nociones sociales de rectitud y justicia, no solamente cambiando las normas que gobiernan su conducta o su estatus.

Entonces, tenemos dos objetivos interrelacionados al introducir el termino demosprudencia. Primero, enriquecer la literatura convencional sobre movimientos sociales al tomar en cuenta las formas en las que abogados, abogadas, jueces y juezas influyen y son influenciados por la forma y dirección que toman las movilizaciones populares. Mucha de la literatura sociológica, por ejemplo, explora a los movimientos sociales independientemente de su rol real en la creación normativa. Segundo, expandir el vocabulario de la creación normativa de manera que tome en cuenta el trabajo de los actores de los movimientos sociales. Las cortes y los órganos legislativos no son los únicos creadores de significados constitucionales y legales. El equilibrio dinámico del poder no circula únicamente entre los privilegiados, los técnicos sabios y las élites influyentes.

Los ciudadanos y ciudadanas no son solamente *fuentes* de interpretación constitucional; los mandantes movilizados son también un *recurso* para la protección de los derechos constitucionales y de las interpretaciones

Legal Conceptions as Applied in Judicial Reasoning, 23 YALE L.J. 16 (1916).

80 Para una definición de cambio cultural, consulta Stoddard, supra nota 21 (argumentando que el cambio cultural altera normas y compromisos ampliamente compartidos, mientras que el cambio de reglas, en cambio, modifica las reglas pero no necesariamente garantiza la aplicación o el respeto de esas reglas).

81 Id.; ver además, JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS (2007) (Describiendo el potencial derivado de la intersección entre trabajadores inmigrantes y la organización sindical, especialmente formas no tradicionales de organización); Jennifer Gordon, We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change, 30 HARv. C.R.-C.L. L. REV. 407, 407-10, 428-45 (1995).

constitucionales que los definen.[82] La demosprudencia examina la interdependencia entre creación normativa y movimientos sociales al repensar la forma en que los mandantes movilizados, a menudo a nivel local, desafían conceptos básicos de lo que comúnmente se ha considerado justo en nuestra democracia. En lugar de aceptar a jueces y juezas como autoridades preeminentes para interpretar y aplicar la Constitución, estos movimientos locales introducen frecuentemente nuevas fuentes de interpretación autoritativa que termina por cambiar las normas culturales de toda la sociedad.

Nosotros creemos que el activismo de los movimientos sociales es tan fuente de Derecho como lo son las leyes y las decisiones judiciales. Incluso aquellos abogados y abogadas activistas, cuyos fines son consistentes con los llamados más elevados de la práctica de la profesión y de nuestra democracia, tienden a pensar principalmente – si no exclusivamente – en términos de sus propias herramientas profesionales para la creación normativa. En cambio, nosotros buscamos crear un espacio analítico de la creación normativa como el trabajo de la ciudadanía movilizada junto a, no aparte de, los y las profesionales del Derecho.

Por ejemplo, en la primera concentración masiva en Montgomery, Alabama, luego de la acusación penal a Rosa Parks por reusar moverse a la parte posterior del bus, Martin Luther King, Jr. declaró: "Nosotros estamos aquí por nuestro amor a la democracia, por nuestra profunda convicción de que la democracia transformada del simple papel a la acción real es la mejor forma de gobierno que existe sobre la Tierra."[83] El mensaje de King fue que la democracia no está cautiva en un documento legal, es una práctica.

82 Ver, e.g., Elizabeth Beaumont, Reviving the Republican Face of Constitutional Rights: Abolition as a Constitutional Project io (2008) (unpublished manuscript), http://www.polisci.umn.edu/assets/pdf/Beaumont-PTColloqio-o8.pdf. Beaumont denomina a este proceso "tutela pública". Id. en la página 1. Según Beaumont, "Nosotros, el Pueblo", podemos y debemos participar en una crítica inmanente, que expone contradicciones, paradojas, fallas o hipocresía constitucional al señalar conflictos entre principios o prácticas constitucionales existentes; reimaginación creativa, que ofrece nuevas comprensiones de los derechos, principios y estructura constitucionales; y reinvención, reconstrucción o refundación, que intenta implementar, institucionalizar, ratificar o poner en marcha políticamente un nuevo marco de derechos y constitucionalismo. Id. en la página 8. Luego, Beaumont ofrece un estudio detenido de la abolición dentro de su contexto histórico como un ejemplo de "tutela pública". Sin embargo, la capacidad de cambio de las comunidades movilizadas no se limita a las acciones de ciudadanos legales, como demuestra el uso del término "ciudadanos no ciudadanos" por parte de Jennifer Gordon. GORDON, supra nota 81, página 237.

83 Martin Luther King, Jr., Address to First Montgomery Improvement Association (MIA) Mass Meeting (Dec. 5, 1955), http://mlk-kppoi.stanford.edu/kingweb/publications/speeches/MIA mass-meeting-página holt street.html.

Y es una práctica que está autorizada por la Constitución original de los Estados Unidos, por sus enmiendas posteriores y por la interpretación de ella realizada por la Corte Suprema de Justicia de 1954 en el caso *Brown v. Board of Education*.[84]

Pero King no solo se apoyó en el criterio de la Corte. Él acudió a una autoridad moral aún mayor, cuando agregó: "Si nosotros estamos equivocados, entonces Dios Todopoderoso está equivocado", así unió el lenguaje de principios religiosos al de principios legales articulados por la Corte Suprema en su decisión del caso Brown.[85] Esta fusión entre normas constitucionales y autoridad religiosa fue clave para convencer a las personas afrodescendientes de Montgomery en 1955 de que su rabia en contra de las normas Jim Crow[86] en el uso de asientos en los buses era justa y legítima. Esta forma de argumentar ayudó a persuadir a las personas afrodescendientes de que su dignidad cívica demandaba que inicien un boicot en contra de esos buses. Por medio de la acción real, ellos ayudarían a los Estados Unidos a darse cuenta de lo que significa tener verdadera fe en la democracia. Nueve años después, Fannie Lou Hamer unió su propia biografía a la de sus compañeros y compañeras del Partido Democrático por la Libertad de Mississippi cuando se dirigió al Partido Demócrata y a la audiencia de la televisión nacional para hablar sobre todas las golpizas que tuvo que soportar para ejercer su derecho fundamental al voto. Su narrativa era acerca de un coraje físico que fue posible únicamente gracias a la existencia de un compromiso colectivo. Para Hamer, acción real significó el rechazar el arreglo propuesto por la élite del Partido Demócrata que habría permitido a los miembros segregacionistas del Partido participar en la convención nacional del como representantes oficiales de Mississippi. Todo lo que se le ofrecía al MFDP fue la posibilidad de contar con dos representantes simbólicos sin derecho al voto. Para Hamer, ese no era, desde ningún punto de vista, un arreglo aceptable.

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84 Ver Gerald Torres & Lani Guinier, The Constitutional Imaginary: Just Stories About We the People, 71 MD. L. REV. 1052, 1064-66 (2012) (ofreciendo una crítica más extensa del originalismo en el marco de JACK BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011).

85 Ver supra note 84.

86 NT: *Jim Crow* es el sobrenombre que se utilizó para designar el régimen de segregación racial especialmente utilizado en los estados del sur de los Estados Unidos de América. Bajo este régimen de segregación racial se aprobaron normas de distintos grados que obligaban a que personas blancas y persona "de color" (principalmente afrodescendientes, pero en ciertos casos podría incluir personas asiáticas y latinas) a estar separadas en los espacios públicos como escuelas, oficinas estatales, restaurantes y los asientos de los buses.

Es esta parte de nuestro proyecto, establecemos tres puntos preliminares. Primero, examinamos los procesos, resultados e historias de representación colectiva como procesos democráticos ya que ese es uno de los lugares en donde la más alta creación normativa encuentra su legitimidad democrática. Segundo, investigamos las interacciones entre los repertorios de estos seres extraños a la política convencional que disputan el acceso al poder y aquellos que regulan dicho acceso, esto con el fin de comprender y apreciar las dinámicas que convierten a los movimientos sociales en un instrumento de creación normativa y una fuerza vital dentro de la democracia. Tercero, exploramos el rol de los y las activistas de los movimientos sociales en la transformación de las formas en que abogadas y abogados representan a sus clientes. Las historias del Partido Demócrata por la Libertad de Mississippi, del Boicot a los Buses de Montgomery y del Sindicato de Trabajadores Agrícolas en California ejemplifican estos puntos. Además, estas historias resaltan los procesos que el Profesor Ackerman detalla. Al enfocarse en las formas en que la Corte Suprema intervino y en los argumentos que construyó a favor de los activistas de los derechos civiles, el Profesor Ackerman ilustra el recursivo proceso necesario para generar cambios legales sustanciales y duraderos. Él ilustra también las formas en que dichos cambios, a menos que se solidifique mediante acciones sociales organizadas, se mantiene vulnerables a las fuerzas reaccionarias que buscan sostener el *status quo.*

I. Nomos y narrativa: todos nosotros está cansado.

"Nosotros no vinimos de tan lejos para ocupar dos asientos…todos nosotros está cansado."[87]

En agosto de 1964, el Partido Demócrata por la Libertad de Mississippi disputó el derecho del Partido Demócrata de Mississippi, integrado por blancos segregacionistas, a representar a Mississippi en la Convención Nacional Demócrata. El Partido Demócrata por la Libertad, una organización insurgente abierta a todos los habitantes de Mississippi, llegó a Atlantic City decidido a hacer un pronunciamiento público en contra de la segregación. Su delegación, que incluía a Fannie Lou Hamer, Victoria Jackson Gray y Annie Devine, estuvo compuesta por ministros religiosos, granjeros, aparceros,

87 "We didn't come all this way for no two seats . . . all of us is tired." Según se informa, así respondió Fannie Lou Hamer a la oferta del Comité Nacional Demócrata de dos asientos para el Partido Demócrata de la Libertad de Mississippi en la Convención Nacional Demócrata de 1964. Ver Lani Guinier, No Two Seats: The Elusive Quest for Political Equality, 77 VA. L. REv. 1414 (1991).

empleadas domésticas y gente desempleada. Los activistas representaban todo el espectro de la comunidad negra de Mississippi y demandaban ocupar asientos de delegados oficiales de Mississippi en la Convención.

El partido fue fundado en la primavera de 1964 después de varios intentos fallidos de asegurar la participación negra en las organizaciones locales del Partido Demócrata[88]y en medio de una violenta reacción conservadora en Mississippi debido a los avances nacionales de reconocimiento de los derechos a la población negra, tales como el Proyecto de Ley de los Derecho Civiles de 1963 (la cual fue aprobada como la Ley de los de Derecho Civiles en 1964). Para argumentar ante el Comité de Acreditación de la Convención Nacional Demócrata por qué crearon el MFDP, Hamer explicó:

> "Formamos nuestro propio partido porque los blancos no nos permitían siquiera registrarnos… Seguimos todas las leyes hechas por los blancos. Tratamos de entrar a los locales de las reuniones y ellos cerraron las puertas para nosotros o movían las reuniones, a pesar de que eso estaba en contra de las leyes que ellos crearon para si mismos. Así que nosotros fuimos los que acudíamos a los lugares en los que habían sido convocadas las reuniones. En todas esas reuniones alrededor de todo el Estado, elegimos nuestros representantes para acudir a la Convención Nacional Demócrata de Atlantic City. Pero aprendimos a la mala que, aunque teníamos todo el derecho y la justicia de nuestro lado, el hombre blanco no iba a renunciar a su poder a favor de nosotros."[89]

Previamente, el 6 de agosto de 1964, el MFDP mantuvo su reunión estatal en Jackson, en donde cerca de 2.500 personas abarrotaron el Templo Masónico. Joseph Rauh, un líder del ala liberal del Partido Demócrata y abogado del MFDP, le dijo a la multitud que, con el fin de obtener escaños en la Convención Nacional Demócrata, el MFDP debía primero presentar su caso al Comité de Acreditaciones argumentando que los negros habían sido excluidos del Partido Demócrata "regular" y que el MFDP era el único partido en el estado que era fiel a la organización nacional. Él le aseguró al público que las posibilidades de éxito eran excelentes. En la convención del 6 de agosto, los delegados eligieron a Lawrence Guyot como el presidente del

88 PAYNE, supra note 37, página 321.

89 FANNIE Lou HAMER, TO PRAISE OUR BRIDGES: AN AUTOBIOGRAPHY (1967), extracto en THE EYES ON THE PRIZE CIVIL RIGHTS READER: DOCUMENTS, SPEECHES, AND FIRSTHAND ACCOUNTS FROM THE BLACK FREEDOM STRUGGLE 176, 178-79 (Clayborne Carson et al. eds.,1991).

MFDP, Aaron Henry como cabeza de la delegación y a Fannie Lou Hamer como segunda responsable. Victoria Gray y Ed King fueron los delegados al Comité Nacional Demócrata.[90]

Hacia 1964, los negros de Mississippi habían probado su convicción al tratar una y otra vez de ejercer sus derechos democráticos como ciudadanos. En las primarias estatales de 1946, Vernando R. Collier, un veterano de la marina de 36 años y presidente de la oficina de Gulfport del NAACP, arribó al municipio de la ciudad a votar con su esposa. Fue noqueado, arrastrado por la entrada principal y arrojado fuera del edificio. Su esposa fue agredida físicamente mientras un policía presente en la escena se alejó como si nada hubiese pasado.[91] Cuando posterior a estos hechos, Collier solicitó protección federal del FBI para poder votar, el agente del FBI le respondió: "no es nuestro trabajo brindar protección, solo investigar."[92]

Mientras la década avanzaba, la resistencia blanca violenta al voto de los negros continuaba. Los senadores sureños, que dominaban el Comité Judicial del Senado de los Estados Unidos, utilizaron su poder para designar a jueces segregacionistas para las cortes federales.[93] Como resultado, los ciudadanos negros de Mississippi no podían confiar en los tribunales federales para proteger su derecho al voto. Sin embargo, para los negros votar no era solamente una cuestión de derechos y respeto. Era una cuestión de vida o muerte.

En 1961m Gerald Stern, un joven abogado judío de Memphis, Tennessee, se unió al Departamento de Justicia de la División de Derechos Civiles. Fue designado para investigar la disciimnación e intimidación a los votantes en Mississippi. Stern se abrió camino por las zonas vecinales de Mississippi, allí encontró a Moses McGee, un anciano hombre negro que araba sus campos con su arado colocado sobres sus hombros y ayudado por su mula. Sin una palabra de por medio, McGee se retiró el arado de sus hombros, se limpió en su establo y regresó dispuesto a hablar. McGee le

90 Id.
91 JOHN DITTMER, LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI 5 (1994)
92 Ver PATRICIA SULUVAN, LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT 318 (2009).
93 THE EYES ON THE PRIZE CIVIL RIGHTS READER, supra note 89, página 69.

explicó a Stern, "no está bien para nadie ser visto como un animal. Yo quiero ser visto como un ser humano."[94]

McGee quería que los negros obtuviesen su derecho a votar así que trató de obligar a los supervisores de los condados a pavimentar los caminos que llevaban a las casas de las personas negras, así como pavimentaban los caminos que llevaban a las casas de la gente blanca. Por ejemplo, cuando llovía, los caminos de tierras se volvían intransitables. Él recordaba una ocasión cuando un bebe negro que cayó enfermo murió porque ningún doctor pudo llegar a su casa por causa de los caminos en mal estado. Él llevó al niño en sus brazos durante millas sobre las colinas para llegar al pueblo. El bebé murió en sus brazos antes de llegar a su destino.[95]

McGee dijo que John Hardy había acompañado a Edith Simmons Peters y a Lucius Wilson, ambos ancianos y dueños de grandes granjas, a registrarse a votar.[96] "Cuando el registrador vio a Hardy, él… tomó una pistola de su escritorio y le ordenó que se retire." Cuando Hardy volteó para salir, el registrador "le golpeó en la nuca con la culata de su pistola, diciendo "Sal de aquí tu maldito hijo de perra y no vuelvas."[97] Hardy ensangrentado encontró al sheriff momentos después, cuando le contó lo que había pasado fue arrestado por "alterar la paz e incitar una revuelta en la población."[98]

La causa en contra de Hardy fue posteriormente archivada, pero cuando Stern pidió al Juez de la Corte Federal de Distrito Elijah Cox que ordene al Condado de Walthall que cese la discriminación en contra de los votantes negros, Cox rechazó la solicitud de Stern. De acuerdo con Cox, solo dos de las 2.490 personas negras en el condado estaban registradas para votar por que los negros "no habían tenido interés en registrarse para votar."[99]

El 30 de mayo de 1964, la policía local detuvo a Otha Williams, un empresario y granjero, y lo golpearon gravemente. Cuatro días después, la

94 Gerald M. Stern, Mississippi, in OUTSIDE THE LAw: NARRATIvES ON JUSTICE IN AMERICA 164 (Susan Richards Shreve & Porter Shreve eds., 1997).
95 Id. página 165
96 John Hardy era "un joven estudiante universitario negro de Nashville, Tennessee", que, "junto con otros estudiantes, estableció una escuela de registro de votantes" en el condado. Todas las noches durante tres semanas, enseñaron a los residentes del condado de Walthall "cómo llenar formularios de registro y explicar secciones de la Constitución de Mississippi... Hardy acompañó a los primeros cinco negros" en su intento de registrarse en un condado sin un solo votante negro registrado. "Fueron rechazados, al igual que los [siguientes] tres que lo intentaron". Id. en la página 164.
97 Id. página 165.
98 Id.
99 Id. página 166.

oficina del Consejo de Organizaciones Federadas de la ciudad de Jackson fue incendiada, el ventanal frontal estalló hiriendo a varios trabajadores que se encontraban dentro. La misma semana, dos hombres negros y una mujer negra fueron encontrados muertos dentro de un auto cerca de Woodville.[100]

Al igual que el resto de la población negra de Mississippi, muchos delegados del MFDP tuvieron que enfrentar muchas adversidades. Fannie Lou Hamer nació el 6 de octubre de 1917 el Condado de Montgomery, Mississippi, y luego se mudó al Condado Sunflower cuando tenía dos años de edad.[101] Ella fue la última de veinte hermanos nacidos para ser aparceros.[102] En 1962, Hamer trabajaba en la Plantación Marlowe a las afueras de Ruleville en donde ella y su esposo habían trabajado por dieciocho años; ella trabajaba labrando al principio para luego convertirse en la supervisora de la plantación.[103] Ella tenía la reputación, según sus propias palabras, de no tener buen juicio -lo que significaba, tener las agallas de protestar sobre las condiciones inhumanas de forma imprudente.[104]

De acuerdo con Hamer, su activismo empezó cuando su pastor anunció una reunión masiva para discutir el registro para votar y una amiga la convenció de ir.[105] Fue la primera vez que ella supo que un "Negro"[106] podía registrarse para votar. Se ofreció como voluntaria para ir el día siguiente a la corte de justicia. Ella reflexionaba de manera retrospectiva que quizá debió sentir miedo de ir pero "la única cosa que podían hacer era matarme y me parecía que eso es lo que ellos venían haciendo de a poco desde que tengo memoria."[107]

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100 DITTMER, supra note 91, en la página 237. Bob Moses, Aaron Henry y David Dennis escribieron al Presidente Johnson, solicitando una reunión el 18 o 19 de junio para "discutir los preparativos para el verano". El primer grupo de voluntarios de verano también escribió una apasionada súplica al Presidente el 17 de junio, pidiendo "mientras partimos hacia ese estado problemático, escuchar su voz en apoyo de los principios a los cuales los estadounidenses se han dedicado y sacrificado desde los inicios de nuestro país". El Presidente Johnson no respondió. Id. en la página 239.

101 THE EYES ON THE PRIZE CIVIL RIGHTS READER, supra note 89, página 82.

102 DITTMER, supra note 91, página 137.

103 Id.

104 PAYNE, supra note 37, página 154.

105 Id.

106 NT: Palabra usada en el texto original. En Estados Unidos las palabras "negro" y su variación coloquial "nigger" son consideradas formas peyorativas para referirse a las personas Afrodescendientes. "Black", que en este texto se traduce como *negro*, en cambio es una forma aceptable, la forma más política de referirse a este grupo étnico es Afrodescendiente. Sin embargo, el término Afrodescendiente tampoco es universalmente aceptado, varios grupos en Latinoamérica y Norteamérica reivindican el uso del término "negro" o "black", respectivamente, ya que consideran que el termino Afrodescendiente es un eufemismo.

107 THE EYES ON THE PRIZE CIVIL RIGHTS READER, supra note 89, página 83.

Su intento de registrarse no fue exitoso y para cuando ella volvió a la plantación, un enfurecido Marlowe le exigió que retire su solicitud o que se vaya de la plantación. Hamer le respondió "no quiero registrarme por usted. Trato de registrarme por mi" y dejo la plantación esa misma noche.[108] Diez días después, merodeadores nocturnos abrieron fuego en contra del hogar de Mary Tucker en Ruleville, en donde Hamer estaba viviendo temporalmente. El invierno fue muy duro para los Hamer. Ninguno tenía trabajo, pero de alguna manera lograron sobrevivir y Hamer se involucró aún más en el movimiento, dictando clases de cívica para la Conferencia de Líderes Cristianos del Sur (SCLC por sus siglas en inglés).[109]

La valentía de Hamer era extraordinaria. Ella era además una oradora carismática. En 1967, Robert Jackall, entonces un joven profesor de sociología de la Universidad de Georgetown, pasó parte de la primavera y el verano trabajando en el Condado Sunflower. En un ensayo publicado años después, él declaró que había visto autento carisma una vez en su vida, cuando en una poco entusiasta reunión masiva, Hamer tomó la palabra:

> "Inmediatamente, una atmósfera eléctrica bañó la iglesia entera. Hombres y mujeres por igual empezar a ponerse de pie para corear su nombre y para pedirle que continúe… Ella empezó a hablar de la maldad moral del racismo en si mismo, y del profundo daño que le estaba haciendo a las almas de la gente blanca de Mississippi… Ella no lo hizo como una acusación, sino con una especie deseo de sanación y reconciliación… Ella terminó dirigiendo a la reunión en los coros del himno… "This Little Light of Mine." Cuando terminó, la asamblea en pleno estaba profundamente impactada a nivel emocional. La gente se apiñaba a su alrededor para prometerle que se unirían a su lucha."[110]

Y Hamer haría que se mantengan firmes a dicho compromiso luego de la reunión.[111]

A finales de agosto de 1964, el carisma de Hamer le dio notoriedad pública a su testimonio presentado ante el Comité de Acreditación de la

108 Fannie Lou Hamer, Testimony Before the Credentials Committee, Democratic National Convention (Aug. 22, 1964), in SAY IT PLAIN: A CENTURY OF GREAT AFRICAN AMERICAN SPEECHES 49, 51 (Catherine Ellis & Stephen Drury Smith eds., 2007) [hereinafter Hamer Testimony].
109 PAYNE, supra note 37, página 155.
110 Id. página 241-42.
111 THE EYES ON THE PRIZE CIVIL RIGHTs READER, supra note 67, página 78.

Convención Nacional Demócrata. Describió con gran detalle una de las golpizas que sufrió tratando de registrarse para votar. En junio de 1963, en Winona, Mississippi, Hamer y otras personas estaban camino de regreso de la escuela de cívica de la SCLC en Charleston, Carolina del Sur. El grupo fue detenido y arrestado. Hamer, que se encontraba con sus compañeros en una celda, fue sacada de ahí y llevada a otra celda en donde se encontraban dos prisioneros negros:

"El patrullero estatal de tránsito ordenó al primer negro que tomara el garrote de policía.

El primer prisionero negro me ordenó… que me acueste boca abajo en un catre.

Me acosté boca abajo y el primer negro empezó a golpearme. Fui golpeada por el primer negro hasta que estuvo exhausto. Tenía las manos en mi espalda tratando de proteger mi lado izquierdo, ya que sufrí de polio cuando tenía seis años.

Luego de que el primer negro me golpeó hasta quedar exhausto, el patrullero estatal de tránsito ordenó al segundo negro que tome el garrote de policía.

Entonces, el segundo negro empezó a golpearme y yo empecé a ahitar mis piernas, así que el patrullero le ordenó al primer negro que se sentara sobre mis pies. Empecé entonces a gritar y un hombre blanco se puso de pie y empezó a golpearme en la cara y a decirme que me calle."[112]

En sus propias palabras, "cuando al fin me soltaron, estaba tan dura como un hueso."[113]

El testimonio frontal de estos hechos, contados de forma cruda por una aparcera le dio a la lucha del MFDP un sentido de urgencia moral. Hamer estuvo, en palabras de Robert Jackall, "libre de toda pretención" con una "convicción inamovible en lo justa que era su causa, probada por los sufrimientos físicos que había sufrido y por el riesgo que aún le rondaba." Ella habría aprendido a "articular sus ideas con una poderosa retórica religiosa que tenía gran impacto en sus audiencias y sin rastro de malicia

112 Hamer Testimony, supra note 108, página 53
113 DITTMER, supra note 91, página 72

o hipocresía."[114] Hamer tenía una presencia pública tan impactante que Lyndon Johnson "una vez convocó a una rueda de prensa solamente para detener la cobertura que los medios le estaban dando a ella."[115]

Hamer cautivó a la audiencia nacional de la televisión que miraba laConvención Nacional Demócrata de 1964 con su descripción simple pero impactante de la lucha por el registro de votantes. Sin embargo, el sacrificio físico de Hamer y su hechizante actuación no fueron suficiente para convencer a Lyndon Johnson, el candidato presidencial del Partido Demócrata, ni a Hubert Humphey, su eventual candidato de vicepresidente, a enfrentarse a los segregacionistas del estado en su conflicto con los MFDP. En lugar de eso, los líderes nacionales del partido Demócrata propusieron un arreglo: el partido adoptará la demanda de prohibición de la segregación en futuras convenciones, pero no en esta. El MFDP tendría que conformarse con dos escaños de delegados.

Hamer y los otros delegados del MFDP rechazaron el arreglo. Como lo explicó Bob Moses, "¿Qué es este arreglo? Nosotros estamos aquí por la gente, y la gente quiere tener su propia representación. Ellos no quieren unos pocos votos como gesto simbólico. Ellos quieren votar por sí mismos."[116] Al final, el Partido Demócrata por la Libertad de Montgomery reusó ser aplacado: Hamer dijo con simpleza, pero con determinación, "Nosotros no vinimos de tan lejos para ocupar dos asientos, ya que todos nosotros está cansado."[117]

El discurso de Fannie Lou Hamer en la convención demócrata fue un teatro político al servicio de un profundo desafío a como los partidos local y nacional entienden la democracia. De acuerdo a Bob Moses, "el objetivo primordial del MFDP es enseñar al más humilde aparcero que él conoce exactamente lo que se requiere para vivir una vida decente por sí mismo, y que lo hace mejor que los candidatos a las más altas magistraturas."[118] La composición de la delegación del MFDP, donde los votantes eran los líderes, resultó emblemática para mostrar los cambios que se necesitaban para hacer

114 PAYNE, supra note 37, en la página 242. Jackall quedó muy impresionado por la "visión ennoblecedora de armonía racial y de redención personal para aquellos que la buscan" de Hamer. Id.
115 Id. página 258
116 DITTMER, supra note 91, página 299.
117 Jack Hitt, Party Crasher, N.Y. TIMES MAG., Dec. 31, 2006, http://www.nytimes.com/2oo6/12 /31/ magazine/3igray.t.html.
118 Polletta, supra nota 37, página 395.

a Mississippi, y a todo el sur, más democrático. Al llevar la pelea al Partido Demócrata, ellos anunciaron que este era un desafío a la nación como un todo y no sólo un debate aislado.

Hamer le habló a la nación en nombre de un grupo de ciudadanos y ciudadanas [contituency] organizados y movilizados que re-imaginaban la estructura de la representación democrática. El MFDP no viajó desde Mississippi solo para jugar a la política tradicional. El MFDP vino a Atlantic City a enfrentar a la manera en que la representación era entendida. Ellos no fueron allí solamente para encontrar un asiento sino para disputar la legitimidad en la que esos asientos descansan. Hamer y los demás miembros de la delegación del MFDP presentaron un mensaje claro: su rol en la vida democrática debía ser tomada en serio. Para el MFDP, esta era una lucha no sólo política, sino moral, como lo explicó la delegada Unita Blackwell:

"El asunto del arreglo fue para nosotros, y para mí, una especie de maniobra política que ellos creían razonable. Pero para nosotros, para Mississippi, era fue una cuestión clara entre lo que estaba bien y lo que estaba mal. Y lo que estaban haciendo estaba mal: nos habían arrebatado nuestros derechos, ante lo cual ustedes no pueden proponer una solución de dos escaños para corregir eso. Había una cuestión moral a ser corregida. Así que no había solamente una cuestión política que arreglar, algo que hubiésemos podido sentarnos en esos salones a negociar. Usted sabe, ellos saben sobre esas cosas, pero nosotros no sabíamos. Como habríamos podido sentarnos es esos cuartos y negociar, y decir "tú sabes, vamos a sacar lo mejor de todo esto, tomaremos un pedazo de aquello". Nosotros íbamos detrás de lo estaba bien, y de lo que estaba mal, de la forma en que habíamos sido tratados por cientos y cientos de años: negarnos el derecho de registrarnos para votar, negarnos el derecho a participar en el proceso político, y eso es lo que estaba en juego."[119]

"Nosotros no estamos aquí para introducir política a nuestra moralidad, sino para traer moralidad a nuestra política,"[120] es lo que Moses dijo a los delegados informándoles que tendrían que tomar una decisión respecto al "arreglo" propuesto por el Comité Nacional Demócrata. Bob Moses,

119 Eyes on the Prize: America's Civil Rights Movement 1954-1985: Mississippi: Is this America? (1962-1964), PBS (Aug. 23, 2o6), http://www.pbs.org/wgbh/amex/eyesontheprize/about/pt_105.html.

120 TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARs 1963-65, página 474 (1998).

Aaron Henry y Ed King habían sostenido en una reunión con Herbert Humphrey, Walter Reuther, Bayard Rustin, Martin Luther King, Jr., y otros representantes del SCLC y de la oficina del Presidente Johnson para resolver el asunto del anunciado arreglo. Moses, Henry y Ed King no aceptaron la oferta, sosteniendo que era una decisión que debía tomar toda la delegación. Más tarde, cuando la delegación se reunió para revisar el tema del arreglo, Moses les recordó a los delegados que ellos eran quienes debían decidir qué hacer.[121]

Para Joe Rauh, abogado del MFDP, la cuestión era diferente. Él sabía las reglas del juego político. Él llegó a la Convención Nacional Demócrata como alguien que era parte del sistema. Él ostentaba uno de sus 110 escaños como delegado del Distrito de Columbia y "enfrentada al Comité de Acreditación como uno de sus pares, no generaba rechazo."[122] En la convención del MFDP, el 6 de agosto de 1964, Rauh había asegurado que "las posibilidades de éxito eran excelentes."[123] Sus alegatos escritos revelaban su inclinación por una salida pragmática basada en su conocimiento sobre cómo funcionaban las cosas. Él citó "26 casos de impugnaciones de acreditaciones" resueltas desde 1836, todas ellas resueltas dividiendo el premio. En particular, citó el caso de Texas de 1944 en donde una disputa entre los partidarios del New Deal y miembros regulares del partido de Texas resultó en que ambos grupos se dividieron los escaños a la mitad.[124]

Sus clientes del MFDP le habían encargado que regatee hasta conseguir nada menos que lo que otros impugnantes habían conseguido: compartir los escaños con los miembros regulares del partido. Sin embargo, Rauh expresó entusiasmo por el arreglo de dos escaños enfocándose en la practicidad dentro de la negociación y el regateo en lugar de la justicia, la ley y los derechos de participación de los negros de Mississippi. En una entrevista realizada en la Convención, minutos antes del anuncio del acuerdo, un presuntuoso Rauh declaraba:

"Nosotros hemos conseguido una oferta para nuestra gente, hemos conseguido un gran acuerdo de estas negociaciones. Creo que llamar esto una derrota es una equivocación… una gran equivocación. Creo que hemos

121 Id.
122 Id. página 458.
123 DITTMER, supra note 91, página 281.
124 BRANCH, supra note 120, página 462.

conseguido una excelente victoria. Siempre se habla de que "no habrá acuerdo" dentro de una Convención, hasta que sacas lo mejor que puedas de la negociación y entonces renuncias a esa posición."[125]

Cuando le preguntaron si los líderes del MFDP estaban satisfechos, Rauh respondió: "No lo creo y no los culpo. Nadie consigue siempre lo que quiere. Los líderes de los oficiales de los miembros blancos regulares del Partido Demócrata tampoco están satisfechos. Ellos van a regresar a Jackson."[126]

Joseph Rauh, el abogado blanco, muy bien relacionado, liberal y establecido en Washington D.C., jugó un papel decisivo en los entretelones de la negociación. Rauh entendió la necesidad de sensibilizar a los líderes nacionales, que estaban entonces desconectados con el movimiento de base, por lo que asumió que los acuerdos que estaba negociando serían vistos como razonables para ambas partes. Si los delegados del MFDP hubiesen tenido mayor participación en orquestar los términos del arreglo, desde el punto de vista de Rauh, habrían sido anulados. Rauh y los de su clase estaban preocupados en el poder estatal, pero fallaron al no darse cuenta que el desafío del MFDP al poder del estado provenía de fuera de los precintos de la política común.[127]

Rauh tenía varios "amos". Él les debía gratitud a los sindicatos nacionales, por mantener su acceso a las élites que toman decisiones, y él quería también, sinceramente, ayudar a los negros de Mississippi. A diferencia de Bob Moses, quién también era un forastero en la arena política, Rauh nunca se integró a la comunidad. Pero lo más importante, y a pesar de su auténtico compromiso con la causa del MFDP, Rauh entendió mal el poder del MFDP el cual trató de canalizar a través de los medios convencionales de negociación. El poder del MFDP venía de la evidente justicia de su reclamo de que la delegación de Mississippi era obviamente ilegítima. Su posición no era sobre reconciliar dos partes razonables en una contienda política. Ellos veían la situación dividida en el lado correcto y el lado equivocado. El significado de participación democrática implicaba sentarse como el partido

125 Eyes on the Prize: America's Civil Rights Years: Episode 5 (PBS television broadcast 1987).

126 Id.

127 Rauh y King pudieron sentarse con el probable candidato a la vicepresidencia. Rauh caracterizó de manera vulgar las acciones del personal de Humphrey, pero parecía creer que la única dificultad con el compromiso era que el DNC, en lugar del MFDP, eligió prematuramente a los dos delegados en general. Ver BRANCH, supra note 120, en la página 470.

legítimo, el único partido que ofrecía representar a todos. El reto no era conseguir el mejor trato, el reto era no abandonar sus valores fundamentales.

A diferencia de Joseph Rauh, el estilo de liderazgo de Bob Moses reflejó que entendió que su autoridad prevenía de su gente, por lo que se reusó a imponerle lo que él pensaba que era lo mejor para ellos. Rauh alegaría, posteriormente, que fue marginado de la discusión en la que el arreglo fue forjado. Sin embargo, los activistas de los derechos civiles se sintieron traicionados por su abogado. Desde su punto de vista, todo fue parte de una puesta en escena. Un acuerdo había sido fraguado mientras moría la noche. Sin embargo, Rauh le dijo a sus clientes que nada nuevo había ocurrido y fue a la reunión del Comité de Acreditaciones sabiendo que el acuerdo había sido sellado.[128] Sea cual sea la verdad, Rauh estuvo dispuesto a realizar ese acuerdo. Rauh, quien fue procurador del Sindicato de Trabajadores de la industria Automotriz (UAW por sus siglas en inglés), le dijo a Walter Reuther, presidente del UAW, que el acuerdo fue una "gran propuesta", pero que él no habría podido votar por ella, ni habría podido mostrar su apoyo a la misma ante los líderes del partido, sin la aprobación y apoyo de Aaron Henry y el MFDP. Si Henry daba su consentimiento, Rauh podría ratificar el acuerdo ante el Comité de Acreditación. El problema fue que mientras Rauh creía en la legitimidad de Henry, los términos del acuerdo no tenían el consenso de toda la delegación del MFDP.[129]

El acuerdo fue anunciado mientras Moses aún estaba reunido como Humphrey, Reuther y los demás. Moses al enterarse le gritó a Humphrey y Reuther, "¡nos engañaron!"[130] Rauh fue más generoso con su amigo Humphrey, "los tontos bastardos de tu lado, y estoy seguro que no fuiste tú Hubert, escogieron nuestros dos delegados en lugar de dejarnos escoger nuestros propios dos delegados."[131] Luego Rauh trató de convencer a la delegación del MFDP de aceptar el compromiso al decirles que, desde su punto de vista, dos escaños eran una victoria.[132] Dado que tuvo que marchar obedientemente al podio de la convención para devolver las credenciales si usar que se habían emitido para Aaron Henry y Ed King, él derramó lágrimas de arrepentimiento. Él estaba perturbado, no tanto por haber

128 DITTMER, supra note 91, página 294-95.
129 Id. página 296.
130 BRANCH, supra note 120, página 470.
131 Id. página 473.
132 DITTMER, supra note 91, página 300.

fallado en el objetivo de representar a sus clientes, sino porque perdió la confianza de Moses, lo cual lo perseguiría por años.[133]

Lo que Rauh no entendió es que Hamer y Moses tenían una visión de democracia que no empieza ni termina en la política o en con "establecer un punto." Además, la MFDP hizo algo más que representar una visión más amplia y más participativa de democracia. Al ser una aparcera sin educación, aunque elocuente, la sola presencia de Hamer -transmitida por televisión nacional- puso además en riesgo las ideas convencionales de liderazgo. Hamer y el resto de la delegación del MFDP buscaron expandir el potencial democrático en Mississippi y en Atlantic City al decir que el derecho a participar le pertenece a todos, sin importar si eran blancos o negros, no solo a las personas que eran consideradas parte de las elites. Asegurar apenas el derecho al voto, o ganar acceso a dos escaños en la convención, no era igual que "libertad." "Al representar a los residentes más pobres de Mississipi, gente sin las condiciones que se requieren para alcanzar el estatus de clase media, el MFDP repudió los criterios tradicionales de liderazgo."[134]

Esta pelea no fue sobre derechos abstractos de personas invisibles. El derecho al voto era una precondición para la movilización, no su fin. El objetivo fue organizar y desarrollar el poder de los grupos locales para cambiar sus propias circunstancias. Como lo explicó el activista Lawrence Guyot, el derecho al voto nos garantizaba el derecho para empezar a pelear "en la manera en que queríamos pelear."[135] Y la manera en que ellos querían pelear involucraba a gente comúnhablando por sí misma.

Por el contrario, Roy Wilkins y Lyndon Johnson querían a Fannie Lou Hamer de vuelta en Mississippi o al menos lejos del centro de atención. De la misma manera, unos cuantos ministros negros del SCLC habían acordado con las organizaciones de derecho civiles más prominentes que las vocerías del movimiento estarían reservadas para aquellas personas que causasen mayor simpatía a los blancos del norte y a los aliados liberales. Bajo una mirada mediática, los negros analfabetos podrían minar la capacidad de los negros "calificados" de alcanzar los derechos que se merecían. Esto era preocupante en especial para aquellos que querían usar el movimiento como un pasaporte personal hacia la respetabilidad y, por tanto, como una

133 BRANCH, supra note 120, página 472, 613.
134 Polletta, supra nota 37, página 395.
135 Id. página 392.

oportunidad personal para el éxito personal.[136] La disputa seccional histórica y la alineación política del Partido Demócrata que le daban su influencia en el sur se estaba renegociando dentro y fuera de la Convención, entre bastidores y retransmitido por la televisión nacional. Mientras los peces gordos discutían, la fuerza moral del MFDP, quienes habían hecho, en primer lugar, el asunto de las acreditaciones un tema de interés nacional, se perdieron.

El pensamiento dominante de la élite reveló una tensión en las formas en que las élites más afines "representaban" a quienes no pertenecen a las élites cuando se pasa del discurso a la acción. Por ejemplo, Martin Luther King Jr. cabildeó a favor del acuerdo y en contra de él al mismo tiempo. Cuando King sopesó en privado la propuesta de dos escaños ofrecida por el Partido Nacional Demócrata, él observó expresamente elvalor multidimensional que dicho acuerdo ofrecía. Hablando con Fannie Lou Hamer, Victoria Jackson Gray, Annie Devine y los otros delegados del MFDP sobre el acuerdo, King reconoció las condiciones de opresión que enfrentaban las personas negras de Mississippi. Él también admitió la carga que sentía como figura nacional cuya influencia dependía, en gran medida, de su habilidad para mantener y movilizar la buena voluntad de otros líderes nacionales. Sin embargo, porque entendía que su reputación dependía también de mantener la confianza de la gente negra local de Mississippi, al tratar de balancear las presiones en colisión, King se equivocó. "Siendo un líder negro, quiero aceptar el acuerdo, pero si fuese un negro de Mississippi votaría en contra de él."[137] Con esa sola oración, King fue el espejo del MFDP, su delegado y su delegatario. King fue la figura que representaba a los miembros del MFDP, ya que lucía como ellos, compartían mucho de su origen histórico y estaba familiarizado con su experiencia; podía servir como su delegado actuando como un agente de los deseos del MFDP; sin embargo era también un apoderado que podía actuar de acuerdo a su propia conciencia en nombre del MFDP.[138]

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136 Andrew Young capturó la orientación de la clase media del movimiento: La principal batalla en las décadas de 1950 y 1960 fue corregir las injusticias contra una población que ya estaba calificada y era de clase media, pero aún se le negaba el derecho básico a los lugares públicos en América. Nos propusimos derribar las barreras raciales para aquellos que estaban excepcionalmente bien calificados, y tuvimos éxito. Andrew Young, Prólogo para-GARY ORFIELD & CAROLE ASHKINAZE, THE CLOSING DOOR: CONSERVATIVE POLICY AND BLACK OPPORTUNITY, página ix (1991).

137 BRANCH, supra note 120, página 473.

138 Ver A. Michael Froomkin, Climbing the Most Dangerous Branch: Legisprudence and the New Legal Process, 66 TEX. L. REV. 1071, 1073-74 (1988) (book review) (citando la adaptación de Eskridge y Frickey de las tres metáforas de la teoría representacional de Hanna Pitkin).

Contrastando la equivocada postura de King, estaba la claridad y el coraje de Fannie Lou Hamer y Bob Moses que denunciaron la falta de liderazgo de la cúpula del Partido Demócrata, incluido Lyndon Johnson y Hubert Humphrey. Hamer y Moses personificaban un concepto implícito de la representación que era contrario al modelo que le ofrecían a la MFDP. Era también extraño a la contradicción en la King alegaba estar atrapado.

La claridad de Hamer y Moses hizo que emerjer el dilema de Martin Luther King Jr. sobre con cuál de las tres facetas de la representación debía comprometerse: el espejo, el delegado o el apoderado. Estas facetas tradicionales representan las formas más importantes en que los líderes representan a sus seguidores, los políticos representan a sus electores y los abogados representan a sus clientes. Hamer y los demás rehusaron cooperar con el rol tradicional asignado a ellos. Hamer no era simplemente la delegada a los dominios de King, lo que le hizo sentir que tenía dos fuentes de autoridad: la comunidad movilizada de Mississipppi y su acceso para hablarle al oído al Presidente. Esta tensión era intoxicante y confusa a la vez y lo llevó a tratar de conservar ambas fuentes de poder. Al tratar de servir a dos amos, King buscaba preservar su propio estatus como portador de un poder personal. Por el contrario, Hamer tenía claro de dónde venía su poder y autoridad. Ella hablaba por, para y con cada negro de Mississippi que se tomó la promesa de la democracia en serio.

Hamer y King tenían, además, objetivos diferentes para su poder Ella no estaba interesada en dos escaños y con su resistencia transformó las promesas del delicado papel en acciones fuertes. Aunque reconocía la importancia del magnetismo personal de King y su acceso a las élites, la posición de Hamer les demostró a los líderes nacionales que sus bases tratarían de hacerles responsables y comprometidos con una visión más grande de justicia. La posición de Hamer fue a la vez una exhortación y una crítica implícita a la concepción que tenía King de la representación y el liderazgo. El rol que jugó Hamer fue un ejemplo de la capacidad que tiene los ciudadanos movilizados para cambiar las reglas del juego y hacer responsables de sus actos a aquellos que reclaman colocarse el manto de líderes. La prueba no era si King y los otros líderes lograban que la élite del Partido Demócrata (el Presidente, el Vicepresidente, sus abogados, entre otros) cedieran algo de poder temporal era, por el contrario sugerir nuevas razones por las cuales a las élites les

era permitido mantener ese poder en nombre de quienes habían sufrido defendiendo la democracia y quien, al resistirse a la supremacía blanca, ponía el principio de igualdad ante la ley en vigencia.

Hamer nos recuerda que la visión de King de la representación habitaba en un territorio peligroso en la medida de que descansaba en un estatus a ser defendido más que en una relación dinámica definida por su rendición de cuentas, responsabilidad y legitimidad mediante un manejo distributivo del poder. Cuando es definido como estatus, la representación descoloca el poder ya que la representación deja de estar basada en la autoridad de la ciudadanía organizada para poner en vigencia, definir y defender los cambios sociales. Al caracterizar esto como una forma equivocada de llevar adelante la representación, queremos decir que la relación entre representantes y representados no refleja un equilibrio dinámico de poder que los ciudadanos organizados aportan a dicha conexión. Al invitar a nuevas formas de información, energía y vigilancia (y exigibilidad) del proceso normativo, estos ciudadanos elevan la calidad de la democracia.

Al yuxtaponer la ambivalencia de King con la determinación de Hammer y Mosses, podemos ver como los actores de los movimientos sociales pueden presentar narrativas opuestas sobre la democracia que redefinen la idea de participación, el significado de la representación y las fuentes de autoridad democrática. Hamer y los otros delegados del MFDP cambiaron la idea de participación que pasa de ser la obligación de obedecer a ser la obligación de pronunciarse. Ellos ya no estaban contentos con seguir siendo objetos pasivos para el poder, ellos se convirtieron en sujetos activos de autoridad legitimada. Hamer además personificaba un significado diferente de la representación. A diferencia de la confusión fundamental de King sobre la otra fuente de su poder a la que él estaría obligado, Hamer rechazó la oferta de representación cuando fue presentada como un soborno de acceso individual disfrazado de poder. La concepción de Hamer de la representación le ataba a la comunidad, que era una reserva de poder, pero no de su poder, sino del poder de la comunidad misma. Ella entendía que su poder venía de la lucha de los activistas de Mississippi y no de las salas de junta de Washington ni de cualquier otro pulido corredor del poder de los cuales esos activistas habían sido, seguramente, excluidos.

Como un grupo dinámico de ciudadanos, el MFDP estaba contando diferentes historias: una meta historia, una micro historia y una historia trascendente. meta historia es aquella que presenta un concepto de justicia e invita a a las historias individuales a unirse en una historia mayor, da sentido a las historias individuales gracias a la identificación La micro historia, por el contrario, permite a los individuos contar "su propia" historia. Compartir estas micro historias construye confianza y garantiza motivación para la acción, así como voluntad de asumir un papel en el proceso. El marco de la historia trascendente es aquella quele da a la gente ordinaria, así como a simpatizantes, aunque no militantes, de los movimientos sociales, un marco conceptual que puede convertirse en parte del entendimiento vernáculo de la justicia. Por ejemplo "todos nosotros estamos cansados"[139] Como un grupo de ciudadanos movilizados, el MFDP desafió la idea misma de la representación política al hacer preguntas fundamentales sobre quien puede hablar en nombre de quien.

Sin embargo, el MFDP no estaba simplemente contando una historia de representación y responsabilidad política. La historia de sus miembros juega un papel fundamental para entender el origen de los "éxitos" de los movimientos. Ellos ilustran el rol vital que jugó el MFDP como una comunidad interpretativa alternativa que ayudo a generar virajes y cambios en el Derecho. EL MFDP –aquí personificado en Fannie Lou Hammer y en las acciones de sus compañeros- ayudaó a crear una obligación, no solamente nuevos incentivos, para quienes ostentaban el poder formal, de cambiar las reglas. Es verdad que sus posiciones no lograron un cambio total de las reglas de la convención de 1961, pero, como resultado de su desafío a la justificación misma de la legitimidad del ejercicio del poder, las reglas formales del Partido Demócrata finalmente cambiaron ya que excluían un gran número de personas de la base del Partido.

El MFDP, como una comunidad interpretativa alternativa y como un grupo de ciudadanos que exigía rendición de cuentas a sus representantes, también generó presión externa a las técnicas disciplinarias normales de acceso a la representación política. La posición del MFDP generó el análisis que sustentó la organización en Selma y en otros frentes finalmente empujaron a King y a Johnson a asumir mayor liderazgo en la aprobación

139 La imagen de Rosa Parks negándose a ceder su asiento es otro ejemplo de un marco resonante. Ver infra Parte II.

de la Ley del Derecho al Voto de 1965.[140] Aunque la organización de Selma, en particular, fue central para este proceso, el desafío público del MFDP no puede ser subestimado como un hecho determinante para que las relaciones de poder entre los gobiernos federales y estatales se modifiquen con el fin de supervisar el cumplimento de las leyes electorales en el Sur. La protesta del MFDP en la Convención Nacional Demócrata empujó dos temas al centro del debate: (1) si conseguirían un rol en el partido nacional que decía defender sus intereses; y, (2) si es que alguna vez les permitían realmente votar como ciudadanos de plenos derechos. El Presidente y su partido debían responder las dos preguntas. Una de las preguntas podía ser eludida con un trato interno arreglado por las personas que "sabían cómo negociar en política", pero la otra pregunta solo podía ser repondida a con un compromiso de cambiar la forma en que estaba construido el proceso electoral en el Sur. Fue por esta presión y por el asombroso coraje de la dirigencia de Mississippi, entre otros lugares, especialmente Alabama, la que movilizó a los activistas a exigir acciones, y el Presidente no podía responder esta demanda ofreciendo un simple compromiso personal o un trato tras bastidores. Las marchas en Selma y la sangre derramada en el puente Edmund Pettus fluyeron juntas con la sangre de Jimmie Lee Jackson y pusieron al Presidente en una posición que no podía salvar.[141] Cuando el Presidente le dijo a King que era "muy pronto" para una Ley de Derecho al Voto, él no anticipó la tenacidad de aquellos que exigían justicia ni la escalada de violencia que generarían aquellos que querían negarla. Él debió haber movilizado su prominente poder político para incitar al Congreso a que realice los cambios que él y la gente demandaban.

Fannie Lou Hamer y sus compañeros del MFDP ejemplifican una importante fuente alternativa de poder de creación normativa que no está enteramente controlada por las elecciones, órganos legislativos, el ejecutivo o las cortes.[142] Basta con comparar la combinación de pragmatismo y altivez

140 Por supuesto, la Ley de Derechos de Votación tiene que entenderse, hasta cierto punto, como un intento por parte de quienes tienen el poder de legitimar su continuo ejercicio de poder.

141 Jimmie Lee Jackson fue disparado el 18 de febrero de 1964, mientras protegía a su madre durante una vigilia nocturna para intentar asegurar el derecho al voto seis meses después de la Convención Nacional Demócrata.

142 En una democracia, hay varias comunidades interpretativas con cierta pretensión de autoridad que pueden desempeñar un papel en influir en la construcción de normas sociales y que proporcionan un marco narrativo para entender la vida social, en el cual la ley debe operar. Una de las maneras en que estas comunidades hacen esto es creando e interpretando historias de justicia. En ciertos aspectos, la distinción entre Brown y el Boicot de Autobuses de Montgomery se trata sobre el origen de la historia; ¿viene de los tribunales o del pueblo?

de Joe Rauh con el sentimiento de indignación de Unita Blackwell o con el compromiso de estimular el liderazgo local de Bob Moses. Es importante, como puede verse también en la historia del Boicot de Buses de Montgomery, el enfrentamiento valiente al poder de Moses, Hamer y Blackwell ayudó a cambiar las narrativas fundamentales de la vida social frente de cara a las distintas expresiones de la autoridad legal. Los miembros locales del MFDP además se constituyeron en un grupo de control que exigía rendición de cuentas a los líderes del Partido Nacional Demócrata, una exigencia que ellos no podían ignorar.

A continuación, pasaremos a analizar el Boicot a los Buses de Montgomery con el fin de examinar los mismos elementos, prestando atención de nuevo a la perspectiva y prácticas de los abogados que "representaban" a un grupo dinámico de ciudadanos.

II. El Boicot a los Buses de Montgomery

En la noche del 5 de diciembre de 1955, el Dr. King expuso de manera sucinta la relación que existe en la ley en los libros y la ley como se experimenta. Ocurrió mucho antes de que King se convirtiese en un líder "nacional", esa noche pronunció su primer discurso como cabeza de la Asociación para el Desarrollo de Montgomery[143] (MIA, por sus siglas en inglés). Más temprano, ese mismo día, Rosa Parks había sido acusada por el delito de alterar del orden público por haberse rehusado a seguir las normas de las leyes Jim Crow del sistema segregado de buses. Su arresto y enjuiciamiento provocaron la planificación de un día de boicot a los buses de Montgomery. En la masiva reunión realizada el primer día del boicot a los buses, King dijo: "Estamos aquí por nuestro amor a la democracia, por nuestro profundo sentir de que la democracia que se transforma del delicado papel a la acción fuerte es la mejor forma de gobierno sobre la tierra."[144] Tomando la autoridad de la Corte Suprema, el vinculó la decisión de Brown v. Board of Education, que había sido emitida un año antes, con la autoridad de Dios, de Jesús y de la misma naturaleza de la justicia. Declarando que él tenía "la autoridad legal de su lado," King asimilóvel derecho a la protesta por los derechos, de su nueva comunidad, con una historia bíblica, con la búsqueda de una justicia

143 Montgomery Improvement Association, en inglés.
144 Ver supra note 84.

divina.[145] King desafió a las autoridades locales gracias a las órdenes de la más alta cCorte del país, pero unió a ese desafió la autoridad aun mayor de la fe religiosa que sus oyentes compartían.

Las reuniones masivas fueron cruciales, como la que ocurrió el 5 de diciembre de 1955. En dicha reunión, King conecto dos importantes fuentes de justicia, Dios y la Corte Suprema, estas reuniones jugarían un rol vital durante los trece meses del boicot.[146] Para los ciudadanos negros de Montgomery, las participación en reuniones masivas fueron parte de un ciclo personal constante de sacrifico, cansancio y éxtasis religioso.[147] Las reuniones masivas se convirtieron además en las obras de arte del movimiento. En dichas concentraciones, los lenguajes legales y religiosos se fusionaban y así la voluntad colectiva de los chicos que tomaban los buses, de las empleadas domésticas, los portero y las costureras se robustecía cada noche.[148] La clase media y los negros pobres, a nivel local y nacional, movilizaron estratégicamente sus recursos colectivos. Como resultado, cincuenta mil personas negras, en una sola ciudad, se negaron a utilizar los buses segregados por más de un año.[149]

Para dicha época, el abogado negro de Montgomery Fred Gray era brillante, agresivo y se había graduado de la facultad de derecho un año antes. Gray, quien además era predicador por las noches del fin de semana, quería impugnar las normas segregacionistas del municipio antes de que Rosa Parks fuese arrestada por desafiar dichas normas en un bus municipal. Sin embargo, Gray esperó a que los líderes del MIA votasen al respecto y le otorgaran la autoridad[150] para presentar su demanda. Sería incluso más

145 TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63, página 139-41 (1988).

146 Las mujeres desempeñaron un papel importante en la movilización y en el apoyo material que permitió el éxito del boicot. JoAnne Grant, por ejemplo, utilizó su acceso a una máquina mimeógrafo en el colegio local para producir folletos y volantes que ayudaron a publicitar la reunión masiva inicial y tuvieron un impacto importante en la participación el primer día del boicot. La existencia de los volantes y folletos fue evidencia de organización y un mensaje para la población negra de Montgomery de que no estaban solos.

147 Ver BRANCH, supra note 145, página 145.

148 Como señaló Charles Payne, "Mezclas de lo sagrado y lo profano, las reuniones masivas podían ser un ritual social muy poderoso... Las personas ayudaron a crear nuevas definiciones de sus seres individuales y colectivos reales". PAYNE, supra note 37, en la página 263. Además, las reuniones masivas, que tenían el tono y la estructura general de un servicio religioso, se basaban en las tradiciones religiosas y las sensibilidades estéticas del Sur Negro. Si la monotonía del sondeo representaba gran parte del tiempo de un organizador en el día a día, las reuniones masivas, cuando eran buenas, eran parte de la recompensa, emocional y políticamente... Id., página 256.

149 Ver BRANCH, supra note 145, página 131-35.

150 NT: los autores usan la palabra "authority" (autoridad) en lugar de "authorization" (autorización), ya

significativa que la aparente auto restricción de Gray[151], las restricciones que le fueron impuestas por el propio MIA, cuyos consejo ejecutivo y comité estratégico no permitieron a Gray dominar sus estrategias generales que iban más allá de lo legal.[152] Por ejemplo, a pesar de que el movimiento se basaba en narrativas sobre la ley y los derechos tanto para legitimar como para inspirar el boicot, King y el MIA se reusaron a iniciar litigios judiciales (con la sola excepción del proceso Parks, que desencadenó todos los eventos).[153] Gray, entonces, se insertó en un gran esquema de posibilidades estratégicas que el MIA desarrollaba con sus aportes, pero no bajo su control. Finalmente, la dirigencia del MIA autorizó a Gray a preparar "el arma final" que consistía en una demanda federal en contra de la segregación en los buses.[154] Gracias a la preparación previa, tras bastidores, de Gray, la demanda se presentó relativamente rápido.[155]

Gray cumplió el rol de soporte, más que el de liderazgo en boicot organizado por el MIA, cuyos recursos clave hicieron crecer la movilización de base y las acciones masivas.[156] Es más, la estructura deliberadamente no burocrática el MIA, una "organización compuesta de organizaciones," extendió, y se fortaleció gracias a, la capacidad del MIA de financiarse desde sus bases.[157] La planificación del MIA para compartir vehículos[158] (*carpool*) y otras actividades que requerían recursos económicos fueron inicialmente

que no se refieren a que los líderes del MIA le concedieron a su abogado una procuración legal, sino que le transmitieron la legitimidad democrática, que les otorgaban sus bases, para exigir que la corte acoja una interpretación del derecho que venía del poder popular. En este sentido el abogado no ofrecía una interpretación convincente, sino una fuente obligatoria (autoritativa) de derecho que debía ser recogida por el tribunal.

151 Aunque Gray dejó claro su deseo de desafiar directamente el transporte segregado con una demanda federal, no presionó más el tema con la MIA; comenzó a explorar discretamente la opción con abogados de la NAACP en Nueva York y con otros abogados en Alabama para estar listo para presentar una demanda si fuera necesario. Ver id., página 158.

152 Ver William Simon, Visions of Practice in Legal Thought, 36 STAN. L. REV. 469, 487 (1984).

153 Ver BRANCH, supra nota 145, página 158-59. Una vez que quedó claro que la estrategia de negociación relativamente moderada de la MIA no penetraría en los obstinados concejales municipales, la junta directiva de la MIA discutió una táctica alternativa de una línea de autobuses de propiedad negra además de su "arma definitiva" de una demanda federal contra la segregación en los autobuses. Id.

154 Ver id

155 Ver id. página 158, 163.

156 Gray trabajaba como predicador en Montgomery los fines de semana. A pesar del interés de Gray en la litigación de impacto al estilo de la NAACP, entendía que él "representaba" a la MIA y no solo a los demandantes nombrados que reclutó para una demanda colectiva. Ver id.

157 Ver BRANCH, supra nota 145, página 144, 163, 176 (describing the relationship with NAACP); ALDON MORIUS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE 54(1984).

158 NT: en el texto original se utiliza la palabra "carpool". Carpool se denomina a la actividad por la cual varias personas se organizan para utilizar un solo vehículo para transportarse, generalmente compartiendo gastos.

financiadas gracias a las colectas que se realizaban en los mítines,[159] recursos que literalmente "recargaban de combustible" al boicot. A pesar de que el dinero pronto empezó a llegar desde afuera, de todas maneras, estos fondos eran recaudados en gran parte por las iglesias negras, organizaciones (incluidos los capítulos locales del NAACO) y por individuos, así como por algunas personas y organizaciones blancas del norte. Como consecuencia, el dinero de simpatizantes blancos aumentaba sistemáticamente no solo los montos recaudados por la comunidad negra de Montgomery, sino además aumentaba las redes de apoyo por todo el país.[160] El fondo de financiamiento del MIA crecía junto con la fama del boicot: para cuanto el panel de tres jueces declaró las normas Jim Crow en los buses inconstitucional, las organización tenía capital suficiente para sostener el boicot mientras se resolvía la apelación.[161] El flujo de recursos externos e internos localizaron el poder dentro de la organización y no solamente en sus representantes.

El MIA fue un grupo de ciudadano comprometido con la responsabilidad política, capaz de mantener a abogados con Gray sujetos a la disciplina del poder compartido. Con el liderazgo de las bases anclado en la iglesia, el control financiero no estaba controlado por un único donante externo. En lugar de esto, el MIA recibía el apoyo de una comunidad motivada y con la habilidad de movilizar recursos de la clase media negra la cual aportó inicialmente los autos para transportar a la gente negra a sus trabajos. A pesar de que fue la intervención de la Corte Suprema, al decidir el caso que Fred Gray presentó en la Corte Federal, la que finalmente declaró que la segregación en los buses era inconstitucional, fue el activismo del movimiento social poseído por un sentido bíblico de justicia el que acortó la distancia entre nuestra realidad democrática y su potencial de ser "el mejor de los gobiernos de la tierra." Las narrativas creadas desde los miembros de la comunidad se convirtieron en mantras para el movimiento. Un memorable mantra fue el de Mama Pollard que alentando a MLK dijo: "mis pies son cansados, pero mi alma esta reposada."[162] Al decirlo con su propia voz, estas narrativas de justicia reubicaron a los negros en Montgomery de víctimas

159 Ver MORRIS, supra note 132, página 56.
160 Id. página 57. Como escribió un líder del capítulo de la NAACP en Brooklyn a King: "Miles de personas, negras y blancas, están trabajando detrás de las líneas para ayudar a aquellos que están llevando a cabo la lucha en el frente". Id. en las páginas 57-58.
161 Ver BRANCH, supra note 145, página 188.
162 Ver BRANCH, supra note 145, página 164 (relatando la reafirmación pública de la Madre Pollard a King de que no estaba solo).

agraviadas a ciudadanos con una causa. Ellos capturaron la dignidad de la lucha comunitaria, inspiraron protestas en otras ciudades, construyeron otras organizaciones insurgentes como el SCLC y finalmente influyeron en blancos del norte y del sur a creer en su propia capacidad de transformar nuestra democracia de "delicado papel a acción fuerte."

Fred Gray y otros litigantes jugaron, ciertamente, un papel crucial al representar a las personas que participaban en el boicot en Montgomery.[163] En este rol, Gray y otros fueron responsables ante un grupo de ciudadanos que rara vez encontraron una voz pública. Ellos tradujeron las preocupaciones y agravios de sus clientes en causas legales que hicieron mucho más que aconsejarles sobre sus respectivos derechos y responsabilidades. El proceso en Montgomery transformó la naturaleza de la lucha política al usar, entre otras cosas, el lenguaje del derecho.[164]

Como resultado del apoyo e influencia del rol de Fred Gray, y el poder enfocado en lo comunitario del MIA, el éxito del boicot fue más allá de la victoria en el litigio que finalmente puso fin a la segregación en los buses.[165] King personalmente registró la lección aprendida: la solidaridad de la comunidad alrededor de la misma causa;[166] la integridad de sus líderes, quienes no se vendieron; la creciente militancia de la iglesia negra; y la comunidad descubriendo su dignidad, su destino y su estrategia.[167] Adicionalmente, el movimiento entrenó a King y a sus colegas ministros como líderes en la lucha de los derecho civiles; a pesar de que el MIA se consumió luego de terminan la victoriosa campaña del boicot, de sus cenizas nació un nueva organización, el SCLC.[168]

Las decisiones de la corte en el caso Browder v. Gayle[169] fueron

163 Ver FREDGRAY, Bus RIDE TO JUSTICE: CHANGING THE SYSTEM BY THE SYSTEM (1994).

164 Ver, e.g., Randall Kennedy, Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott, 98 YALE L.J. 999 (1989). Por supuesto, según algunos observadores, las victorias legales de estos forasteros pueden provocar una reacción política incluso mientras inspiran y energizan la movilización popular. Ver, e.g., Klarman, supra nota 25; ver también BROWN-NAGIN, supra note 34 (discutiendo las sentadas en los años sesenta en Atlanta).

165 Robert Jerome Glennon, The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955-1957, 9 LAW & HIST. REV. 59, 94-97 (1991).

166 Cf SIDNEY TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS 4 (1998) (describiendo los movimientos sociales como (1) desafíos colectivos, basados en (2) propósitos comunes y (3) solidaridad social en (4) interacción sostenida con élites, oponentes y autoridades).

167 BRANCH, supra nota 145, página 195.

168 Glennon, supra nota 165, página 96-97.

169 352 U.S. 903 (1956).

documentos importantes que influyeron y moldearon el discurso y la acción en el marco de la sociedad más grande. Pero la academia legal y los abogados con frecuencia ignoran las complejas vías extrajudiciales en las cuales los actores de movimientos sociales logran hacer escuchar su voz, entre ellos, a sus oponentes, a las élites legislativas y a los intérpretes de la ley. La amnesia popular relacionada con el caso Browder demuestra las vías en las cuales el derecho, aunque importantes para la confirmación legal de la premisa del boicot, ha visto casi como un pie de página la acción de los participantes del boicot y la resistencia sostenida que ellos representan. El litigio, la decisión judicial, y las acciones combinadas de la gente para cambiar el clima en Montgomery. Ellos cambiaron el viento.

Como ilustra la historia del Boicot de los Buses de Montgomery, la conversación real entre el derecho y el activismo de los movimientos sociales es compleja y multidireccional. Está asentado en las acciones y creencias de la gente ordinaria que se reúne y fabrica, a través de sus experiencias y acciones, una historia de vida social y poder y de creación del cambio social a través del tiempo. Grafica a los participantes de fuera de la profesión legal la forma de profundizar en el alcance del derecho más allá de la sofisticada gramática legal de rectitud formal hacia un compromiso trascendental con la justicia. Cuando esto pasa, el lenguaje de la ley se ensancha para acomodar el lenguaje de la gente, especialmente para aquellos que actúan colectivamente para fortalecer nuestra democracia. En consecuencia, el actor del movimiento social en Montgomery influyó en la forma en que las cortes y la gente por si misma interpreta y da sentido al derecho.

El boicot a los buses involucró una teoría de movilización popular y una teoría de democracia representativa. Los activistas de los movimientos sociales, representado por abogados, pero también representándose a si mismos, se convirtieron en importantes autoridades colectivas de interpretación de nuestra democracia. La autoridad colectiva de interpretación de Martin Luther King Jr. estaba asentada en un universo "democrático" de personas que estaba "votando" con sus pies (al caminar a sus trabajos), con su espíritu personal fundido con un espíritu de lucha colectiva y la narración histórica de liberación bíblica, y con trascendencia de su sacrificio compartido. Sus acciones han tenido un impacto duradero al punto de que ellos provocaron cambios en la forma en que se entientde al derecho y a la justicia. Ellos no

solamente impulsaron políticas o propuestas de reforma legal específicas y discretas. Al estudiar sus discursos colectivos en las mismas formas en que abogados y académicos analizan cuidadosamente los argumentos orales de la Corte Suprema y sus decisiones, nosotros podemos empezar a entender la forma en que los actores de los movimientos sociales son autores de significado legal.[170]

En el Boicot de los Buses de Montgomery, los abogados representaban a un movimiento, no a una clase. Las imágenes icónicas del boicot muestran a cincuenta mil personas negras movilizadas por más de un año para protestar colectivamente por el arresto de Rosa Parks y la vigencia de la segregación en los buses municipales. La Asociación para la Mejora de Montgomery (MIA, por sus siglas en inglés) tenía reuniones directivas semanales con los abogados para planear una estrategia conjunta de protesta y resistencia. El foro para el cambio no fue la sala de una corte o la sala de conferencias de un estudio jurídico, sino un evento de masas. Incluso la discusión sobre que sería lo que se ponía en juego debió pasar por una consulta colectiva. El Boicot de los Buses de Montgomery y el MIA demandaron igual reconocimiento de su dignidad y el fin de la imposición privada opresiva de los privilegios raciales de los blancos. Esa demanda resultó en la desegregación de los buses, pero la decisión de la corte, de varias maneras, ratificó los actos de las personas. La desegregación significó la libertad de sentarse donde sea que quisiese y retiró el poder a los conductores de actuar como agentes de seguridad civiles de la élite política.

La movilización masiva creó un propósito común cuyo símbolo fue el aporte de la clase media negra de sus autos privados para crear una alternativa al sistema de transporte público. Dada la importancia que tenían los autos en el estatus de sus dueños, este acto representó un serio compromiso. Este acto fue vital para la ética inter-clase de la protesta que la condujo al éxito y a la creación de poder. El boicot no pudo haber durado lo que duro sin esta contribución crucial. Otro ejemplo de cómo la movilización produjo capacidad de resistencia fue el sistema de medios de comunicación creado

170 La naturaleza misma de la educación jurídica dificulta obtener esta perspectiva en la escuela de derecho. La técnica de investigación en las escuelas de derecho implica el examen detenido de opiniones individuales escritas por jueces de apelación sobre disputas individuales, donde los únicos hechos que importan son aquellos considerados legalmente relevantes para el resultado que alcanza el tribunal. La materia prima de la opinión de apelación es una declaración muy selectiva de los eventos reales que motivaron la disputa que resultó en una demanda. Es como si los hechos sociales fueran eliminados para que la mera silueta de la realidad se convierta en su definición a efectos del "derecho".

por el MIA y sus simpatizantes que logró mantener la honestidad de los medios convencionales. La comunidad estuvo en la capacidad de potenciar al máximo sus recursos que de forma individual habrían sido escaso, pero que combinados suministraron la capacidad fundamental para la resistencia.[171]

Mientras continua el sano debate sobre el significado del Boicot a los Buses de Montgomery, si habrían o no triunfado sin las victorias judiciales y sin una Corte Suprema lista para dar paso a la integración en el transporte público, independientemente a esto nos parece que existen al menos dos resultados importantes de la cobertura local, regional y nacional de los eventos de Montgomery. En primer lugar, validó un nuevo modelo de protesta y creó un espacio en donde lo que las personas negras consideraban correcto podía validarsesin la mediación de instituciones controladas por otras personas. Esto no quiere decir que sin la protesta no habrían existido disputas sobre la existencia de actos de discriminación, pero las personas negras pusieron en el centro del debate lo que para ellos significaba que las instituciones estatales estuviesen racializadas. El sentido concreto de la desigualdad se veía expuesto en la distribución dispar de los recursos públicos y privados. Además delos pequeños actos de desprecio y las incontables micro agresiones que sufrían y que podían ser entendidas como parte de un sistema racista de supremacía blanca. Esto pudo tener el efecto de animar y permitir a los jueces federales locales actuar de manera más rápita para administrar justicia, a pesar de la furia de sus pares: era mejor mantener el problema en cortes que tenerlo en las calles. En segundo lugar, movilizó a una comunidad negra local -fortalecida a través de meses de lucha- que pudo presionar al municipio a cumplir las órdenes de la Corte Suprema de justicia ya que el incumplimiento ponía en riesgo a la ciudad.

La trascendencia a largo plazo fue la formación de nuevas organizaciones, el MIA y el SCLC. Estas organizaciones ayudaron a institucionalizar la idea de la movilización de masas y aceleraron la transformación de las iglesias en centros de confluencia social en donde además de adoración religiosa se elevaban consignas políticas y morales. Este éxito ayudo a formar un

171 Ni King ni Rosa Parks por sí solos desegregaron los autobuses. El éxito del boicot dependió de la capacidad de líderes como King y la red de activistas comunitarios para mantener una fuente alternativa de información popular, lo que le permitió a él y a la MIA contrarrestar rápidamente las afirmaciones falsas que estaban a punto de ser publicadas en la edición dominical del Montgomery Advertiser, que anunciaba que el boicot había terminado. Los líderes del boicot se dispersaron en los clubes negros, iglesias, fiestas en casas y otros lugares donde la gente negra podría estar congregándose un sábado por la noche para llevarles la verdad sobre el boicot.

movimiento nacional y creó una nueva camada de jóvenes líderes. Pero tan importante como lo anterior, el boicot les dio a sus participantes un sentido de dignidad y del poder que tenían de cambiar la sociedad,[172] validó sus experiencias vitales en formas que los demás tuvieron que reconocer. La publicidad nacional educó a los blancos y a otras personas de fuera del "Sur" y, de esta manera, ayudó a transformar el debate nacional a cerca de la raza.

III. La historia del Sindicato de Trabajadores Campesinos: otra visión de la lucha por la libertad

Las dos primeras historias evocan dos momentos dramáticos en la crónica de la lucha por la igualdad legal de las personas negras. Estas historias estaban atadas a largas luchas que empezaron con la Primera Reconstrucción e incluso antes. La Segunda Reconstrucción dio como resultado leyes canónicas, decisiones de la Corte Suprema y una restructuración básica de las relaciones entre el gobierno federal, el sujeto y el estado. Pero hizo más que eso. Fue una movilización de ciudadanos comprometidos que confrontaron una injusticia basada en la raza, le dieron nombre, y crearon instituciones informales para consolidarse e identificar recursos que hiciesen posible una resistencia sostenida. "El Verano de la Libertad" trajo a muchas personas de los estados del norte al Sur para participar en la transformación de los Estados Unidos. Uno de esos jóvenes norteños fue Marshall Ganz, un estudiante de segundo año de la universidad de Harvard que abandonó sus estudios para trabajar en Mississippi. Él dejo Harvard en 1962 y pasó más de dos años en Mississippi trabajando con los organizadores de la comunidad negra, organizando a los votantes y ayudando a crear fuentes alternativas de poder para la gente a la cual se les había negado el acceso a las instituciones formales de gobierno.

Marshall nació en California y era hijo de un rabí de Bakersfield. Marshall regreso unos días a casa y se dio cuenta que su trabajo en Mississippi lo había cambiado. La "gente café" trabajando sin descanso en condiciones feudales en las plantaciones de frutas y vegetales en el centro de California dejaron de ser para del telón de fondo contra el cual había pasado vida. Por

172 Cf GORDON, supra nota 81 (describiendo un proceso por el cual los trabajadores indocumentados llegaban a su clínica legal llenos de indignación debido a los daños a su dignidad sufridos para los cuales no existía un remedio legal, y cómo, sin embargo, resolver las cosas que la ley podía controlar les daba un sentido de agencia y dignidad, un camino fuera del atolladero, incluso si no abordaba directamente su indignación).

el contrario, explicaría él, vio las brutales condiciones en los campos a través de lo que él llamó "la visión de Mississippi." Esta visión le permitió ver como los aparceros que definían lo que era la pobreza rural y la opresión en el Sur tenían una versión en el oeste en las pandillas de trafico de trabajo en el Valle Central de California. La estructura de exclusión difería en muchos detalles, más no es su efecto. Al igual que las personas negras en el Sur, los agricultores era únicamente recursos para ser usado, no gente que debía ser respetada.

Los esfuerzos para organizar a los trabajadores migrantes del campo habían demostrado ser fútiles. Loa mayor parte de ellos eran indocumentados e incluso aquellos que eran ciudadanos eran pobres y analfabetos en inglés, e incluso en español. A pesar de esto, el precursor de lo que sería el Sindicato de los Trabajadores del Campo (UFW, por sus siglas en inglés) empezó la tarea de organizar a los agricultores granja por granja, sembradío por sembradía. Marshall no volvió a Mississippi, tenía trabajo que hacer en California.

Mientras el trabajo en California imitaría los esfuerzos por justicia civil, política y económica que ocurrieron en el Sur, uno de sus principales motores fue la Asociación Nacional de Trabajadores del Campo (NFWA, por sus siglas en inglés). El NFWA se convertiría en el famoso Sindicato de Trabajadores del Campo. Mientras varias historias de este movimiento se enfocan en el rol que tuvo como una organización de trabajadores dominada por y trabajando para los intereses de los ciudadanos americanos de origen mexicano (los mexicano-americanos), Ganz mostró como esta lucha estaba conectada con un movimiento mayor en búsqueda de justica. En 1996, durante la marcha desde el pueblo agrícola de Delano, a la capital del estado, Sacramento, un reportero de un periódico afro-americano declaró: "Aquellos que marchan por la libertad de los negros también deben marchar por la libertad de otras personas, por libertad económica y justicia."[173]

El NFWA sentó las bases para un movimiento de mayor alcance al definirse así mismo no solo como una organización de trabajadores, sino como un "movimiento por los derechos civiles de los trabajadores del campo." Al hacerlo, reconocían la necesidad de conseguir apoyo más allá de los mercados laborales locales. Este apoyo fue posible porque, como Ganz lo señaló, el corazón de la dirigencia y los voluntarios en el día a día, en la

173 LAUREN ARAIZA, TO MARCH FOR OTHERS: THE BLACK FREEDOM STRUGGLES AND THE UNITED FARM WORKERS (2013).

toma de decisiones tácticas involucradas en cada huelga, los recién llegados aprendían como funcionar como parte de un equipo de líderes, mientras los líderes consolidados aprendían de primera mano sobre las realidades sobre el terreno sobre las cuales ellos tenían que trazar estrategias… La capacidad del NFWA de aprendizaje continuo, su motivación para aprender, y su acceso a una colección de información siempre cambiante, aunque relevante, es lo que caracterizó a este movimiento.[174]

Fue a través de la lucha por los derechos de los trabajadores del campo a organizarse y a vivir con dignidad que muchos otros elementos del movimiento Chicano (La Causa)[175] convergieron y formaron alianzas con líderes de la comunidad negra. Si iba a existir un movimiento por justicia en el oeste de los Estados Unidos, este debería ser necesariamente multicultural dada la demografía del oeste. En efecto, por su dirigencia públicamente visible, el UFW es comúnmente entendido como una organización de mexicanos-americanos. A pesar de esta percepción pública, la afiliación y los consejos de gobierno del sindicato reflejaban la diversidad del estado de California. La historia del UFW no habría podido ser escrita sin una referencia a los trabajadores filipinos, y a los organizadores blancos y judíos que trabajaron hombro a hombro con Cesar Chavez, Dolores Huerta y los otros conocidos miembros del sindicato. Es más, la UFW y La Causa utilizaban generalmente elementos de lucha cultural para popularizar sus posiciones y para empoderar a las bases en formas que generaron una especie de democracia participativa.

Antes de explorar las alianzas inter-raciales que dieron el soporte fundacional a sindicato en sus esfuerzos de organizar a los trabajadores y de organizar a los políticos necesarios para alcanzar un cambio en las leyes laborales que regulaban el trabajo agrícola, queremos enfocarnos en una innovación de la UFW que dio a los trabajadores el poder de involucrarse por sí mismos en una exploración a todo pulmón de las políticas de justicia económica. Al revivir la fórmula de los Actos,[176] Luis Valdez y sus aliados crearon un mecanismo que politizó la estética de una manera que hizo de la actuación dramática una herramienta útil para educar, movilizar y cambiar.[177]

174 MARSHALL GANZ, WHY DAVID SOMETIMES WINS: LEADERSHIP, ORGANIZATION, AND STRATEGY IN THE CALIFORNIA FARM WORKER MOVEMENT 117-18 (2009).

175 NT: originalmente en español.

176 NT: originalmente en español.

177 Vea la discusión sobre el uso de drama y representaciones callejeras en la liberación de Sudáfrica narrada

A. La formación y el impacto de El Teatro Campesino

"El Teatro Campesino"[178] empezó cuando Luis Valdez viajó a su ciudad natal, Delano, California, para participan en una marcha de apoyo a la huelga de los recolectores de uvas convocada por el recientemente formado Comité de Organización del Sindicato de Trabajadores del Campo (UFWOC, por sus siglas en inglés).[179] Era el año de 1965 y no era coincidencia que el ascenso del UFWOC y del Teatro Campesino ocurriesen en aquel momento de gran acción sociopolítica motivada por la inconformidad social presente entre los negros y los Chicanos quienes lideraban un movimiento por lo derechos civiles multidimensional.[180] Valdez, que había sido aprendiz en el grupo de teatro San Francisco Mime Troupe, se aproximó a Cesar Chaves y Dolores Huerta, líderes del UFWOC para proponerles iniciar una compañía de teatro de los campesinos. Chavez replicó que no tenían dinero, actores, ni un escenario para una compañía de teatro,[181] pero si Valdez de todas maneras podía hacer algo sin recursos, él estaría de acuerdo.[182] "Y eso era todo lo que necesitábamos, una oportunidad," explicaría Valdez más tarde.[183] Él estaba comprometido con la idea de crear un teatro "de, por y para campesinos", y así nació el Teatro Campesino, en las manifestaciones de Delano.[184] De acuerdo con Valdez, las manifestaciones fueron el único y el más efectivo lugar para hacer lo que ellos querían hacer: "comunicarse con los trabajadores en formas no violentas y comunicar sus ideas con humor, mucha energía y mucho espíritu."[185] Valdez describió así el momento en que el Teatro Campesino fue formado:

"Hablé por algo así como diez minutos, y entonces me di cuenta que hablar no me iba a llevar a ninguna parte. La forma de hacerlo era haciéndolo, así que llamé al frente a tres manifestantes y colgué en dos de

en White, supra note 60.

178 NT: originalmente en español.

179 Ver HARRY J. ELAM, TAKING IT TO THE STREETS: THE SOCIAL PROTEST THEATER OF Luis VALDEZ AND AMIRI BARAKA 3 (1997).

180 Id. página 2.

181 Ver Voces Vivas, Luis Valdez-Founder "El Teatro Campesino," YouTUBE (Oct. 21, 2011), http://www.youtube.com/watch?v=XdelwysKwJM.

182 Ver Max Benavidez, The Fight in the Fields, PBS, http://www.pbs.org/itvs/fightfields/book3 .html (last visited Mar. 24, 2014).

183 Ver id.

184 Ver Voces Vivas, supra note 152.

185 Ver id.

ellos un cartel que les identificaba como "huelguistas."[186] Luego, le colgué a otro un cartel de "esquirol,"[187] y le pedí que se pare al frente y que actúe como un esquirol. Él no quiso hacerlo al principio, ya que esa era, entonces, una palabra despreciable, pero él finalmente lo hizo con buena disposición. Luego los dos huelguistas empezaron a gritarle, y todo el mundo empezó a reír a carcajadas. De repente, la gente empezó a acercarse a la casa rosa de no se donde, ellos llenaron a tope la cocina. Empezamos a intercambiar los carteles entre la gente que se ofrecía voluntariamente, "déjame actuar de ese o de ese," "mira, eso es lo que yo hice," imitaban toda clase de cosas. Nos pasamos casi dos horas solamente haciendo eso. para cuando habíamos terminado, había gente llenando todo el lugar. La gente estaba en las puertas, en los pasillos, en la sala, incluso había personas paradas afuera espiando por las ventanas. Dolores [Huerta] apareció más tarde. Ella se quedó parada mirando lo que ocurría por un largo rato, y yo pienso que recibió el mensaje-puedes hacer mucho cuando sacas las cosas mediante la actuación."[188]

Más adelante, la compañía se presentó delante de los campesinos por primera vez. Valdez relataría así dicha presentación: "Saltamos encima de un camión y empezamos nuestra presentación. Luego algo grandioso ocurrió, nuestro trabajo elevó el espíritu de todos en el piquete y Cesar [Chavez] lo vio."[189] Muy pronto, el Teatro Campesino se convirtió en "la voz cultural del UFWOC."[190] Yolanda Broyles-González alegó que "la militancia del Teatro Campesino fue una respuesta directa a las necesidades de la lucha del UFW, del cual, además, había emergido."[191] Esas necesidades eran "la necesidad de sindicalizarse para poder luchar en contra de los múltiples abusos de los negocios agrícolas, que incluían envenenamiento a gran escala a los campesinos con pesticidas, explotación laboral por los bajos sueldos, casa no aptas para ser habitadas, trabajo infantil, y la ausencia total de beneficios laborales."[192] En efecto, el Teatro Campesino conformó una sub-comunidad de interpretación autoritativa, dentro del propio UFWOC, que impactó profundamente la forma en que todo movimiento percibía los nociones

186 NT: originalmente en español.
187 NT: originalmente en español.
188 Beth Bagby, El Teatro Campesino: Interviews with Luis Valdez, 11 TULANE DRAMA R. 70, 74-75 (1967).
189 Benavidez, supra nota 182.
190 ELAM, supra nota 179, página 3.
191 YOLANDA BROYLES-GONZALEZ, EL TEATRO CAMPESINO: THEATER IN THE CHICANO MOVEMENT 25 (1994).
192 Id.

de Derecho y de justicia. Sirvió como un "puente" entre las "experiencias vitales" de los campesinos y las "alternativas que imaginaban."[193] El Teatro Campesino transformó como los campesinos pensaban sobre su propio poder de generar cambios y los motivó a tomar acciones para demandar por sus derechos que el teatro les había convencido que ellos merecían. También definió la experiencia vital de los campesinos, una experiencia que los abogados del UFWOC deberían respetar y por la que tendrían que rendir cuentas.

Luis Valdez describe el Teatro Campesino como "algo entre [Bertolt] Brecht y Cantinflas."[194] Cantinflas "es virtualmente sinónimo de la tradición popular mexicana de la comedia asociada con la carpa por los últimos doscientos años," un "show de carpa" que ha servido como una "herramienta contra-hegemónica del excluido y oprimido."[195] Los actos, o sketches, eran improvisados. Valvez describía el proceso de creación de un acto: "Tomábamos situaciones reales -a menudo esto ocurrían en las líneas de huelga- e improvisábamos alrededor de ello. Cuando lográbamos una improvisación que nos gustaba, estábamos listos. Un acto nunca tenía un libreto."[196] Esencialmente, cada acto representa una historia sobre rectitud individual y social, y justicia. "La memoria fue la forma principal para todas las presentaciones del Teatro Campesino," explicaba Broyles-Gonzáles.[197] "y el poder y la instrumentalización de la memoria, asentada en la comunidad y en el cuerpo, haciendo posible que el trabajo de ensamble funcione con la inmediatez, autenticidad, y la vitalidad que le caracterizan."[198] El uso de humor jugo también un papel importante, como lo explica Valdez:

"Usábamos comedia porque era lo que se necesitaba ante la situación que enfrentábamos -la necesidad de levantar la moral de los huelguistas, que llevaban en paro diecisiete meses. Las reuniones a las que acudían eran largas y agotadoras, así que nosotros hacíamos comedia con la intensión de hacerles reír –pero con un propósito. Tratábamos de abordar problemas sociales, no a pesar de la comedia, sino a través de ella. Esto nos llevó a la sátira y el astracán, y muchas veces cerca de subrayar la tragedia que yacía

193 Cover, supra note 54, página 4, 9.
194 BROYLES-GONZLEZ, supra note 160, página 7 (quoting Luis Miguel Valdez, Theatre: El Teatro Campesino, RAMPARTs, July 1966, página 55, 55).
195 Id.
196 Id. página 22.
197 Id. página 23.
198 Id.

en todo ello –el hecho de que generaciones de seres humanos hayan sido desperdiciadas en [ese tipo] de trabajo de campo…

… La gente decía, "Sí, así es como pasa," y luego reían. Si era una realidad que ellos conocían por sí mismos, ellos iban a reír e incluso lagrimas brotarían de sus ojos."[199]

Chavez había querido usar la carpa como una herramienta organizacional, creyendo que esto otorgaría a los trabajadores del campo un lenguaje cultural común.[200] "Con la carpa, le podíamos decir cosas difíciles a las personas sin ofenderles," explicaba Chavez. "Podíamos hablar, por ejemplo, de la gente que actuaba cobardemente. En lugar de ser ofensivo, resultaba gracioso. Sin embargo, comunicaba sobre un tema importante del sindicato."[201] El Teatro Campesino fue en sí mismo un "arma social y cultural única y muy a menudo efectiva" que era utilizada cuando los dirigentes regulares del sindicato fallaban.[202] Por ejemplo, en Selma, California, el Teatro Campesino tuvo éxito en convencer a los campesinos de que tenían que organizarse luego de que los dirigentes de la UFWOC habían tratado de convencerles por semanas sin ningún éxito.[203] La efectividad del Teatro Campesino provenía quizás del hecho de que sus actos representaban una declaración de derechos que era proclamada a través de la presentación de una experiencia vital compartida acompañada de una solución. Según explica Chaves, "una de las cosas que nos veíamos forzados a introducir en nuestra forma de drama era a presentar una solución. Los campesinos decían, 'conocemos los problemas, ¿qué hacemos con eso?' Así que en el acto, un campesino agarraba un cartel de huelga y gritaba '¡Huelga!'"[204] De esa manera, el Teatro Campesino "nos forzaba a imaginar finales que eran siempre, en el fondo, el mismo. Ese era el final de impacto, siempre terminaba de manera explosiva, pero con cierta esperanza. Debíamos mostrar alguna clase de victoria, aun cuando la victoria no se podría alcanzar de inmediato."[205]

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199 Bagby, supra note 188, página 77.
200 Ver BROYLES-GONZALEZ, supra nota 191, página 11.
201 Id. página 13.
202 Ver Elam, supra note 150, página 45.
203 Ver id. (citando a JOHN WEISMAN, GUERRILLA THEATER: SCENARIOS FOR REVOLUTION 19 (1973)).
204 Bagby, supra note 188, página 79.
205 Id. página 80.

Teatro Campesino fue parte de una "extendida movilización teatral" que "buscó afirmar una visión social alternativa que se basara en la distintiva estética Chicana."[206] En efecto, ayudó a crear y difundir una nueva visión moral tanto dentro del movimiento como fuera de él. El Wall Street Journal describió al Teatro Campesino como "pantomima proletaria."[207] "Los intelectuales chicanos lo promocionaron como 'la clave para una nueva conciencia histórica.'"[208] Pero más importante aún, los campesinos empezaron a "verse a sí mismos como los protagonistas de un drama cotidiano que el que les había parecido que estaba solos, hasta ese momento," explicaba Jorge A. Huerta.[209] "Con cada improvisación sobre sus luchas diarias, estos campesinos le demostraban a Valdez que existía un mensaje a ser dramatizado y que existía en la habitación talento para dramatizarlo."[210] Durante del día, la compañía del Teatro Campesino "visitaba los campos y los barrios latinos buscando construir apoyo para el sindicato y también para actuar en el balde de una camioneta en los campos aledaños a los trabajadores recolectores de fruta."[211] Más tarde, en la noche, actuaban en escenarios improvisados en medio de los campos "ante animadas multitudes que reían y miraban los espectáculos iluminados por las luces encendidas de los faros de los autos."[212]

Los primeros actos se desarrollaban alrededor de una única solución, "unirse al sindicato."[213] La compañía de teatro no se enfocaba específicamente en cambios tangibles en la realidad legal de los campesinos. En lugar de eso, era parte del esfuerzo de una movilización mayor de no solo cambiar la forma en se administraba la justicia, sino cambiar la forma en que los campesinos se veían a su mismos y su propio poder dentro del sistema. Valdez sostuvo que "nuestro principal objetivo es llegar hasta los campesinos. Todos los actores son campesinos, y nuestro único tema es la huelga."[214] Más adelante, Valdez describiría así el propósito del Teatro Campesino:

"Nosotros no pensamos en términos de arte, sino a través de nuestro propósito político alrededor de ciertos puntos. Nosotros pensamos en nuestro

206 BROYLES-GONZALEZ, supra note 191, página 3.
207 RANDY SHAW, BEYOND THE FIELDS: CESAR CHAVEZ, THE UFW, AND THE STRUGGLE FOR JUSTICE IN THE 21ST CENTURY 277 (2008).
208 Id.
209 JORGE A. HUERTA, CHICANO THEATER: THEMES AND FORMS 12 (1982).
210 Id.
211 Shaw, supra nota 207, página 278.
212 Id.
213 HUERTA, supra note 209, página 16.
214 ELAM, supra note 179, página 100.

objetivo espiritual en términos de convertir a multitudes. Nosotros sabemos cuándo no estamos convenciendo a la multitud. Desde el punto de vista del negocio del espectáculo eso ya era bastante malo, pero ganaba mucho más significado cuando tratas de alentar a la multitud a ir a la huelga y apoyarte."[215]

"La compañía de Valdez no tenía la pretensión de crear una gran obra de arte. Tampoco tenían el tiempo para semejantes derroteros estéticos cuando sus miembros podían ser llamados de improviso a unirse a los piquetes de la huelga, o para entregar panfletos en el campo, o involucrarse en cualquiera de las otras actividades que el naciente sindicato demandase."[216] En lugar de eso, Valdez identificaba cinco objetivos que buscaba alcanzar con los actos: (1) "Inspirar a la audiencia para que se involucren en acciones sociales," (2) "Remarcar ciertos puntos sobre los problemas sociales," (3) "Satirizar a la oposición," (4) "Mostrar o dar pistas de una solución," y (5) "Expresar lo que la gente estaba pensando."[217] Al final, las "simples recreaciones" de los problemas de los campesinos no solamente tuvo el efecto de involucrarles en la democracia, también ayudó a los trabajadores a encontrar una "forma de darle coraje y reforzar el espíritu."[218]

Los atributos especiales de los actos ayudaron a Valdez a alcanzar sus metas. El acto requería al menos dos personajes y un conflicto.[219] Siempre que el conflicto fuese entendido y resuelto por los participantes del acto, los elementos escenciales del acto estarían presentes.[220] Olivia Chumacero, miembro del Teatro Campesino explicaba:

"enías que usar el lugar de donde venías, que sacarlo de ti y actuar desde allí. Las cosas salían de ti, desde donde tu pensabas, desde donde venías, desde lo que habías experimentado en tu vida… No era sobre memorizar mecánicamente unas líneas, palabra por palabra. Palabras que alguien más había puesto en tu boca. [El acto] era sobre tu vida."[221]

Los actos también involucraban la participación de la audiencia.[222] Los actores "transformaban a los espectadores en participantes activos, y su

215 Bagby, supra note 188, página 78.
216 HUERTA, supra note 209, página 16.
217 Id.
218 Id. página 13.
219 Ver id. página 17.
220 Id.
221 BROYLES-GONZALEZ, supra note 191, página 22.
222 Ver ELAM, supra note 179, página ii.

activa participación dentro del teatro era un indicador, o un precursor, de la actividad revolucionaria fuera del teatro."[223] Luis Valdez declaró en 1967, "nosotros no debemos ser juzgados como teatro. Éramos en realidad parte de una causa."[224]

El Teatro Campesino tuvo también un profundo efecto más allá de la comunidad campesina. Poco tiempo después de su creación, la compañía fue invitada a realizar una actuación pagada en la Universidad de Stanford.[225] "Actuamos en una sala de estudiantes con alrededor de cincuenta personas presentes. Fue interesante desde el punto de vista de que lo que habíamos estado haciendo con los campesinos en Delano pudiese funcionar fuera también, en un contexto universitario," explicaba Valdez.[226] Fue un éxito y desde entonces, el Teatro Campesino empezó a visitar los campus universitarios, iglesias, centros comunitarios y teatros.[227] El mensaje de los campesinos fue tomado del campo y llevado a las ciudades, en donde las audiencias fueron incentivadas a donar dinero al sindicato que tan desesperadamente necesitaba cualquier tipo de apoyo financiero que pudiese obtener.[228]

B. Las Dos Caras del Patroncito

Jorge H. Huerta describe la obra, Las Dos Caras del Patroncito, como "representativa de las necesidades que [la UFWOC] tenía en aquel momento."[229] La primera presentación de la obra fue en 1965 en las manifestaciones de la huelga de los recolectores de uvas de Delano.[230] El acto fue creado con el fin de combatir el poder y la riqueza de los productores de uvas que hicieron la movilización y la huelga tan difícil para la UFWOC.[231] En respuesta, Valdez y los actores crearon una obra donde los campesinos y el jefe (el patroncito) intercambiaron roles de manera que cada personaje entendía cómo era estar en los zapatos del otro.[232] El patroncito era identificado con una máscara de cerdo y los trabajadores con sus tijeras para

223 Id.
224 Id. página 19.
225 Ver HUERTA, supra nota 209, página 18.
226 Bagby, supra note 188, página 76.
227 Ver id.
228 Ver id.
229 HUERTA, supra note 209, página 19.
230 ELAM, supra note 179, página 38.
231 HUERTA, supra note 209, página 19.
232 Id.

podar.[233] El patroncito, quien está cansado de las "frustaciones" asociadas con la riqueza, accede a intercambiar lugares con el campesino,[234] para lo cual se desprende de sus símbolo de opresión: su máscara, el látigo, el cigarro y el abrigo.[235] Luego de retirarse estos objetos, el campesino exclamaba: "!Patrón, usted se parece a mí¡,"[236] sugiriendo que el poder del patroncito "no era esencial ni intrínseco, por el contrario, era construido."[237] El campesino se colocaba la máscara de cerdo y se convertía en el patroncito.[238] Empieza a enumerar las cosas que le perteneceny ofrece al antiguo patroncito menos paga.[239] El patroncito convertido en campesino se da cuenta de que la cosa se fue demasiado lejos como para pedir ayudar.[240] Sin embargo, el oficial de policía en el escenario no reconoce al patroncito sin sus símbolos de poder y lo arresta.[241] El patroncito grita, "¿Dónde están esos malditos dirigentes sindicales?¿Dónde está Cesar Chávez? ¡Ayuda! ¡Huelga!"[242] La humillación del patroncito es descrito como "un importante momento de inflexión en la construcción de la dignidad _campesina."[243]

Harry Elam escribe, "esta obra reafirmaba la nueva conciencia que se reflejaba en el autoestima y orgullo por la cultura entre…los perdedores…. Exponía la vulnerabilidad del dueño del rancho y alentaba a los campesinos a surgir como nuevos sujetos políticos en sus propias luchas en contra de la subordinación."[244] El contexto en el que Las Dos Caras del Patroncito fue originalmente presentada, en frente de los guardias de seguridad armados de los productores de uvas, incrementando sus efectos. La actuación fue en si misma "un acto de resistencia" que "estuvo al mismo tiempo dentro y fuera de las otras actividades de la huelga en la línea del piquete."[245] En efecto, "funcionó para reparar el drama social que existía al retirar simbólicamente el poder a los rancheros y revelando el poder potencial alcanzado mediante

233 Id., página 20.
234 Id., página 22.
235 Id.
236 Id.
237 ELAM, supra note 179, página 40.
238 HUERTA, supra note 209, página 22.
239 Id.
240 Id.
241 Id.
242 Id.
243 ELAM, supra note 179, página 42 (Citando a GUILLERMO E. HERNANDEZ, CHICANO SATIRE: A STUDY IN LITERARY CULTURE 36 (1991).
244 Id.
245 Id. página 38.

la participación colectiva de los campesinos en la huelga."[246] Elam describía que "a través del poder de su puesta en escena, el teatro desafío las relaciones convencionales del poder y la subordinación de los campesinos en la jerarquía de los agronegocios."[247]

"Las Dos Caras", además, reconceptualizó el orden social en el que los campesinos vivían. La participación de la audiencia junto al contexto en el que el acto fue presentado en los campos donde la historia originó en los campesinos un sentido de agencia. El poder fue retratado como algo externo y construido, en lugar de algo intrínseco. Un académico argumenta que el rol invertido en Las Dos Caras representa la transferencia a formas sociales externas que determinan el estatus social y en efecto "pueden derrumbar todo el orden social."[248] Elam, por otro lado, cree que el orden social fue invertido, pero la jerarquía se mantuvo intacta con el fin de simbolizar la devaluación del poder que el UFWOC estuvo intentando conseguir en realidad.[249] "Esta obra reafirmaba la nueva conciencia que se reflejaba en el autoestima y orgullo por la cultura entre" los perdedores, como escribía Elam.[250] "Exponía la vulnerabilidad del dueño del rancho y alentaba a los campesinos a surgir como nuevos sujetos políticos en sus propias luchas en contra de la subordinación."[251] Ambas teorías incorporan la visión de que el acto reinterpretó el status quo y ofreció una visión alternativa del poder.

Para el final de los años sesenta, el Teatro Campesino no estaba concentrado únicamente en los campesinos y sus formas de organización, se extendió a asuntos más amplios "de la identidad chicana, racismo en la educación, la guerra de Vietnam, y la brutalidad policial."[252] "Pero siempre," anota Valdez, "la raíz cultural fue el campesino. A mí no me importó cuan sofisticado se volvió en la ciudad, nosotros compartíamos una memoria comunal de la tierra. Esto funcionó para los Chicanos, como pudo haber sido para cualquiera."[253]

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246 Id.
247 Id.
248 Id. página 40.
249 Ver id. página 40-41 (citando a Andrea G. Labinger, The Cruciform Farce in Latin America: Two Plays, in THEMES IN DRAMA: FARCE 220 (James Redmond ed., 1988)).
250 Id. página 42.
251 Id.
252 Benavidez, supra nota 182.
253 Id.

C. El esfuerzo organizativo: derechos laborales y civiles

Al igual que los activistas por los derechos civiles en el sur, la dirigencia del UFW sabía que la estrategia importaba.

Cuando Cesar Chavez decía "el poder te hace estúpido," lo que quería decir era esto: tiendes a depender demasiado en la inmensa ventaja que te dan tus recursos, que es exactamente lo crea una oportunidad para los Davides del mundo. Chavez encontraba un especial placer en reunirse con personas para discutir sobre el tema, para responder ataques con contraataques, para hallar maneras de, como él decía, matar dos pájaros con una sola piedra y quedarse con la piedra."[254]

Cimentado en el compromiso con la causa, más que con una estrategia en particular, el sindicato tuvo la capacidad de improvisar y de aprender de la gente de base. "Necesitas además acceder a la información correcta. El UFW movía de forma coordinada todos sus contactos en el mundo de los trabajadores campesinos, las iglesias, los sindicatos, el movimiento de los derechos civiles, y en el dominio de la política de maneras muy diversas."[255] Adicionalmente, el UFW estaba dispuesto a aprender y tenía "la valentía para arriesgarse al fracaso."[256]

El UFW fue más que un sindicato, pero fue, por supuesto, creado para organizar a los trabajadores y asegurar contratos que les fuesen beneficiosos. En el proceso de negociar más de mil contratos sindicales y de contar con más de cincuenta mil afiliados aportantes, el sindicato entrenó a cientos de dirigentes y activistas comunitarios. Estos esfuerzos permitieron que la UFW se convierta en un participante a tener en cuenta dentro del campo político en California, así como un partícipe preminente en el activismo Chicano que no estaba relacionado con los trabajadores del campo. Debido al uso del boicot y el involucramiento de celebridades y activistas de fuera del mundo sindical, el público vio las acciones y los temas planteados por el UFW como parte del movimiento por los derechos civiles en lugar de un conflicto laboral común. Después de más de doce años de activismo y, en ocasiones, conflicto violento en los campos, los sindicatos y sus antagonistas estuvieron en la posición de negociar el Proyecto de Ley de Relaciones Laborales Agrícolas

254 GANZ, supra note 174, página 253.
255 Id. página 252-253.
256 Id. página 253.

(ALRA, por sus siglas en inglés) y, de esta manera, iniciar una nueva etapa en las relaciones entre industrias y trabajadores del campo.[257]

El UFW no diseño el ALRA solamente como un marco para proteger los nuevos contratos, sino para usar el proceso de negociación de los mismos como una oportunidad para continuar la organización de los trabajadores.[258] Las provisiones del Proyecto les daban maniobrabilidad y creaba un proceso que ayudaría a protegerlos de la intimidación de los productores. Además, las disposiciones anti-intimidación también impulsaban la educación de los trabajadores. El UFW quiso usar el ALRA para impulsar un continuo proceso organizativo.[259]

Sin embargo, a pesar del éxito organizativo durante la década de 1960, el período más peligroso para la UFW llegó después de la aprobación del ALRA. La verdad fue que "la vida y las condiciones de trabajo de los campesinos de California eran un poco mejores que al principio del siglo veinte" que cuando sus esfuerzos organizativos empezaron.[260] "A pesar de que el [ALRA] seguía siendo la única ley de negociación colectiva que incentivaba la sindicalización de los trabajadores en la parte continental de los Estados Unidos, la organización que la hizo posible era una sombra de lo que había sido en el pasado."[261] Como lo señala Marshall Ganz:

> "Una vez más, sin embargo, un momento de victoria se convirtió en un momento de peligro… Esta vez, sin embargo, la amenaza venía desde adentro y no fue vencida. Solamente cuatro años después [de la aprobación del ALRA], la UFW dejó de organizarse, echó a sus líderes más experimentados, y entro en una etapa de declive de la cual no se ha recuperado."[262]

Conclusión: un movimiento social es la mejor manifestación de la democracia

El punto de las historias que hemos contado, que son solamente ejemplos, es que las cortes por si mismas no son la voz del cambio. En el mejor de los

257 Id. página 234.
258 Id.
259 Id. página 235-36.
260 Id. página 239.
261 Id. página 240.
262 Id. página 241; ver, MATTHEW GARCIA, FROM THE JAWS OF VICTORY: THE TRIUMPH AND TRAGEDY OF CESAR CHAVEZ AND THE FARM WORKER MOVEMENT (2012).

casos, ellas ratifican el cambio. Los activistas de los movimientos sociales -a través de su movilización política y su transformación de la cultura- hacen que las acciones de la Corte Suprema parezcan apropiadas e incluso largamente esperadas. Lo mismo ocurre con las reformas legislativas.

En los casos del Partido Demócrata por la Libertad de Mississippi y el Boicot a los Buses de Montgomery, los activistas negros no querían simplemente competir por un escaño en una convención. Permitir que dos personas representen al conglomerado, como Joseph Rauh y Martin Luther King, Jr. Hicieron en el conflicto del MFDP, aleja el poder de la comunidad que ellos decían representar. En Montgomery, el MIA no quería solamente más asientos para negros, ni siquiera eliminar la segregación en los buses; ellos querían eliminar la ejecución privada de las leyes Jim Crow por parte de los conductores de los buses. En consecuencia, los activistas en Mississippi y en Montgomery clamaban por una fuente alternativa de poder, una que tomase la promesa de la democracia en serio. Ellos reestructuraron el significado de la oportunidad mientras que reestructuraban el significado de la representación.

Sin embargo, el movimiento por los derechos civiles, especialmente a nivel nacional, no era un frente de lucha en el que todos los negros estaban representados. Muchos de los negros de clase media (de la misma manera que sus contrapartes blancas) usaron el lenguaje de las calificaciones (hablar con propiedad el inglés, saber leer y escribir) para definir quienes debían ser los líderes y privilegiar a algunos voceros sobre otros. El lenguaje de las calificaciones implicaba que una aparcera analfabeta no debía dominar el drama nacional de la Convención Nacional Demócrata en Atlantic City. La postura del MFDP, como consecuencia, buscó hacer retroceder a las élites blancas y negras para enfrentar así la doble exclusión a los negros pobres "de la política nacional y la política del movimiento."[263] Al desafiar el lenguaje de las calificaciones y todo lo que este otorgaba, los activistas locales también pensaron que encontraron una forma de hablar de clase sin reducir ésta a la raza, o viceversa.[264]

En efecto, las demandad del MFDP desafiaron la falta de democracia en Mississippi, así como lo hicieron con el Partido Nacional Demócrata.

263 Polletta, supra note 37, página 398.
264 Id.

Esos activistas negros en su mayoría pobres y analfabetos amenazaron el monopolio del poder que conservaban las élites nacionales, no solamente los blancos segregacionistas. Ellos entendieron pronto que pocos líderes negros tradicionales serían persistentes en enfrentar la resistencia blanca, sea a nivel local o a nivel nacional. El peligro que representaba la gente común hablando por si misma había sido suficiente para provocar que Roy Wilkins, la cabeza de la dirigencia nacional del NAACP, explotase. Wilkins criticó duramente a Hamer, "ustedes son personas ignorantes, ustedes no saben nada sobre política, tratan de imponer su posición, ¿por qué no empaca y regresa por donde vino Señora?"[265]

Al igual que Roy Wilkins, los asesores legales y los abogados activistas con frecuencia pierden también perspectiva cuando se mudan para estudiar y aprender de lugares donde los abogados suelen estar en control durante esta clase de conflictos públicos.[266] El conflicto puede entonces ser trasladado a los documentos legales que ellos estudian, pero muchas veces olvidan que esa es una traducción hecha para una audiencia especializada, usando una forma encriptada de hablar y comprender el mundo. No significa que las élites del Derecho estén mal; es sólo que su representación solo permite una visión parcial. Ellos se enfocan en el informe legal que Rauh escribió, por ejemplo, en el que citaba normas legales relevantes, estatutos de la organización y precedentes judiciales. Ellos incluso pudieron haber analizado los documentos legales y su correspondiente casuística en búsqueda del significado duradero que se podría dar al conflicto en el futuro. Para esta clase de preguntas, lo que importa en el tiempo es la forma en que las élites, al final del día, le dan sentido a las acciones de los activistas que no pertenecen a la élite. Nosotros argumentamos que el sentido opuesto es frecuentemente el más cercano a la

265 Id. página 395.

266 Para una definición de los abogados activistas como actores políticos cuyo trabajo implica hacer derecho, que utilizan sus habilidades legales para perseguir fines e ideales que trascienden el servicio al cliente, y que están involucrados en un proyecto profesional para proporcionar un bien público, pero que tampoco son lo mismo que los abogados de interés público, ver STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 1-22 (2004). Scheingold y Sarat argumentan que el abogado de causa encaja dentro del discurso principal de la profesión legal sobre la abogacía como un bien público. Intentan justificar el papel del abogado de causa en una democracia, distinguiendo entre abogados de causa políticos y de estado de derecho. Los abogados de causa políticos, de hecho, declaran su solidaridad con sus clientes y las causas que persiguen conjuntamente... Por el contrario, los abogados de causa de estado de derecho tienden a identificarse con los derechos, la legalidad y la constitucionalidad como fines en sí mismos. Para el abogado de causa políticamente comprometido, tanto el cliente como la ley se tratan como medios en lugar de fines. Para el abogado de causa legalmente comprometido, la legalidad es, de hecho, la causa. Id. En la página 18. Utilizamos el término "abogado activista" para referirnos tanto a abogados políticos como a abogados de estado de derecho.

verdad. Los protagonistas de la elite a menudo les dan sentido a sus acciones gracias a los esfuerzos de activistas no elitistas como Fanny Lou Hamer y todos los demás que se levantaron detrás y junto a ella.

Los boicoteadores en Montgomery y los activistas del MFDP fueron de personajes marginales a ser miembros de comunidades de interpretación autoritativas. Lo que ellos estaban interpretando era el significado la justicia constitucional de los Estados Unidos. Al final, ellos reestructuraron la política de lo posible. Ellos les dieron a sus actos una explicación plausible, una que pasó a formar las bases de un entendimiento común. Ese entendimiento creció inicialmente como una forma de explicación interna que permitía a la comunidad dar sentido a su existencia. Sin embargo, este entendimiento debía también persuadir a actores externos. Estas dos comunidades se volvieron fuente de autoridad ya que otros miembros del campo político se encontraron a sí mismos en la posición de tener que pactar bajo los términos de dichas interpretaciones. En una versión heroica de las acciones de los boicoteadores de Montgomery y los activistas del MFDP, demostraron que el cambio institucional era necesario si se pretendía sostener la retórica de la democracia y la igualdad. Estos dos movimientos ilustran lo que el Profesor Thomas Stoddard documentó: los cambios normativos ausentes de cambio cultural no son suficiente para producir cambios reales y sostenidos en el tiempo.[267]

Si bien es cierto la gente negra en Montgomery y los activistas del MFDP buscaban asientos, no se debe olvidar la dimensión metafórica de su demanda. Sus historias son "textos" de lo que podemos llamar demosprudencia. El definir las reglas para ocupar esos asientos, sea en un bus local o en una convención política nacional implicaba un desafío al uso privado de la fuerza estatal. Sin embargo, los activistas de Mississippi y Alabama no estaban simplemente confrontando la autoridad del estado. Ellos se enfrentaban a lo que se reclamaba socialmente como justicia. removieron el manto que quería ser llamado autoridad pero que se demostró que era falso. Ellos desafiaron lo que "es" como una visión de lo que "debe ser" y empujaron a la sociedad

267 Sec Stoddard, supra note 21. Nos interesa especialmente las movilizaciones (o acción colectiva) que comparten tres elementos: (1) se basan en un conjunto de creencias sobre el futuro o cómo podrían ser las cosas (basado en una visión normativa), (2) sus historias sobre el futuro contienen la motivación para actuar y (3) sus acciones expresan la moral de la historia. Nuestro interés incluye movilizaciones colectivas, tanto de la derecha como de la izquierda, que comparten el compromiso duradero con la movilización masiva para transformar la cultura, los arreglos económicos o sociales y/o las instituciones. Las campañas electorales, la litigación para obtener una victoria judicial singular y las estrategias legislativas pueden ser tácticas utilizadas por un movimiento social, pero por sí solas no indican la existencia de un movimiento social.

mayor a contemplar "lo que sería" la justicia si pudiese ser traída al campo de lo real. Pero lo más importante fue que ellos ayudaron a cambiar las normas culturales, no solo las normas legales. Ellos promulgaron una "normativa" o "motivaron" una visión de una sociedad más justa que era a la vez reparadora y aspiracional. No fue una simple inspiración, fue a través de sus acciones que se promulgaron dramáticas intervenciones en el status quo.

El éxito de la UFWOC se debió en gran parte a su habilidad de presentar, dentro de una heurística cultural, preguntas trascendentales de justicia. Además, la persistente e incansable organización del UFW juntó los agravios laborales con preguntas más amplias sobre justicia social. El uso estratégico de sus recursos le permitió a la UFW prevalecer sobre rivales muy bien financiados. Sin esta capacidad de movilizar recursos, que tradicionalmente no se considerarían como tales, no existiría el ALRA. El UFW conectó concepciones católicas sobe la justicia con sus demandas en contra de los productores. El uso de la iconografía de la religión fue similar a la habilidad del Dr. King de basar sus demandas por justicia usando el sistema de creencias de la iglesia de la Iglesia Bautista.

Coincidimos con el Profesor Ackerman en que las cortes, la legislatura y los procesos electorales son importantes. Sin embargo, el énfasis que Ackerman en las élites no debe cegarnos a las acciones de hombres y mujeres ordinarios en el terreno. Sin las personas que estuvieron movilizadas a través del sur y el norte (los participantes de los Veranos de la Libertad, por ejemplo), habrían existido menos líderes efectivos. Fueron sus acciones concertada las que le dieron contenido sustantivo a, y amplificaron las voces de, los autodenominados "voceros del pueblo americano." Sin el MFDP, sin el SNCC, sin la marcha de Selma a Montgomery, no se habría aprobado el Proyecto de Derechos al Voto en 1965; no habrían ocurrido cambios fundamentales en la comprensión de para qué es nuestra de democracia. De la misma manera, sin la UFW -y su capacidad de organizar a sus aliados de todas partes del país (empezando con la marcha de Delano a Sacramento)- no habría existido el Proyecto de Ley sobre Relaciones Laborales en la Agricultura (ALRA) en California.

Los líderes de las instituciones políticas obtienen su coraje para actuar de la gente. El presidente Johnson nunca habría podido pronunciar su discurso "nosotros debemos prevalecer," tan dramático e importante como

fue, sin el sacrificio de la gente en el movimiento de los derechos civiles. La importancia de tal formulación está tanto en la idea de "movimiento" como lo es en el contenido de los "derechos civiles." El contenido sustancial cambió, como cambió el potencial democrático en nuestra cultura, al expandirse la posibilidad de lograr la promesa de las cuatro libertades que el *new deal* original prometía hacer accesibles para todos.

De varias maneras, nuestro proyecto no es nuevo. De la misma manera que lo hizo el Profesor Ackerman, estamos enfrentado la forma de privilegiar a las fuentes formales de autoridad que desprecian o minimizan el rol de los activistas de movientes sociales y otras formas contenciosas de organizar el poder para nombrar sus propias realidades y le dieron a esa realidad un corazón, un alma y una historia. La transformación política de los Estados Unidos viene no solo de lo que la Corte Suprema está resolviendo o de los argumentos que los abogados de los movimientos sociales están presentando. Los activistas de los movimientos sociales son parte del proceso de creación de la normativa. Ellos hacen que algunos argumentos resuenen mejor e incluso más plausibles. Esto es lo que Adam Liptak, al describir los duelos que sostuvieron los personajes que intervinieron en casos como le icónico Brown v. Board of Education, llama la "música", opuesta a la "lógica" de la ley.[268] Los abogados son usualmente concebidos de forma tácita como personas que controlan la lógica de la ley a través de sus análisis de precedentes y su compromiso con los principios. Mientras tanto, los activistas revelan la música del derecho al combinar el lenguaje de los derechos con historias locales de justicia que definen marcos normativos y narrativos a través de los cuales se procura entender que es lo que las cortes pensaban que hacían. De acuerdo con Francesca Polleta, cuando los dirigentes del movimiento sureño por los derechos civiles "reordenaban" los marcos conceptuales de un dominio institucional a otro, ellos proveían de nueva energía para la resistencia.[269] La música que compusieron estos activistas es el trabajo de "trasposición," que combina, por ejemplo, formulaciones de derechos legales con "retóricas justificadoras que resuenan a nivel local."[270]

Dicho trabajo, a través de estructuras descentralizadas ubicadas a

268 Adam Liptak, Brown v. Board of Education, Second Round, N.Y. TIMEs, Dec. 10, 20o6, http://www.nytimes.con/20o6/12/1o/weekinreview/1oliptak.html.

269 Polletta, supra note 37, en la página 379. Polletta describe la importancia de la iglesia negra en "nutrir desafíos contrahegemónicos" y preservar marcos normativos alternativos. Al destacar y promover la misión social del evangelio de la iglesia negra, los activistas por los derechos civiles pudieron fomentar desafíos culturales que "promovieron la compatibilidad de los idiomas religioso y legal". Id. a las 379-80.

270 Id. página 379.

cierta distancia de las organizaciones de derechos civiles nacionales y estatales, propugnó la experimentación y la innovación táctica e ideológica, construyó solidaridad dentro de la organización, y permitió a los activistas del movimiento hacer crecer significativamente su perfil en algunos casos, y, en otros, al menos avanzar en la reflexión crítica de lo ocurrido.[271] Cuando un grupo "dinámico" de REPRESENTADOS nombra su propia realidad al, por ejemplo, cantar espirituales en el coro de la iglesia, componer sus propio himnos cristianos en el responsorio de la misa, o invocando a Dios en inglés vulgar, frente a las cámaras de televisión, durante el trato brutal que recibían por tratar de registrarse para votar en Mississippi, los activistas del movimiento aumentaban las fuentes de autoridad del abogado y creaban una nueva fuente de obligación de rendición de cuentas para el abogado y el Derecho. Al decirle que es lo que dice el derecho a aquellos que están sujetos a él, los activistas crearon nuevas bases para la interpretación del mismo e hicieron más difícil para las élites interpretarlo de una manera contraria a la de las personas en las calles, ya que ellos hablaban desde su experiencia de vivir la injusticia. Cualquier alteración sustancial a esa interpretación se sentía como injusta. Es a través de ese efecto de retorno que aquellos que cantaban la música del derecho podían tener un rol en la composición de su lógica.

Al definir ganar en su sentido más restringido, como lo hizo Joe Rauh con el MFDP, los abogados pueden apresurar a los litigantes a celebrar importantes victorias tácticas. A la vez, la visión estratégica que se requiere para un cambio a largo plazo que se sostenga en el tiempo puede haberse perdido.[272] Sin embargo, sin importar su rol contingente en la historia, la relación de Fred Gray con el MIA muestra como el derecho y los abogados llevan al final mucha de la carga pesada de darle forma a la trayectoria que seguirá un movimiento social al diseñar sus objetivos a corto plazo y

271 Id. página 380-81. Al elevar su voz colectiva, la música de la comunidad puede cambiar su propia comprensión de lo que es capaz y de lo que el poder organizado puede hacer. Una dinámica constante se construye a partir de una identidad compartida mediante el desarrollo de una estructura (rituales, compromisos, liderazgo) para sostener esa identidad y nombrar cosas que entienden como verdaderas (la brecha entre ideología y epistemología).

272 Ver, e.g., ROSENBERG, supra nota 25; Tomiko Brown-Nagin, Elites, Social Movements, and the Law: The Case of Affirmative Action, 105 COLUM. L. REV. 1436 (2005); ver también Michael Grinthal, Lawyers and Relational Organizing 23 (May 15, 20o6) (unpublished manuscript) (on file with authors) (Describiendo la forma en que el litigio sobre derechos puede definir a los demandantes por su debilidad y su necesidad de intervención estatal). Cf Lani Guinier, From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma, 91 J. AM. HisT. 92 (2004) (Explicando que uno de los conflictos dentro de la estrategia para desegregar el Sur era cómo eliminar los efectos negativos de la raza manteniendo los efectos positivos de la raza.).

las consecuencias esperadas a largo plazo.[273] Dado que los abogados juegan el papel de élite , de expertos, y porque a menudo no son conscientes del impacto que tiene su experiencia (como entes privilegiados se la sociedad) en su imaginario, su rol en los movimientos sociales merece un mayor atención.

Los abogados activistas y los académicos de derecho han empezado a tomar nota de las múltiples formas en que los abogados practicantes, dirigentes y autoridades públicas pueden representan, y representan, a comunidades marginadas en su proceso de contar historias diferentes y crear un nuevo derecho.[274] Existe un renovado interés en investigar las relaciones entre los movimientos sociales y la creación normativa entre los académicos del derecho y los abogados practicantes, tanto en la izquierda,[275] como en la derecha.[276]

273 Austin Sarat llama a la diferencia entre objetivos concretos y resultados intangibles a largo plazo "cambio generacional primero" y "cambio generacional segundo". Entrevista telefónica con Austin Sarat (30 de noviembre de 2006). Hay una distinción cronológica en términos sensibles al tiempo; también tiene la intención de destacar la diferencia entre el cambio tangible y el cambio intangible. Thomas Stoddard denomina esto como "cambio de reglas" frente a "cambio cultural". Véase Stoddard, supra nota 21, página 973.

274 Ver, e.g., Ann Southworth, Professional Identity and Political Commitment Among Lawyers for Conservative Causes, in THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE 83 (Austin Sarat & Stuart Scheingold eds., 2005).

275 Hay un creciente cuerpo de literatura jurídica sobre este tema, gran parte de la cual proviene de Yale Law School. Ver, e.g., KLARIAN, supra nota 25; Jack M. Balkin & Reva B. Siegel, Principles, Practices, and Social Movements, 154 U. PA. L. REV. 927 (20o6); Brown-Nagin, supra note 241; Kenneth W. Mack, Rethinking Civil Rights Lawyering and Politics in the Era Before Brown, 115 YALE L.J. 256 (2005); Robert Post, The Supreme Court, 2002 Term -Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, 117 HARV. L. REV. 4 (2003); Siegel, supra note 55; Reva B. Siegel, Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown, 117 HARv. L. REV. 1470 (2oo4); Reva B. Siegel, Text in Context: Gender and the Constitution from a Social Movement Perspective, 150 U. PA. L. REV. 297 (2001); ver también KRAMER, supra nota 25; William N. Eskridge, Jr., Channeling: Identity-Based Social Movements and Public Law, 150 U. PA. L. REV. 419 (2001); William N. Eskridge, Jr., Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century, 1oo MICH. L. REv. 2062 (2002); Edward L. Rubin, Passing Through the Door: Social Movement Literature and Legal Scholarship, 150 U. PA. L. REV. 1 (2001). But cf Lucas Powe, Are "the People" Missing in Action (and Should Anyone Care)?, 83 TEx. L. REV. 855 (2005) (reviewing KRAMER, supra nota 25). Durante las décadas de 1980 y 1990, también hubo un conjunto enérgico de conversaciones sobre la relación entre la ley, el litigio y el cambio social. El movimiento de estudios legales críticos dedicó considerable atención a una crítica de los derechos, especialmente aquellos que dirigen la atención de los demandantes hacia el cambio social a través del litigio. Gran parte del trabajo anterior, sin embargo, se centró específicamente en la labor de litigantes y tribunales. Algunos académicos también han puesto sobre la mesa el género de "legisprudencia". Ver, por ejemplo, Robin West, Katrina, la Constitución y la Doctrina de la Pregunta Legal, 81 CHLI-KENT L. REV. 1127, 1170 (2006). La nueva investigación ha ampliado la conversación para incluir el trabajo de actores no legales. Sin embargo, nuestro enfoque particular se centra en la relación dinámica entre la creación de leyes y la creación de significado, en la que la creación de significado se origina y arraiga en el nivel de base, no solo en los tribunales o la legislatura.

276 Por ejemplo, los abogados conservadores, financiadores y activistas que se unieron para animar, narrar y autorizar un cambio legal fundamental en el último cuarto del siglo XX estudiaron la estrategia de litigio cuidadosa y secuencial de la NAACP en las décadas de 1940 y 1950 para revocar Plessy v. Ferguson. Su estrategia evolucionó lentamente en respuesta a lo que aprendieron mientras libraban sus batallas contra jueces liberales, medios de comunicación liberales y "perezosos" pobres (generalmente de color).

Aun así, gran parte de los esfuerzos siguen dirigidos a descubrir nuevos caminos para conseguir el tipo de cambio social que se consigue mediante las élites. Algunos abogados y abogadas activistas buscan vías para hacer procesos de "formación" o para desarrollar "estrategias comunicacionales" para ganar apoyo para sus causas, pero en escasas ocasiones se detiene a pensar como las causas que litigan resuenan con la experiencia vital de sus clientes, no solamente con sus simpatizantes putativos y financistas.[277] Desde la sociología, la ciencia política y la historia se tiene una larga tradición de estudiar a los movimientos sociales, sin embargo sus teorías de cambio social también separan el rol del Derecho y de los abogados y las abogadas, como si funcionasen en paralelo con los actores y actrices de los movimientos sociales, pero en distintos carriles. De la misma manera, muchas abogados y abogadas, así como profesoras y profesores de derecho aún se concentran en casos legales y opiniones judiciales sin necesariamente considerar las fuerzas sociales, políticas e históricas que influenciaron el desarrollo de las doctrinas legales. A diferencia del Profesor Ackerman, ellas y ellos se concentran, en primer lugar, en las instancias formales de creación del derecho como la judicatura, la legislatura o el ejecutivo. Abogadas y abogados, en particular, a menudo asumen que su mayor oportunidad de éxito descansa en influir en el derecho a través de los argumentos formales presentados en un contexto judicial. Sus argumentos, sin embargo, no están necesariamente situados en una historia más grande, que tenga fuerza normativa por si misma y que pueda ser lo único notable y que la corte podría decir que es importante. Incluso cuando momentos de constitucionalismo popular son considerados,

Ver Southworth, supra nota 243; ver también Kimberly Liu, The Role of Litigation Movement for Education Reform: A Case Study of the Milwaukee Voucher Campaign (2007) (trabajo de estudiante inédito, Facultad de Derecho de Harvard) (archivado con los autores). Adaptando lo que habían aprendido, los conservadores construyeron una estrategia que abandonó los llamados explícitamente racistas o sexistas del pasado y en su lugar utilizaron una retórica sofisticada pero resonante para contar una historia sobre el Sueño Americano sitiado. Luchando por la oportunidad individual, los valores familiares y las legítimas recompensas del trabajo duro, su base de seguidores se movilizó para resistir y revocar decisiones icónicas, socavando su base legal y popular (como en Roe v. Wade, 410 U.S. 113 (1973)) o cooptando argumentos a favor de la igualdad a través de una forma de amnesia nacional (como en Parents Involved v. Seattle School District No. 1, 551 U.S. 701 (2007)). Los tribunales, trabajando en conjunto con iniciativas ciudadanas, como la Iniciativa Civil de Michigan para Defender la Acción Afirmativa que se aprobó en 2006, continúan redefiniendo el significado de las victorias convencionales en derechos civiles, feministas y laborales. Ver Schuette v. Coal. to Defend Affirmative Action, 2014 WL 1577512 (U.S. 2014). Una de las grandes lecciones de los éxitos de los agentes de cambio conservadores es que los cambios legales y sociales tienen lugar en las esquinas de las calles y alrededor de las mesas de la cocina, no solo dentro de los tribunales o legislaturas.

277 Esto no es un problema nuevo. Ver Derrick A. Bell, Jr., Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 YALE L.J. 470 (1976).

las acciones de "el pueblo" cuentan solo cuando han sido canonizada a través de las palabras de las sentencias de las cortes o en el lenguaje normativo de la legislatura.[278] En cualquier caso, es el poder judicial el que sirve como el editor autorizado de la ley.

Por contraste, nosotros defendemos que las sociedades democráticas están organizadas para producir una variedad de comunidades de interpretación autorizada [comunidades con autoridad interpretativa] [comunidades con interpretación legítima del derecho].[279] Las historias del MFDP, del Boicot de Buses de Montgomery y del UFW explican las formas en que los movimientos sociales que funcionan como una comunidad de interpretación legítima del derecho pueden jugar un rol crítico en redefinir el significado de rendición de cuentas, de representación democrática, de acción democrática y de la democracia en los Estados Unidos.

Hamer y los otros delegados del MFDP fueron "cambiadores del viento" ejemplares. Su objetivo fue aumentar el ámbito de la participación real en los procesos de toma de decisiones. Ellos cuestionaron la limitada definición de lo que es legítima representación; ellos redefinieron participación real; y, ellos insistieron ampliar la noción de que quien debía incluirseen el proceso de toma de decisiones. Por el contrario, los politicosy el liderazgo nacional del partido, como miembros del aparataje estatal, se pararon con sus dedos humedecidos en alto tratando buscando dirección sin notar que el clima había cambiado.

Los roles que jugaron Fred Gray y otros abogados en el Boicot de Buses de Montgomery, la historia que finalmente cuentan, la robusta idea de igualdad, lo asumido sobre la fuente de poder para hacer el cambio, y la definición de éxito reflejan el sello distintivo de una comunidad de interpretación a la cual los abogados se sentían obligados a respetar y a rendir cuentas de sus actos. En el caso del boicot de buses, el derecho es usado de manera táctica. Este

278 KRAMER, supra nota 25; William E. Forbath, Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role offudicial Finality in Popular Understandings ofPopular Sclf-Rule, 81 Ci.-KENT L. Riv. 967 (2006).

279 Ver supra notes 116-119, 138-144 y texto acompañante (discutiendo cómo el Partido Demócrata de la Libertad de Mississippi en 1964 y el Boicot de Autobuses de Montgomery en 1955 funcionaron como comunidades interpretativas alternativas pero autoritarias). Parte del objeto de nuestra investigación es mapear las intersecciones de estas diversas comunidades. El significado generalizable ocurre en las intersecciones, y la ley cruza una variedad de comunidades interpretativas autoritarias, extrayendo significado de estas diversas comunidades. Sin embargo, estas comunidades son dinámicas y ponen el significado legal bajo un flujo continuo de diversas intensidades. Una forma en que se media este flujo es a través de la interacción de la ley, los abogados y los movimientos sociales.

derecho está vinculado a una comunidad movilizada que está en búsqueda de producir justicia. Una narrativa cuya más alta autoridad viene de la idea de que la ciudadanía pertenecía también a las personas negras de Alabama fue la que motivo a esta comunidad. Estas personas eran inspiradas para tomar riesgos en apoyo a sus ideales porque creían en un Dios justo y en el apoyo que de él obtenían mediante sus rituales culturales religiosos, como una manifestación de la devoción religiosa, su espiritualidad y el canto en las reuniones masivas. A través de sus luchas colectivas y su riqueza de recursos comunitarios ganaron un sentido de agencia y crearon una base social de resistencia que construyó una nueva organización e inspiró una serie de movimientos nacionales.

Los textos de sus historias fueron escritos con la tinta del gran coraje de una comunidad movilizada que activamente se representó a sí misma. Estas actrices y actores de movimientos sociales cambiaron las bases sobre las cuales las preguntas de legalidad y justicia eran respondidas. marcharon, cantaron, declamaron con sus voces sin escolaridad. Cambiaron el viento y en el proceso, transformaron el simple papel sobre el que está escrito la democracia en acción real de un gobierno del, para y por el pueblo.

SECTION III

Dossier

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BEYOND CONSTITUTIONAL JURISPRUDENCE: SOCIAL MOVEMENTS AND SYNERGY FOR THE RIGHTS OF NATURE

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ABSTRACT

The current study focuses on the jurisprudence of the Constitutional Court of Ecuador regarding the rights of nature, developed from 2019 to 2022. The standards established during the examined period emerged from a collaborative effort between ecological, indigenous, and animal rights social movements, alongside various Constitutional Court justices with expertise in these areas, stemming from both academic backgrounds and social activism. This study examines the involvement of various advocacy groups through the amicus curiae mechanism. This analysis aims to clarify the collaborative dynamics and deliberative context surrounding constitutional decisions. The results demonstrate how the different social movements engaged in collective action, leveraging a conducive environment that facilitated their interaction with the justices in advancing constitutional rights.

RESUMEN

El presente artículo se enfoca en la jurisprudencia de la Corte Constitucional del Ecuador sobre los derechos de la naturaleza, desarrollada desde 2019 hasta 2022. Se parte del entendimiento de que los estándares emitidos en el periodo analizado surgieron a través de una sinergia entre los movimientos sociales ecologistas, indígenas y animalistas, y varios jueces de la Corte Constitucional que estaban familiarizados con estos temas tanto desde la academia como desde el activismo social. Con base en lo anterior, se analizan las militancias que participaron mediante la figura del *amicus curiae* para comprender esta sinergia y el contexto deliberativo de las decisiones constitucionales. Como resultado, se describe cómo los diferentes movimientos sociales participaron a través de la acción colectiva, aprovechando un contexto favorable que facilitó este encuentro con los magistrados en el desarrollo de los derechos constitucionales.

KEY WORDS: Rights of nature, *amicus curiae*, social movements, democratic deliberation, judicial decisions.

PALABRAS CLAVE: Derechos de la naturaleza, *amicus curiae*, movimientos sociales, deliberación democrática, decisiones judiciales.

JEL CODE: N460, N56

RECEIVED: 11/10/2023
ACCEPTED: 26/12/2023
DOI: 10.26807/rfj.vi14.486

INTRODUCTION

The jurisprudence concerning the rights of nature in Ecuador has undergone significant development since 2019, aligning with a recent restructuring of the Constitutional Court. This phenomenon is not accidental; rather, it is the result of a synergy between ecological, indigenous, and animal rights social movements, alongside support from several Constitutional Court justices who were already well-versed in these issues from both academic study and social activism. Furthermore, social movements demonstrate a form of activism wherein autonomy, both individual and collective, is a fundamental characteristic that allows them to diverge from the organizational formalism of traditional left-wing structures. The methodology employed in this research is grounded in the sociology of law, which challenges the positivist approach that views norms as an end in themselves, thus distancing itself from legal formalism. The study aims to explore comprehensive ways of understanding the law through the analysis of social transformations and via multiple case studies.

This study also analyzes advocacy actions as they manifest in jurisprudence. It examines participation in legal processes, such as through the *amicus curiae* mechanism, and includes in-depth interviews with four students from the master's program in the rights of nature and intercultural justice at the Universidad Andina Simón Bolívar (UASB)[1] and with two students from the advanced course in intercultural community technical studies in human rights and nature, facilitated by the Andean Program of Human Rights[2] at UASB. Additionally, to comprehend the dynamics of this synergy, interviews were conducted with two former justices of the Constitutional Court who played prominent roles in several rulings. The findings demonstrate that the activism of advocacy groups can establish connections within a deliberative setting, which can be understood as dialogical activism by the Constitutional Court.

1 This master's program was launched in 2020 at UASB, Ecuador campus, as part of an international project involving seven universities funded by Erasmus-EU—the OPTIN Project.

2 The advanced course was given in collaboration with Acción Ecológica, thanks to an international project funded by the EU.

1. Environmental social movements

Research on social movements in Latin America began in 1970s. These movements can be characterized as organic-conscious and programmatically structured or organic-spontaneous, emphasizing immediate demands or other forms of resistance or social disobedience (Contreras and Vásquez, 2006, p. xx). John Rawls, discussing the civil disobedience associated with the youth movements of the 1960s and 1970s, identifies them as: "an action dictated by conscience, but of a political nature […] Directed and justified by political principles; that is, by the principles of justice" (as cited in Scheuerman, 2019, p. 81).

According to classical liberalism, civil disobedience should be solely linked to demands for civil and political rights, as economic, social, and cultural rights disrupt structural inequalities. In this way, justice can uphold these acts of disobedience as the movements' last recourse. It is thus a question of advocating for a distributive justice that ensures public demands without undermining "civic friendship." The limitations of this theory become evident in societies wherein structures of inequality have historical and cultural roots and where groups strive for alternative forms of justice. According to Antonio Wolkmer, this involves "a pluralism in the legal sphere of a community-participatory nature 'from below,' which raises questions about key issues such as 'sources,' 'foundations,' and the 'object' of law" (Wolkmer, 2018, p. 205). Regarding this pluralism, Wolkmer (2018) states:

> Moreover, it is imperative that pluralism, as an alternative framework for the political and legal spheres, be inherently committed to the participation of multiple social identities (legitimacy of actors), the fulfillment of human needs ("material foundations"), and the democratic political process of decentralization, participation, and community oversight (strategies). Additionally, legal pluralism involves the integration of certain "formal foundations," such as the embodiment of a "concrete ethic of alterity" and the establishment of processes related to an "emancipatory rationality." Both elements are adept at articulating the diversity and differences present in forms of everyday life, identity, and autonomy of subaltern collectivities, thus serving as sources of alternative legitimacy. (p. 205)

In this context, the theory of new social movements, which emphasizes identity construction (Tanaka, 1995, p. 4), and the theory of "collective action" (Tarrow, 1997, p. 9), which describes the composition of contentious actions and political opportunities for collective action, are particularly relevant to the study of social movements in Latin America. Indeed, these organizational forms challenge the inaction of the rule of law by fostering shared "solidarities." In this regard, we can define social movements, following Sidney Tarrow's (1997) assertion, as "collective challenges, based on common purposes and social solidarities, in sustained interaction with elites, opponents, and authorities. This definition has four empirical properties: collective challenge, common objectives, solidarity and sustained interaction" (p. 21).

The advancement of the rights of nature in Ecuador can be attributed to several factors, including relational social capital (Bourdieu, 1980, pp. 2-3), which extends across public institutions, and a "collective challenge" characterized by collective action and synergy resulting from shared histories among civil society organizations, including social movements and academia. When discussing Pierre Bourdieu's (1980) concept of social capital, we are referring to resources associated with a durable network of relationships, whether institutional or informal, characterized by recognition and mutual acknowledgment and bound by enduring connections. The social capital of each activist will depend on the network of relationships they have been able to build and mobilize throughout their life. The collective challenge is associated with the common goals formed through the collective actions of civil society. Lastly, the collective synergy in this case arose at a specific moment to promote jurisprudence for the protection of the rights of nature.

> The components and elements of social capital are rendered ineffective without a catalyst to facilitate effective interaction among all individuals within a given social network. At this point, synergy (between each component and the collective whole) assumes particular significance, as it amplifies the impact of actions undertaken by all involved parties […] From the perspective already outlined, synergy is nothing more than an extension of collective behavior, wherein the role of the institutional environment, involving individuals and/or social groups, is recognized. (Álvarez, 2015, p. 14)

The rise of social movements in Ecuador occurred within a complex context. First, a shift in production occurred with the exploitation of oil in the late 1960s by the US oil company Texaco, leading to an economic dependence that persists to this day. Second, democracy returned to the country after dictatorships and political and legal instability. A new constitution marked the transition in 1979, which made some innovative contributions, including the recognition of indigenous languages. Subsequent crises have also led to a concentration of popular forces in various social organizations, including environmentalism. According to Verdesoto (1986):

> The economic and social changes that began in the 1960s accelerated in the following decade, particularly with the growth of oil exports. During the 1980s, the crisis reshaped the nature of these changes, prompting efforts to reconfigure the mode of accumulation and the extent of state intervention in society. Ecuadorian oil exports have limited influence in the global market. However, the internal circulation of this revenue created a heavy dependence on accumulation. (pp. 19-20)

The origins of the environmental movement in Ecuador are rooted in liberal principles. It emerged nearly simultaneously with the indigenous movement in the late 1970s, starting with the establishment of Fundación Natura in 1976, and it garnered support from a centrist-right political party, Democracia Popular. One of its founders was Roque Sevilla, former mayor of the Metropolitan District of Quito and associated with the World Wildlife Fund. During the 1980s, the grassroots environmental movement emerged with an agenda that facilitated alliances with historically marginalized sectors, including indigenous peoples and Afro-descendant communities. Certainly, this provided resilience in the social sphere amid the country's persistent political and economic crises. According to Sara Latorre (2015), this trend peaked in the 1980s with the creation of the Ecuadorian Environmental Movement, the Green Party, and the Ecuadorian Coordinator of Organizations for the Defense of Nature and the Environment (CEDENMA in Spanish).

This movement was initially established with the goal of creating opportunities for participatory discussion to coordinate proposals addressing environmental issues. As Latorre (2015) explains, it brought together various social sectors such as workers, indigenous peoples, farmers, and professional

associations, and evolved into a coordinating body for various NGOs in the early 1990s. Likewise, other coordination mechanisms emerged, including environmental networks and international campaigns, notably Amazonía for Life and Save the Mangroves (Latorre, 2015). As Esperanza Martínez points out, this environmentalism has leftist origins:

> As we were left-leaning, we began to engage, that is, to work in defense of nature with unions, which was a big headache, but we did it, also with farmers. We worked a lot with farmers and indigenous people. So, the idea was to work on both issues related to nature and to social sectors, and that's where the idea of popular ecology was born. There was Fundación Natura, which was very instrumental, from the upper class. Well, that difference still exists. So, we started working on campaigns. I've worked in oil all my life since I can remember. In Texaco. I started working with the Yasuní […] we started the Amazonía for Life campaign with other, more local organizations. In fact, our first direct actions were with León Febres Cordero. Very much in the style of holding candles in the central plaza. And so, along the way, we decided to become an organization that promotes direct action, active nonviolence. Those principles gradually grew within us, leading us to define ourselves as environmentalists. (personal interview, November 25, 2022)

This new context led to a displacement of productive sectors and the labor movement; it also laid the groundwork for a new activism. According to Maristella Svampa (2010), activist leftism in Latin America experienced substantial changes starting in the 1990s, marked by the emergence of activism centered around territorial rights and socio-environmental conflicts (p. 1). This shift became evident following the crisis of the model, which questioned concepts such as verticality (with leadership positions often held by men) and pragmatism, among others. Esperanza Martínez (personal interview, November 25, 2022) highlights these changes, emphasizing the linkage of actions by the grassroots environmental movement with leftist visions and actions. In this context, the left is characterized by its fight against transnational and extractivist capitalism, as well as its alignment with marginalized social sectors.

From the late 1980s onward, "collective action" was forged through coordination between the environmental and indigenous movements, with

some historic moments involving the protection of Yasuní National Park in the Ecuadorian Amazon. The strategies of the social movements were focused on direct action and resistance in a challenging context that offered little promise for the advancement of the rights of nature. This changed with the 2008 Constitution, which incorporated the rights of nature. Activists subsequently refocused on new avenues of political participation, marking a generational repositioning characterized by rupture. The concept of "activist ethos" moves away from more biologically deterministic notions like "generations" and is closer to that of collective identities, akin to Bourdieu's (1980) concept of *habitus*. Carlos Walter Porto Gonçalves concisely defines it as "the set of values that shape identity" (as cited in Longa, 2016, p. 50). Nevertheless, identity is more complex, requiring additional constitutive elements such as ideologies, political goals, and even socio-legal aspects.

2. The activist ethos for the rights of nature

Svampa (2010) points out that the leftist activist ethos in Latin America shifted with the emergence of activism more closely related to everyday life and socio-environmental conflicts while more distant from the classical leftist activist model (Longa, 2016, p. 54). The neoliberal context, coupled with the crisis in the socialist bloc in Eastern Europe following the fall of the Berlin Wall in 1989, prompted leftist activism to shift toward other arenas, including the indigenous movement (Rodríguez Caguana, 2017), academia, and environmental organizations, among others. The activist ethos, which questioned relationships with capitalism, remained relevant, but it could no longer persist in the same manner.

> This new narrative has been shaping a shared ethos that emphasizes organizational de-bureacratization and democratization. As a result, it is fueled by a deep distrust of party and union structures, as well as any higher coordinating bodies. Broadly speaking, autonomy is not only an organizational principle but also a strategic approach, invoking "self-determination" (in Castoriadis' sense of "to give oneself one's own law"). (Svampa, 2010, p. 9)

Since its inception, the environmental movement in Ecuador has been the most consistently active, both in terms of organizational and community support for socio-environmental conflicts and of engagement in subsequent legal processes of various kinds and at different levels. Advocacy for the

rights of nature in Ecuador spans different arenas, including the grassroots environment, the indigenous, and the animal rights movements. These movements embody distinct ethos, which will be explored via the narratives of specific individuals' life experiences.

3. Indigenous activist ethos

Indigenous activism shares its origins with the Ecuadorian left. Notably, the first national indigenous organization, the Ecuadorian Federation of Indians, emerged within the Communist Party in the 1930s under the leadership of Dolores Cacuango. However, starting in the 1970s, as oil exploitation increased in Ecuador and the indigenous movement gained autonomy, the focus of their struggle shifted toward cultural affirmation within their territories. These territories constitute the geographic areas where indigenous peoples persist and resist, maintaining unique ontological relationships with their surroundings. This assertion of their territories served as the foundation for the development of rights for *Pachamama* (Mother Earth). Current activism, especially in the Amazon, draws upon this historical background as collective memory. According to Justino Piguave:

> Actually, I believe that being connected to social and cultural issues has roots in my grandfather's past, who was a prominent social leader. My dad was the first teacher; he graduated from high school with a focus in bilingual education. So, I come from a family perhaps much more connected to and concerned about social and cultural issues. Above all, my grandmother was a skilled narrator of oral tradition; she was a good historian. So, I learned a great deal about those struggles, especially about resistance. During the military conflicts between Ecuador and Peru in the 1940s, my grandfather was forced to resist, because when the state's territory was divided, the nationality's territory was split down the middle, and he attempted reunification. He ventured into the jungle for two months without a compass or any tools, relying solely on his knowledge of the jaguar, and managed to reunify the territory once again. From there, my conviction was born. Later, when I was just 18 years old, my involvement with environmental disasters led me to engage with cases like Chevron, for instance. I was the first underage person to sign against Chevron. So, all of that connects me, makes me

> much more inclined to believe in social activism, and also reinforces my belief that cultural differences should be respected. It also underscores the importance of understanding nature according to the worldview of other actors who might believe that extractivism will destroy nature and everything else. (personal interview, October 30, 2022)

In Justino's narrative, memory emerges as a crucial tool for reclaiming identity through the construction and redefinition of his vital space, particularly the territory. For Justino Piguave, an indigenous leader from the Amazon and president of the Secoya-Siecopa nationality, his family history is closely linked to organizational processes. He is the son of his community's first teacher and the grandson of an important leader who reunified communities affected by the Ecuador–Peru conflict in the 1940s. Because of his career advocating for the indigenous communities affected by pollution by Texaco-Chevron, Justino became involved with the Ceibo Alliance, a coalition of individuals from the A'i Cofán, Siona, Siekopai, and Waorani peoples. This led him to participate as an *amicus curiae* as part of the case of the A'I Cofán Sinangoe community (Judgment No. 273-19-JP/22).

Oral memory serves as a resource for delving into mnemonic mechanisms that facilitate its transmission, such as recounting communal family history via stories within the community. As suggested by Ruth Moya (1992), myths serve as a functional tool for memory, bringing together political engagement, developing-world church initiatives, the Christian left, and other stakeholders. The mythical narrative continues to provide support for contemporary territorial struggles today. Similarly, Svampa (2010) notes the "political awakening" of indigenous peoples through memory:

> The contemporary resurgence of indigenous political engagement draws strength from both the enduring collective memory and recent struggles. It emerges against the backdrop of neoliberal globalization's encroachment into territories once deemed unproductive. (p. 11)

This form of memory is not structured as an objective (scientific) recollection of the past but rather as an ongoing dynamic that clarifies both present and future identity. Justino speaks of his struggle against Texaco not as something inherited but as a consequence of his own life. This confrontation with the past is reminiscent of the social dynamics proposed by Walter

Benjamin and his thesis on history, as examined by Sergio Thischler (2010), who states the following:

> To a certain extent, it could be argued that these individuals' struggles are a response to the process of real and symbolic abstraction. This process, driven by notions of progress and rationalization, threatens to reduce them to mere objects, frozen in time, devoid of agency or vitality. Hence, there is a struggle to preserve time in its living form to prevent its escape and transformation into a denial of that essence as something independent. However, they are aware that this implies confronting the dominant temporal structure, which is the commodified form of time in the capitalist society they fight, symbolized by the clock. (p. 45)

The relationship with time in activism is akin to that with nature: a rejection of capitalist abstraction. It might seem idealized, given that activism often revolves around clocks, appointments, meetings, and commitments, objectifying and subordinating them to serve commodities rather than prioritizing individuals and concrete matters. Therefore, when discussing the rights of nature, we are not speaking of an abstract environment but of a vibrant, living ecosystem. This dynamism leads to the emergence of additional, more democratic approaches to activism within the indigenous movement, for example, the movement of Amazonian women, who have their own agenda focused on defending their territories with a feminist approach. Although this shift is recent, women's participation in Puyo's March 8th marches since 2017 demonstrates that the indigenous activist ethos is continuously evolving, embracing new realities rooted in memory.

4. Activism: an environmentalism ethos from the people

The activism stemming from grassroots environmentalism has its source in traditional left-wing ideology. It tends to emphasize recent experiences and interactions with various social sectors, including indigenous organizations, leftist activism, academia, and NGOs. Detailing her involvement as an environmental activist, Esperanza Martínez points out:

> Since becoming capable of rational thought, I have been an activist. Since I was 15 years old, I have participated in the May Day demonstrations, but from a leftist perspective. Very much in line with what Galeano

> used to say, that the heart is on the left, intelligence is, too. I became interested in environmental and nature-related issues when I started studying biology. Forty years ago, we established an organization called the Society for the Defense of Nature, which later evolved into Acción Ecológica. (personal interview, November 25, 2022)

Esperanza Martínez is the most recognized environmental activist in the country, known for her involvement in various key milestones of the environmental movement, with an extensive career in the defense of territories against oil and mining exploitation. She is a biologist and lawyer, as well as one of the founders of the organization Acción Ecológica. She has participated in several cases presented before the Constitutional Court and as an *amicus curiae* in the Los Cedros case (Judgment No. 1149-19-JP/21), and her organization Acción Ecológica acted as a plaintiff in the Manglares case (Judgment No. 22-18-IN/21). In her organizational activism, she highlights the following:

> We began as a sort of alliance between CEDENMA and a communication group that were all men, but we were women. We split off and decided to create Acción Ecológica, which initially was an environmental information and documentation center. But within the first year, we began to engage more actively in activism-related issues. We then started to develop our own ideas, like working on environmental issues, and especially learning. I think we had some moments of revelation or magical inspiration from the beginning; among these was deciding that we have a joke here, and it's that they've been deceiving us all along. We talked about the human right to have a voice, for each person to have a cause. So, we decided that each of us would be in charge of an issue. I mean, it was like saying, "We're going to learn this." So, Glorita focused on mining, meaning she read, studied, checked what was going on, and we learned very quickly. I was oil, mining, and we covered plantations. We divided the different topics among ourselves to explore what we could accomplish with each one, and we maintain this structure, which is deeply rooted in Acción Ecológica, to this day. In an organization, in an NGO, you typically end up adopting organizational structures more like those of a ministry than a social process. So, there's the person in charge of legal processes and the one for training processes, and we reversed

> that. So, we said, "This person will work on and oversee everything related to mining." So, we learned and got each person to learn a lot, be responsible for their own representation, and we developed very diverse strategies because as human beings, we are all unique. Some became more academically oriented while still focusing on their respective topic. Others became more grassroots-oriented, but we worked together really well. Others focused more on the political but continued with their issue. For example, Elizabeth was focused on biodiversity and is very scientific, but she took over GMO-related information and brought her expertise to that aspect of our work. Glorita was very grassroots-oriented. I think I've always been a more political person, always networking. I started leading many campaigns. So, the first thing I did was create "Amazonía por la Vida" to make it not just about one person but an alliance of people working on the issue of oil, and each person representing their own perspective. Somehow, that has worked. (E. Martínez, personal interview, November 25, 2022)

The self-determination of political subjectivity is one hallmark of the new activist ethos, which departs from the classical idea of a uniform party. While Esperanza has roots in leftist activism, she has pursued a path more closely aligned with her own experiences and exercise of freedom. Throughout its history, Acción Ecológica has had female leadership, as women were among the first to break away from the masculinized and patriarchal left. However, as Esperanza notes, "We don't self-define as feminists, but we don't exclude it, either" (November 25, 2022), which is part of the organization's heterogeneous dynamics.

Cinthia Andrade is another environmental and cultural activist. Her work has focused on literacy, working-class communities, and indigenous worldviews. She has conducted research on the history of Guápulo and Andean cosmovision, which led her to collaborate with the Error Vial Guayasamin Committee in the Bolaños neighborhood, a committee protesting road construction that would affect vulnerable residents. She participated as an *amicus curiae* in the Rio Monjas case (Judgment No. 2167-21-EP/22).

> I have a degree in education science, a postgraduate specialization from the Autonomous University of Madrid in society, culture, and development in Latin America, and another from the Complutense University of

> Madrid. What can I say? I completed a Ph.D. in educational research. That's more or less it. From there, I was always involved, somewhat, in social issues. I'm a teacher, I've been involved in things like literacy programs in working-class neighborhoods and with indigenous issues. But lately, I've been involved in what we call the Guayasamin Road Committee, which opposes the Guayasamin Road Solution project, in which the Bolaños neighborhood, an ancestral community, would be torn down. I began researching everything related to this ancestral community. I've conducted several investigations into Guápulo because they're also part of it. For more than 20 years, I've been involved in Andean issues, so both things came together. This research has focused on Andean topics and a little on the history of Guápulo, particularly regarding its surroundings and that of the Bolaños Pamba community. That's essentially how I became involved with Acción Ecológica, which has been supporting us in various road safety matters. It was through this collaboration that I enrolled in the specialist course at the university. Given my involvement in Andean issues, we discussed the possibility of me presenting an *amicus curiae* regarding the Andean perspective on water, including the significance of rivers, in the case of the Monjas River during the Constitutional Court's judgment. So, that's when I submitted this *amicus* brief on the topic of what the entire issue of water meant for Quito—the rivers, the symbolism, the associated myths, and the ancestral significance for us as Andeans and specifically as Quito residents (C. Andrade, personal interview, January 23, 2023).

This activism operates autonomously and is not tied to any specific organization, a characteristic that is also reflected in the ecological activist ethos. Andrade could be described as an intellectual committed to ecological causes and offers her services to various organizations. She has even participated in legal proceedings defending the rights of nature through *amicus* briefs.

Finally, activist environmentalism is grooming new leaders from within its ranks, such as Gustavo Redín, a lawyer and president of CEDENMA. His professional work has involved litigating environmental cases. He intervened directly as an *amicus curiae* in the case of the A'I Cofán Sinangoe community (Judgment No. 273-19-JP/22), while his organization CEDENMA

participated as an *amicus curiae* in the Los Cedros case (Judgment No. 1149-19-JP/21) and as a plaintiff in the Manglares case (Judgment No. 22-18-IN/21). Gustavo emphasizes the significance of his organization's history for the continuation of his work as a professional activist:

> Throughout my life, I've been committed to activism. I've consistently engaged with cases, reviewing them, crafting proposals, and offering support from the standpoint of collective rights, the rights of nature, and human rights. Later on, I enrolled in a master's program in Madrid on human rights [governance and human rights]. I lived in Madrid for a long time. After returning to Ecuador, I joined up with CEDENMA. First, I worked as a lawyer for the organization and then ended up as president. For me, there's a clear distinction between before and after in these court processes since I started working directly with CEDENMA. It's evident that institutionally, the organization carries the weight of over 35 years of history. We existed before the Ministry of Environment. So, this institutional background has enabled me to participate in the processes I've been involved with as a lawyer for CEDENMA. Having access to all our archives provides us with a strong foundation. In all our engagements, we no longer begin from square one. We review our previous stances in specific cases, making it easier to formulate subsequent positions. Of course, every case requires thorough preparation, but you're no longer starting from scratch, needing to build an entire argument or position from nothing. Instead, you have a history that supports your argument, making the process more manageable. So, in a way, all you're doing is building and developing upon an argument that is already formed. (personal interview, November 7, 2022)

Organizational experience is crucial in shaping the development of an activist. The rights of nature have disrupted legal positivism to such an extent that neither the legal education in public nor private universities has fully incorporated this approach to nature's rights into the curricula. Thus, organizations have endeavored to address this educational gap by providing training for their own activist-workers.

5. Activism ethos for animal rights

We observe another type of activism based on recent experiences, often rooted in autonomy: the animal rights movement, which has emerged more recently and maintains a somewhat distant relationship with leftist ideologies. Tatiana Rivadeneira, an animal rights activist, describes the trajectory of this movement as follows:

> The movement truly began to grow during the bullfighting struggle, a battle that has not yet ended. Not only bullfighting but also cockfighting. But this issue gained momentum, especially thanks to the referendum, further propelling the movement forward. The movement began to grow rapidly. Now, in terms of our relationship with other environmental organizations, as you mentioned, I would say that we're not completely isolated. The thing is that, in my opinion, I truly feel and am certain that the issue of animals is not well understood. I mean, it's something that even I, in my work, have realized requires much more specificity; even discussing just one species can be more effective. […] Actually, it's an incredibly diverse issue, and I'd even say it's a little like the dynamic. The movement doesn't like to define itself politically, and I appreciate that. There are also many interesting topics that have emerged. For example, we've seen significant collaboration in collective feminist activism; there has been a strong sense of unity in these efforts. But this is also normal because, for some reason, globally, animal rights organizations are predominantly composed of women. So, it's actually women who are doing the work, I mean, there's much more female participation here. […] But without a doubt, among all my colleagues and the wonderful people I meet through the animal rights movement, there's a profound understanding of vulnerabilities. These are individuals who also dedicate their work and even more to animals. Because, ultimately, in other causes, at the end of the day, the emphasis in on collecting money. Here, as we're dealing with animals, at least in my case, our efforts for them are truly heartfelt and genuine. Without a doubt, I would say these are people who clearly understand leftist ideals, although they may not like to define themselves as such. You'll never hear them say that, or at least not in our current discussions. Because I've even proposed that we become a political movement; we

> already work to nominate candidates and things like that. I've explained my reasons to them. In other words, we're aiming for a different kind of impact, to attain positions of authority and all that, and they're not interested. For example, during campaign periods like now, they reach out to us a lot because they know we mobilize people, but we decline their offers. Besides, they don't want to be involved in that kind of stuff. That's not how I feel, but I'd say it's the general sentiment. (personal interview, February 1, 2023)

Animal activism has an ideological openness that is manifested through the understanding of the vulnerabilities inherent in animals. Of course, this characteristic is more democratic, but it likely presents greater organizational and/or decision-making challenges. As Svampa (2019) points out, "Concerning the emerging autonomist narrative, largely situated within the framework of 'short memory,' its core components include the assertion of autonomy, horizontalism, and consensus democracy" (p. 19). This type of activism represents a collection of individual experiences that together shape approximate identities around common objectives, a narrative that highlights the individual actions of their activism or commitment. This has also allowed animal defense strategies to be redoubled. According to Rivadeneira:

> I must confess that I've had an inclination toward the rights of nature because just after I graduated from law school, the issue of the constitution came up, and all this started. The most groundbreaking aspect at that time was the idea of granting legal rights to nature. So, I have to admit that at that time, I was quite intrigued because, of course, I had just graduated as a lawyer and during my studies, I was always searching for a subject I could focus on and specialize in. I always knew what I liked, and I actually work and make a living in the field of constitutional law. However, within constitutional law, I was particularly interested in the concept of the rights of nature. So, from there, I began to prepare and take a personal interest in getting involved with other groups, particularly environmental ones, and in some other causes. One of the causes that definitely resonated with me, and one that I'm still actively involved in, is the GMO-Free Ecuador group. GMOs led me to explore topics related to food, delve into discussions about the meat industry and veganism, and ultimately, I became involved in animal rights issues.

> That's when I started my activism journey as an animal rights activist. I first got involved with the Animal Libre group, which is mainly focused on promoting veganism. I was already engaging in activism, but within this group, I noticed we weren't focused on taking legal action or representing animal cases in court. Animal Libre does an amazing job, but it wasn't quite what I wanted. So, I joined the national animal rights movement, which truly engages in many causes. There's a lot of work and mobilization within the national movement, making it the largest movement in Ecuador. It also involves not only activists but over 40 organizations. During that same time, I was also recruited by Victoria Animal. The organization's primary strength is advocating for animal rights causes, and I've chosen to stay with them and am very happy with my decision. They've also entrusted me with the coordination of the foundation, of the organization, so, for some time, I've been leading this foundation. With Victoria Animal, we brought the Estrellita case (personal interview, February 1, 2023).

It is worth nothing the prominence of the theme of emotions, an aspect traditionally overlooked within mainstream political leftism, which has historically prioritized Marxist science and a "political commitment to changing these realities." This rationality detached from emotions contrasts with the focus of this movement. Its connection to the rights of nature occurs easily, perhaps due to its distance from abstract and textual legal frameworks toward a more vibrant, concrete conception of rights.

Up to this point, we have examined narratives recounting the experiences of environmentalists, indigenous activists, and animal rights advocates who have participated in either direct demands or *amicus curiae* briefs in cases concerning the rights of nature before the Constitutional Court between 2019 and 2022. The following section analyzes the role of justices in shaping a type of jurisprudence that some have characterized as activist. It should be noted that analyzing the extent of judicial activism is beyond the scope of this study.

6. The role of justices in shaping the rights of nature

Ecuador recognized the rights of nature in the 2008 Constitution, amid a contentious discussion around the content of these rights. This marked a historic moment for the Ecuadorian environmental movement. The current Constitution is often seen as aspirational (Saffon and García-Villegas, 2011, pp. 75-107) and as requiring the active involvement of social movements to achieve its principles. This explains why these rights did not undergo significant development in the early years, as achieving a radical change or transformation required a favorable environment, such as non-positivist legal education in law schools. Another contributing factor is the positivist judicial system, which has historically been detached and sometimes even resistant to the recognition of the rights of nature. In some cases, it has adopted a preservationist or conservative discourse, positioning itself as an adversary to proponents of protective interpretations.

Gustavo Redín characterizes the period before the emergence of jurisprudence for the rights of nature, here termed the "positivist-formal" period, as a "dark" period for the court because "of the limited scope for meaningful discussion. There was a moment when environmental organizations and nature rights organizations decided not to bring many cases to the court out of fear that it would not recognize the right, so there was an understanding that it wasn't the way forward" (personal interview, November 7, 2022).

Starting in 2019, the Constitutional Court underwent a radical shift in its trajectory, closely tied to what Bourdieu (1980) conceptualized as a network of solidarities within civil society. In that year, the new composition of the court, which included academics with a history of engagement with the demands of social movements, contributed to a change in the traditional strategy, opting for a new path within the highest legal institution. Agustín Grijalva provides an example when discussing his work philosophy: "It was always the policy of our office to combine technical proficiency with social empathy. There's this human aspect while also maintaining rigor in the legal technicalities. We've always operated under the belief that not only are the two compatible, but they should be complementary, thereby enabling us to defend rights even more robustly. That was our philosophy" (personal interview, February 2, 2023).

Similarly, former justice Ramiro Ávila points out: "I have a particular sensitivity to the opinion of civil society expressed through people who appear in court […] I couldn't be inconsistent with my utopian vision of the oppressed, where the people are the source of law and institutional praxis had to be considered" (personal interview, November 30, 2022). In his contributions to legal theory, Ávila examines the systemic theory of law within the context of the rights of nature to clarify the radical departure from traditional and formal theory. Both jurists concur on the necessity of a specific "sensitivity" that is not opposed to technical proficiency; on the contrary, it demands a dual task from the interpreter: to have a deep understanding of the law and theory while also possessing a special sensitivity toward these paradigmatic rights. Sensitivity is not just an abstract feeling but a permanent dialogical activity.

Grijalva reflects on the rise of these rights within the court's jurisprudence, encompassing aspects such as the nature of the collegial body, dialogue and deliberation among judges, and the court's independence from other powers or external actors:

> In my experience, it's evident that a court is a collegial body, comprised of a small number of individuals, wherein the ideological and political positions of these individuals carry significant weight. The way they relate to each other and interact is also very important. I would say that objectively, Ramiro and I were the justices who showed the most interest in this issue. But we also shouldn't overlook, for example, Teresa Nuques in the Estrellita animal rights case. Let's not forget Daniela Salazar in one of the initial judgments concerning river channels. Then, there's the case with Karla Andrade's report on the consultation. So, I think that what happens is that, especially if there's deliberation, that's the most interesting phenomenon. (personal interview, February 2, 2023)

Grijalva's position echoes the ideas of John Hart Ely in his work *Democracy and Distrust* (1980, p. 135) regarding the role of the judge in ensuring a deliberative process in cases involving representation of minority groups. Hart Ely views the normative approach from the procedural dimension of democracy via deliberation; constitutional justices must review both formal normative and substantive aspects to develop democratic jurisprudence. Roberto Gargarella references Ely to enhance and radicalize the relationship

between democracy and law, taking into account the active participation of "stakeholders" in an ongoing deliberation.

On the other hand, Ávila contemplates jurisprudence from a perspective distinct from the deliberative dimension. He argues that the evolution of this jurisprudence was propelled by the Constitutional Court's commitment to addressing these issues, setting aside traditional doctrine and incorporating concepts and definitions from other disciplines. Emphasizing this point, he says, "The court finally develops words that lack legal resonance within traditional doctrine, such as natural cycle, function, structure, or evolutionary process. These terms are highly relevant, particularly in fields like biology, geology, and hydrology" (Ávila, 2022, p. 137). Nevertheless, it remains a product of deliberation. Similarly, aligning more with a theory of the values underlying these rights, Ávila mentions that the justices of the court had a particular interest in working on cases related to their "theoretical obsession." This would even explain why the court's most significant jurisprudential output on the rights of nature occurred during the last year of the court's turnover, specifically between 2019 and 2022.

> For me, it's crucial that whoever leaves does so urgently. So, there's a kind of understanding regarding the obsessions of the judges who are leaving. There's this thing where everyone wants to leave their legacy and give their best effort while also respecting the perspectives of their fellow justices. So, I was obsessed with the rights of nature, and there's an obvious fondness, but I won't interfere with their plans. Each one pursued their theoretical obsession. And there was, let's say, this idea of "you're leaving, leave your mark." It was an implicit pact (R. Ávila, personal interview, November 30, 2022).

Emotions also play a role in deliberation. Hence, it is unrealistic to expect justices to adjudicate cases devoid of their personal subjectivities. As Ignacio de Otto (1998) argues, the notion that judges should be entirely apolitical, free from any prior public opinions, is untenable, and this should not impinge upon their independence. The "theoretical obsession" inherently implies an objective that does not evade dialogue; on the contrary, it advocates for it (Otto Pardo, 1998).

CONCLUSIONS

The active participation of various social movements, advocating for the transformation of law to protect ecosystems and promote intercultural interpretation, is not a novel concept. As demonstrated, this process began in the 1990s, characterized by the emergence of a different model of activism that diverged from the classic authoritarianism of the left. It promotes a practical and more democratic participation, aiming for change and adjusting tactics and strategies according to the political landscape. Collective action unfolds amidst shifting alliances and contexts. In 2019, following the change in the composition of the Constitutional Court, an emphasis on judicial strategy facilitated a rearticulation around historical demands. By 2022, a distinct jurisprudential evolution was evident, largely attributed to the dynamics of strategically crafted alliances between social movements and legal entities.

The Constitutional Court, in turn, has engaged in a dialogical synergy with social movements. This enabled several justices to pursue their own theoretical and technical commitments, underpinned by a unique "sensitivity" toward the issue of the rights of nature. This synergy, or dialogical activism, facilitated a necessary convergence for the advancement of constitutional rights.

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INDIGENOUS SOCIAL MOVEMENTS: DEMOSPRUDENCE AND POLICY IMPACT IN THE AMERICAS

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ABSTRACT

This article examines the history and policies related to Indigenous peoples in Colombia, Paraguay, Bolivia, Canada, Peru, and the United States. It addresses topics such as colonization, land dispossession, state violence, and Indigenous resistance. Colombia faces armed conflicts and the struggle for Indigenous rights. In Paraguay, colonization and current struggles against exploitation and deforestation are highlighted. Bolivia is making progress in recognizing Indigenous rights, while Canada faces challenges, including the aftermath of residential schools. Peru adopts multicultural approaches, and in the United States, historical tensions are explored. Despite diverse contexts, Indigenous resistance stands out as a persistent response to colonization and state oppression, concluding with the reasons behind the struggle of these Indigenous peoples and the impact of politics and development on the history of each of these countries in relation to their indigenous people.

RESUMEN

En este artículo, se examina la historia y las políticas relacionadas con los pueblos indígenas en Colombia, Paraguay, Bolivia, Canadá, Perú y Estados Unidos. Se abordan temas como la colonización, desposesión de tierras, violencia estatal y resistencia indígena. Colombia enfrenta conflictos armados y la lucha por los derechos indígenas. En Paraguay, se destaca la colonización y las actuales luchas contra la explotación y deforestación. Bolivia avanza en el reconocimiento de derechos indígenas, mientras que Canadá enfrenta desafíos, incluidas las secuelas de las escuelas residenciales. Perú adopta enfoques multiculturalistas, y en Estados Unidos, se exploran tensiones históricas. A pesar de la diversidad de contextos, resalta la resistencia indígena como respuesta persistente a la colonización y la opresión estatal, concluyendo con las razones de la lucha de estos pueblos indígenas y el impacto de la política y el desarrollo en la historia de cada uno de estos países en relación con sus pueblos originarios.

KEYWORDS: Indigenous people, Indigenous land, social movements, resistance, demosprudence, human rights, native.

PALABRAS CLAVE: Pueblos indígenas, Tierras indígenas, Movimientos sociales, Resistencia. Demojurisprudencia, derechos humanos, nativo.

JEL CODE: N460, N56

RECEIVED: 21/02/2023
ACCEPTED: 16/12/2023
DOI: 10.26807/rfj.vi14.484

INTRODUCTION

Indigenous people in the Western Hemisphere hold a rich history of collective action and social movements as they have fought for their communities under the settler-colonial states. In a 2020 article on Indigenous collective action, the University of Alberta's Pascal Lupien claims that, even today, "Indigenous peoples have remained among the most marginalized population groups in the Western Hemisphere" (Lupien, 2020, p.). Although only 8% of Latin America is Indigenous, they comprise about 14% of the poor and 17% of the extremely poor, according to the World Bank (World Bank, 2023). In the United States, 1 in 3 Indigenous people live in poverty, according to a 2020 Northwestern University study (Redbird, 2020). Since European contact beginning in the 15th century, the sovereignty of Indigenous peoples has been continuously encroached upon by settler governments. These efforts aim to strip them of their land, self-governance, spirituality, and culture, among other human rights. However, this oppression has also been met with resistance from Indigenous communities since the beginning. The histories of communities indigenous to the Western Hemisphere chronicle not only the tragic effects of settler-colonialism and oppressive government but also the hope for radical change that can be found through collective action.

Yale Law professors Lani Guinier and Gerald Torres, in a 2011 Law and Social Movements class, presented their ideas in a 2014 essay for the Yale Law Journal titled "Changing the Wind: Notes Toward a DemosPrudence of Law and Social Movements". In their essay, Torres and Guinier introduce a new concept they term "demosprudence". They explain that "demosprudence is the study of the dynamic equilibrium of power between lawmaking and social movements" and "focuses on the legitimating effects of democratic action to produce social, legal, and cultural change" (Guinier et al., 2014, p.). The essay underscores the significance of collective action in empowering the masses and driving progress. Specifically, it emphasizes the need to integrate lawyers and politicians as fellow advocates in social movements rather than treating them as a separate class within a governed vs. governor's dynamic.

In this paper, we aim to show the ways in which Torres and Guinier's concept of demosprudence has been showcased in the context of Indigenous

movements across North and South America. In particular, we will analyze the histories and policy impacts of movements in Peru, the United States, Colombia, Paraguay, Bolivia, and Canada. Torres and Guinier argue that to understand and implement demosprudence, we must change "the people who make the law and the landscape in which that law is made" (Guinier et al., 2014, p.). Through this framework, we will explore the presence and causes of varying levels of success among Indigenous social movements. We argue that Indigenous population size, national political landscape favorability, and degree of movement organization are all major determining factors achieving change in a country's lawmakers and landscape.

1. Peru: State Racial Policies

Today, Peru is home to 51 Indigenous peoples, constituting about 45% of the total population, with the largest portion residing in the highland Quechua communities (Minority Rights Group, 2008). While Peru initially legally recognized these Indigenous groups, there was simultaneous belittlement, de facto disenfranchisement, and abuse of them. This laid the foundation for a nation-state in which an anti-Indigenous culture informs institutionalized racism (Merino, 2021).

In 1535, a Spanish-style municipal government was established in Cuzco, followed by Lima (Britannica, 2022). Despite the presence of a plurinational legal system technically deferring to Indigenous "customary law", Native peoples were effectively controlled by "human and divine law", restricting their culture and customs (Kania, 2016). The encomienda system, demanding tribute from Indigenous people in the form of labor or gold to land-owning Spaniards, was instituted. In 1536, Indigenous people, led by Manco Capac II, rebelled unsuccessfully against the Spaniards, leading to subsequent conflicts among the conquerors over the spoils (Britannica, 2022). The king of Spain enacted the New Laws in 1542, aiming to eliminate the encomienda system due to fears of promoting feudalism and mistreatment of Indigenous people. However, during Francisco de Toledo's administration in 1569, the first large-scale control of the Indigenous population was attempted, with Native chiefs tasked with collecting tribute and forced labor for the conquerors. In 1780, Indigenous peoples across Peru and Ecuador revolted against the Spaniards, but their efforts were largely unsuccessful in achieving lasting change (Britannica, 2022).

When Peru gained independence in 1824, caudillos began vying for power. In 1825, Simon Bolivar abolished special rights for *pueblos de indios*, including communal property rights, leading to the rapid expansion of the hacienda system (Kania, 2016). Indigenous people endured slavery and degradation, such as rubber expeditions in the Amazon and forced servitude in Andean farms. Concurrently, elites utilized the mestizaje discourse to syncretize cultures and consolidate the ideal nation-state (Merino, 2021). The ruling class strategically sought to include Natives in the Peruvian identity to garner support, all while expanding the exploitation of their communities.

In the early 20th century, a paternalistic *indigenismo* policy gained popularity, stripping Native people of their power in national territory 'disputes' and leaving their fate to the elite and middle class (Merino, 2021). The Constitution of 1920 included two articles officially recognizing Indigenous communities and guaranteeing them special state protections, although these were rarely enforced. In 1924, the "Aprista movement" originated in Mexico City, spreading its ideology among Peruvians and advocating for the unity of Indigenous people and an end to nationalized foreign-owned industry. That same year, a Penal Code was introduced, categorizing Peruvians into four groups: civilized (Creoles/mestizos), Indigenous, semi-civilized, and wild peoples—a classification system that persisted until the 1990s. "Civilized" people were explicitly granted legal and cultural dominance, while Indigenous peoples were made subordinate. Thus, although Native communities were technically recognized, they were concurrently facing extermination and assimilation (Kania, 2016).

During the 1960s and 1970s, the government, led by General Velasco, introduced agrarian and social reforms. Velasco advocated for educational and agrarian reform in Indigenous communities, reinstating linguistic and cultural practices. He expelled foreign companies and nationalized the natural resource industry. The Agrarian Reform Law of 1969 marked the end of serfdom, granting haciendas to Indigenous people and providing internal conflict resolution for Indigenous communities. However, a series of laws from 1974 onwards recognized their territorial rights as comunidades nativas but also fragmented and relegated them to smaller areas. A new Constitution drafted in 1979 incorporated some of the Velasco-era Indigenous provisions (Kania, 2016).

In the 1980s and 1990s, the Peruvian government shifted to a multiculturalism strategy, promoting tolerance of Indigenous communities and recognizing human rights. However, it did not necessarily acknowledge their identity as a social collectivity. This effort aimed to suppress Indigenous opposition to national policies that adversely affected them and occurred during the horrific Shining Path attacks on Andean communities (Merino, 2021). In 1994, Peru ratified ILO Convention No. 169, seeking to grant Native people increased respect and autonomy (Kania, 2016). During Alberto Fujimori's authoritarian rule (1990-2000), however, the neoliberal economy took precedence over Indigenous rights, leading to the sale of Native-owned lands to transnational corporations and the dispossession of communities. Particularly after the violence of the Shining Path, an aggressive protectionism policy also emerged: Native communities were placed under military control, and more than 260,000 Quechua women were forcibly sterilized (Kania, 2016).

Since the end of Fujimori's dictatorship and the beginning of the 21st century, Peruvian democracy and the neoliberal economy have been closely intertwined, significantly impacting Indigenous peoples as their lands are degraded for the extraction of raw materials (Carrasco, 2020). In 2007 (Naciones Unidas, 2007), Peru adopted and ratified the UN Declaration on the Rights of Indigenous Peoples, as part of an effort to enhance recognition and multiculturalism. Although Peru has made progress in the legal recognition of rights for Native communities, such as adopting UN and ILO conventions, they also persistently encroach upon and dispossess Indigenous peoples in a neo-colonial cycle. This contradiction between recognition and abusive actions highlights that the Peruvian government consistently prioritizes economic progress over human rights (Kania, 2016).

2. Peru: Indigenous Social Movements

The Ashaninka people of the Peruvian Amazon in particular have a rich history of resistance from the beginning of Spanish exploration. Their first European contacts were missionaries, and the Ashaninka killed some infringing Fransiscans fathers in the mid 1600s. The missionaries brought with them alien rules, epidemics, and "freebooters". In 1742, a Black man entered Ashaninka forests, and he was christened Santos Atahualpa and was accepted

as the Lord Inca. He urged the people to reject the Europeans and create an independent society, a movement that lasted for 15 years. He was (and still is) a major figure in Ashaninka resistance and was a sort of mythological savior showing that Indigenous Amazonian myth mobilizes action against colonization and development efforts (Brown and Fernandez, 1991).

However, the Peruvian Amazonian movement is generally considered to be "several steps behind its regional counterparts", largely due to the lack of unity in Indigenous political movements in Peru, a consequence of the Shining Path guerrilla movement in the 1980s (Culver, 2011). This movement, founded by Professor Abimael Guzman, advocated for the complete replacement of Peruvian society with a Maoist state. The Shining Path employed armed tactics against the state and Amazonian Indigenous groups, particularly the Ashaninka, and exerted significant influence over the political left. This dominance left no room for a unified Indigenous movement and cast a shadow over future left-leaning movements, serving as a reminder of the Shining Path.

Peru's election day on May 18, 1980, marked the beginning of the Manchay Tiempo. The Shining Path movement emerged with the burning of ballots in a village in Ayacucho. The immense violence of the Manchay Tiempo turned many Peruvians against any kind of leftist movement, including those led by Indigenous people. During the intense persecution of the Manchay Tiempo, the Ashaninka were displaced, and many migrated to urban areas, including Lima, where they had to live in slums. Their new community size was much larger than their traditional communities, causing a significant shift in culture and a need to focus on daily survival rather than collectivizing. Additionally, the initial nationalization of the petroleum industry and subsequent privatization caused environmental degradation on Indigenous lands due to a lack of environmental and social accountability. In the 1989 Geneva Convention, Peru became one of the first countries to ratify Convention 169, which protected Indigenous cultures under international law. This granted more autonomy for Indigenous people socially, but these communities remain exploited by oil companies (Culver, 2011).

On June 5th, 2009, the Awajun and Wampis were protesting the "Law of the Jungle", which would allow oil companies more reign over Indigenous lands. 500 officers of the state and helicopters massacred between 30 and

100 Indigenous protesters that morning. The Bagua massacre was a wake-up call for many Peruvian conservatives of the wildly imperfect state of their government. This tragedy illustrates the enemy-of-the-state, second-class, animalistic nature of Indigenous peoples in the eyes of the Peruvian state. This attitude prevents actual enforcement of laws protecting native peoples. Following the Bagua massacre, Indigenous people in Peru collectivized under organizations like CONAP to demand citizenship rights and plurinationality (Culver, 2011).

Today, due to Peru's extensive Amazonian territory, the Peruvian government has been allocated hundreds of millions of dollars in climate protection funding, specifically for areas encompassing communal Indigenous lands. In 2018, the Minister of Environment emphasized, "Land titling for indigenous communities is a fundamental right and a priority" (Ministerio del Ambiente, 2018, p.). In the Cordillera Escalera, conflicts arise between the titling objectives of the Native people and the conservation goals of environmental groups. The naming of Yaguas as a National Park excludes indigenous peoples outside the conventional "steward" norm. Overall, it is crucial to prioritize social justice for Indigenous peoples in conservation movements.

3. The United States: State Racial Policies

At the outset of European contact in North America in 1492, settlers sought to establish amicable relationships with the Indigenous peoples and drafted treaties with the First Nations, recognizing them as sovereign nations because they lacked the resources to overpower them. As Europeans fought amongst themselves for influence in the Americas, the Indigenous people suffered greatly in the crossfire and various alliances. In 1789, the Northwest Ordinance prohibited non-Natives from settling on native land, and the 1790s brought more treaties and protections for Indigenous people that ended up being ignored and unenforced. This ostensible protection of Indigenous rights began to shift when the 1823 Johnson v. McIntosh Supreme Court case included the concept of the Doctrine of Discovery in case law. The ruling set a precedent for the federal government to curtail the rights of Indigenous nations when it was deemed to be in the United States' best interest (Dziak, 2021).

Under the notoriously anti-Indigenous President Andrew Jackson, the 1830 Indian Removal Act forced Indigenous peoples westward to make room for white settlers. While the U.S. Supreme Court upheld Native peoples as sovereign nations, the Jackson administration was unaffected and created the treacherous Trail of Tears, resulting in the deaths of thousands during a forced westward march for relocation. In the latter part of the 19th century, the state gained more control over Native reservations and systematically stripped the people of their culture, forcibly assimilating them into U.S. culture, language, and law. For instance, the 1868 Peace Policy under President Grant replaced "Indian agents" with Christian missionaries to oversee reservations. Although intended to curb corruption, it ended up imposing assimilation to Christian values because missionaries-controlled reservation resources and law. The Dawes Act of 1887 further opened reservations to settlement by non-Natives (Dziak, 2021).

In 1924, Indigenous people were granted U.S. citizenship, and the Wheeler-Howard Act of 1934 promised improvements in education, healthcare, financial aid, restoration of local government on reservations, and employment assistance. However, in 1953, Congress passed House Concurrent Resolution No. 108, which terminated federal funding for reservations. In 1968, the Indian Civil Rights Act pledged protection for Native peoples under the U.S. Constitution, and subsequent rulings reinstated federal funding for reservations (Dziak, 2021). Unfortunately, by then, almost all of the original indigenous people from that territory (United States) had already been eliminated.

4. The United States: Indigenous Social Movements

Indigenous peoples in the United States have resisted colonization since the beginning, exemplified by the Cherokee Nation's struggle against the Trail of Tears. Contemporary activism, as we recognize it today, began in Indigenous communities in the 1960s through movements like the Red Power movement, AIM (American Indian Movement), and various demonstrations. In 1969, 90 Native Americans occupied Alcatraz Island in an effort to reclaim it. Their demands included the return of Alcatraz, funding for its rehabilitation, and the establishment of a university. In 1970, members of the United Native Americans occupied Mount Rushmore to

reclaim the land granted to the Great Sioux Nation in the 1868 Treaty of Fort Laramie (Cooper, 2016).

In 1970, the first National Day of Mourning took place after the speech censorship of Indigenous peoples voicing their struggles at Plymouth Rock, Massachusetts, on the U.S. Thanksgiving Holiday. In 1972, protesters from the Trail of Broken Treaties Caravan occupied the Bureau of Indian Affairs offices for six days, armed with a 20-point manifesto. In the same year, the American Indian Movement (AIM) and parents in Minneapolis initiated community schools as an alternative to BIA and public schools with high dropout rates, promoting Indigenous culture strongly. In 1973, 250 Sioux members occupied South Dakota's Pine Ridge Reservation in the 71-day Wounded Knee occupation, the same site as the 1890 Wounded Knee Massacre, drawing global attention to unsafe living conditions and generations of mistreatment. In 1975, Native protesters took over the Bonneville Power Administration in response to the FBI's murder of Joseph Stuntz; the protesters demanded restitution for Stuntz's widow and an end to the undeclared state of martial law in South Dakota (Cooper, 2016).

In 1978, the Longest Walk, a transcontinental march for Indigenous justice, commenced at Alcatraz Island and concluded in Washington, D.C. with 30,000 marchers. Their aim was to draw attention to the suffering of Indigenous communities and the U.S. government's avoidance of treaty obligations. In 1981, the Fort McDowell Yavapai Nation of Arizona won a decade-long battle protesting the construction of the Orme Dam when the Interior Secretary announced that the dam wouldn't be built. In 1992, the National Coalition of Racism in Sports and Media was formed to protest the use of native imagery in logos/symbols in sports, marketing, and media. This movement gradually gained traction, leading many schools and sports teams to change their imagery (Cooper, 2016).

In 2004, the Save the Peaks Coalition was formed to address human and environmental rights concerns regarding Arizona Snowbowl's proposed developments on the San Francisco Peaks. Despite their efforts, the ski resort was allowed to expand. In 2011, a massive protest was launched against the Keystone XL Pipeline, which was planned to traverse tribal lands, resources, and sacred sites. The petition was rejected by President Obama in 2015. In 2013, the Havasupai Tribe filed a lawsuit against the U.S. Forest Service for

permitting uranium mining operations near Grand Canyon National Park without consulting the tribes, and a District Judge ruled in the mine's favor in 2015. In 2016, the Standing Rock Sioux initiated protests against the Dakota Access Pipeline (Cooper, 2016).

Native peoples in the U.S. have remarkably inspired national organization and garnered support for their causes through powerful public speaking, impactful demonstrations, engaging debates, and influential written media. This success has been particularly evident in the 20th century, as the Red Power Movement, AIM, and other national groups fully developed, enabling them to effectively combat government abuses and defend their rights.

5. Colombia: State Racial Policies

Colombia's Indigenous population, constituting a mere 2% of the total population, faces an alarming decline, edging closer to extinction. Despite this small demographic share, Indigenous territories command a significant one-third of Colombia's land area, a recognition only recently granted (WWF, 2005).

Centuries before Columbus's arrival, Indigenous peoples inhabited present-day Colombia. The advent of conquest, however, brought slavery and widespread devastation to Native communities, leading to a staggering 90% decline in the Indigenous population within a century. Displacement from ancestral lands and degradation of territories ensued. Concurrently, the Spanish introduced thousands of enslaved Africans yearly to work on plantations and mines. These communities, such as San Basilio, organized revolts, culminating in the establishment of the first free town in the Americas, which remains intact today. Afro-Colombians and Indigenous communities find themselves disproportionately susceptible to poor treatment, meager wages, and substandard living conditions. This can be attributed, in part, to the State's inclination to delineate its population along ethno-racial lines, influencing legal frameworks and spatial organization. The concept of mestizaje in Colombia further exacerbates the challenges, as it implies the destined disappearance of Indigeneity and perpetuates a capitalist order that systematically dispossesses Indigenous communities (Minority Rights Group, 2008).

Following Colombia's independence in the 19th century, the government initiated the privatization of land and a "civilizing" agenda, dividing reservations and displacing Native communities from their lands. The political landscape became further complex with the founding of the conservative and liberal parties in 1849, sparking a political battle between Simon Bolivar and Francisco de Paula Santander. This tension eventually led to the War of the Thousand Days in the early 1900s, during which Native peoples took up arms to defend their rights and interests. Post-war in 1904, elites imposed stringent policies in Cauca, promoting capitalism through measures such as fencing territories, prohibiting mountain crop cultivation, and modernizing haciendas (Vanegas, 2008).

Political turmoil heightened in the 1940s and 50s, marked by the assassination of left-wing presidential candidate Jorge Eliecer Gaitan. This event triggered El Bogotazo, a violent conflict between political parties, resulting in mass urban flight and the establishment of the "National Front" agreement that provided fertile ground for guerrilla groups. The Revolutionary Armed Forces of Colombia (FARC), founded in the 1960s, became the largest guerrilla group until the 2000s. The 19th of April Movement emerged in 1970, utilizing coercive tactics, including recruiting minors, raping women, and intimidating communities. Their power grew, leading to nationwide attacks and checkpoint seizures, culminating in the 1985 Palace of Justice siege that claimed 101 lives. Simultaneously, drug prohibition escalated, contributing to drug cartel violence and increased urban flight, forcing some to leave Colombia altogether (MRM Story, Unknown). The rural campesinos, including Indigenous peoples, bore the brunt of these challenges. In 1989, Covenant 169 was enacted, granting Indigenous peoples the right to be consulted in government decisions directly affecting them. The new Constitution in 1991 included provisions for Indigenous rights, introducing a nuanced tension between Indigenous and universal rights (Vanegas, 2008).

In the early 2000s, the notorious cartel leader Pablo Escobar was assassinated, and the largest paramilitary and guerrilla groups negotiated peace talks, reducing violence and insecurity in the country. During the demobilization, Indigenous communities in Cauca had recovered 75% of the lands that had once belonged to their reservations. In 1996, the Colombian

Court decided that the government's decision to allow the Occidental Petroleum Company to exploit fields within the U'Wa people's territory was unconstitutional and violated Covenant 169/1989. However, in 1997, the Court did not uphold this same recognition of Native rights and compensated them monetarily for the damages done to their land instead of consulting with them (Vanegas, 2008).

As a whole, racial policy concerning the rights of Indigenous peoples in Colombia includes not only government-sanctioned dispossession and violence but also violations of rights by guerrilla and paramilitary groups. Colombia's fragmented history prioritizes the interests of corporations and capitalist progress over the rights of Indigenous peoples, even though their own Constitution grants them protections.

6. Colombia: Indigenous Social Movements

Colombia's history of Indigenous disenfranchisement and abuse began with the arrival of European explorers and has since evolved to benefit a neoliberal capitalist state afflicted by the "resource curse" of oil. While the initial genocide of Native peoples was very successful, the remaining communities have fought back against their oppressors for centuries, even amid the political fragmentation and violence that has plagued Colombia since its founding in the 19th century. Their numerically small but strategic resistance has allowed them to gain legal recognition at a national level but has kept them in a neocolonial relationship with the Colombian government.

In response to the division and privatization of reservations and subsequent exploitation of Indigenous communities, the Nasa people of Cauca organized themselves against the colonial elites. Deprived of voting rights, political representation, and avenues for political participation, Indigenous people participated in the War of the One Thousand Days in an attempt to defend their interests, but lasting change eluded them. Post-war, as restrictive economic policies were enforced, Indigenous peoples once again rallied under "Quintin Lame" to protect their land and people from the white elites. Lame urged the people to persist in the struggle until their land titles were respected by the government, aiming to establish an Indigenous republic. While Lame initially used Colombian law to bring about change, he

faced heavy criticism for putting faith in colonial institutions. Unfortunately, his critics were proven right when he experienced limited success. Faced with the failure of the legal strategy, Lame and his supporters resorted to taking up arms against white landowners to reclaim their land, marking the establishment of the first known Indigenous guerrilla group in 1914. This organized revolt prompted suggested changes to legislation regarding political participation for Natives, but these proposals were rejected as the government persisted in its belief in the need for white control. Lame's fixation on using the legal system ultimately led to the demobilization of his movement and the triumph of white elites (Vanegas, 2008).

In the early 20th century agrarian conflicts and reforms were prominent, which caused mass exploitation of rural peasants. The ANUC was formed to organize these peasants against exploitation, and although it did not achieve legal results, it symbolized an important moment of mass organization. At the same time, the Nasa people began their own organization efforts, in 1963, the Guambiano and Nasa leaders created the *Sindicato del Oriente Caucano,* which vindicated their right to land and autonomy. This organization also failed because it did not fully represent the needs of all Indigenous peoples. To remedy this, the *Consejo Regional Indígena del Cauca* was founded in 1971. They encompassed both Indigenous and peasant advocacy while also recognizing the specificity of the oppression of Natives, so they were very successful in recovering lands. The Movement Quintin Lame was formed to defend Native people from attacks from landowners and paramilitary groups, and it was eventually dismantled in 1991 in a peace agreement, and gained representation in drafting the 1991 Constitution. Today, Native peoples in Colombia continue to have very low levels of political participation because of local divisions and lack of access to voting places and resources (Vanegas, 2008).

7. Paraguay: State Racial Policies

Paraguay's Indigenous communities, like those throughout the Western Hemisphere, have confronted the challenges of settler colonialism since the first contact. The state's racial policies, reflecting this historical context, employ mechanisms such as erasure, exclusion, eradication, infantilization,

and exploitation. It is within these conditions that Indigenous peoples have responded through various forms of engagement with and resistance to the state. Gaya Makaran classifies these responses into three characterizations: the *Indio montés* or wild Indian, the *Indio encomendado* or encomienda Indian, and the *Indio reducido* or reduction Indian (Makaran, 2016). These categories highlight the diverse approaches taken by the Paraguayan state and Indigenous communities in their interactions.

The *Indio montés* refers to those who fiercely resisted conquest, continuously evading settlers by retreating into increasingly inhospitable regions. The *Indio encomendado* primarily denotes the Guaraní people who experienced the encomienda regime established as early as 1555, compelling them to become part of the colonial systems as a labor force (Makaran, 2016). Lastly, the *Indio reducido* describes the Guaraní residing in Jesuit missions from 1609 to 1767, avoiding exploitation under the encomienda system but facing the imposition of Christianity. These three distinctions illustrate the varying degrees of integration of Indigenous peoples and underscore the violent and pervasive nature of settler colonialism. The subtext suggests that the state's preferred strategies were dispossession, exploitation, and conversion (Makaran, 2016).

These mechanisms of colonization persist through the state's policymaking over the next few centuries. Carlos Antonio Lopez, the state's leader from 1844 until 1862, initiated legal erasure with the enactment of the Decree of 1848, leading to the lawful "disappearance" of Indigenous peoples for 133 years. Articles 1 and 11 were pivotal in this regard; the former dispossessed Indigenous peoples of their land "in exchange for illusory citizenship" (Makaran, 2016, p.), while the latter declared that "the assets, rights, and actions of the aforementioned twenty-one nations of native peoples are property of the state" (p.). Consequently, the indigeneity of communities was erased and disregarded as they were forcibly assimilated into the Paraguayan settler identity. Moreover, it is essential to note the patronizing nature of relegating an entire people to the status of "property of the state". Following this decree, the only Indigenous peoples recognized as such were those who chose voluntary isolation and resisted integration.

The communities that voluntarily isolated themselves from contact with the state were considered primitive, uncivilized, and threats to the nation-

state: Marakan writes that they were "closer to being enemies of the country than citizens" (Marakan, 2016, p.). Thus, the state continued their attacks on Indigenous autonomy throughout the twentieth century via attempts at tribal reductions - *Ley de reducciones de tribus indígenas* (reductions of Indian tribe's act) in 1907, and via the state's agenda of assimilation, specifically under the nationalist government of 1936-1947.

Meanwhile, the state also implemented a practice of intense infantilization as it aimed to "civilize" Indigenous communities. Throughout the 20th century, the government sent Indigenous children to live with wealthy families under the guise of civilization, which often resulted in semi-slave labor. In this way, infantilization and exploitation frequently went hand in hand. Joel Correia (2021) introduces the idea that, just as patron-peon relationships occur on an interpersonal level, similar power dynamics take place between the state and Indigenous communities. *Patrón-peón* is the term used to comprehend the relationship between cattle ranchers and their workers. Patrons control resources and labor, perpetuating the imbalance of power between themselves and their workers, which Correia argues is an effective understanding of the Paraguayan state's stance towards Indigenous communities.

Exploitation occurs in both of these patron-peon dynamics as the state encouraged the racialized labor that took place on cattle ranches. Until 1961 with Law 729, Paraguay "did not prohibit using indigenous labor without monetary compensation" (Correia, 2021, p.). Moreover, the state's land reforms, beginning with the sales of many landholdings in the Paraguayan Chaco after the Triple Alliance War that left the Paraguayan state with debt after its end in 1870, perpetuated the settler colonial trend of dispossession. Foreign investors bought land without consulting the Indigenous communities that inhabited it and were thus enclosed in new "properties," becoming a "reserve labor force" for the ranches (Correia, 2021, p.). As seen here, colonization is inextricable from the exploitation of the land and people: settler states seek power through land control.

Thus, as cattle ranching surged throughout the Bajo Chaco, the industry required labor, which was secured through foreign land sales and consequent enclosures. Low pay and poor working conditions were rampant on such ranches and state officials denied rights to the Indigenous peoples living and

working there (Correia, 2021). In another example of the state's disregard for Indigenous wellbeing, throughout the 20th century, multicultural policies that supposedly offered new forms of recognition ultimately created "'governable spaces of Indigeneity' that advance capital expansion while limiting autonomy" (Correia, 2021).

Trends of state-sanctioned exploitation can be explicitly observed in the interactions between the Mbyá people and the Mennonite settlers of the 20th century. While Mbyá communities successfully avoided direct contact with the Paraguayan state, as will be discussed further later on, they were, nonetheless, displaced by Mennonite families. This dynamic involved a cycle of dispossession and exploitation, where complaints of mistreatment resulted in empty promises of investigation and retribution. Initially, the Mbyá people lodged complaints with the DAI (*Departamento Asuntos Indígenas*), and the subsequent request for a police investigation yielded no results (Reed, 2015). Over the next twenty years, complaints led to minimal actual change; any investigations, limited as they were, backfired with increased Mennonite aggression. The state's response was to offer Mbyá communities land for relocation. However, the Mbyá refused these offers, deeming the land invariably infertile and inadequate. They believed in their right to their original homelands, despite being invaded and deforested. In summary, the Paraguayan state has consistently demonstrated its unwillingness to defend Indigenous peoples from violence and, in fact, has actively perpetuated such violence through its policies.

In addition to the exclusion, infantilization, and exploitation characterized within the Paraguayan state's racial policies, there were also genocidal impacts. The Stroessner regime of 1954-1989 facilitated the deadly eradication of many Indigenous peoples via agricultural expansion and colonization of El Chaco, which can be understood as a second conquest. Such decimation was enabled through the spread of deadly and unfamiliar disease and the destruction of homelands. These actions had a particularly fatal impact on the Ache people in Eastern Paraguay due to the intense deforestation concentrated in that region. Recorded at 75% forest in 1973, Paraguay's east soon ranked fourth in the world's rates of deforestation with 3.5% removed each year. By 2015, only 14% of the original forest remained (Reed, 2015). Such environmental devastation was made possible since the

government considered it to be a kind of collateral damage necessary for the country's progress and modernization.

Three central reasons explain the aggressive territorial dislocation and deforestation in Paraguay. Firstly, the expansion of the cattle ranching industry necessitated more land for pastures. Secondly, as Stroessner's power weakened in the 1980s, he distributed acreage along the eastern border to poor mestizo campesinos in an attempt to "mollify the landless masses" (Reed, 2015, p.). Thirdly, the growing demand for soy, initiated by Paraguay's soybean industry in 1967, contributed to these trends. By 2012, the country's soy industry had experienced significant growth, with 3 million hectares planted. Importantly, these pursuits took advantage of the "lack of legal property titles and regulations" (Makaran, 2016, p.), resulting in the extreme dispossession of Indigenous communities.

New rights were granted in the 1980s and 1990s, but it is crucial to emphasize the disparities between text and context. In 1981, there was official recognition of Indigenous communities for the first time since the Decree of 1848, as discussed earlier in relation to legal erasure. The aim was "at the social and cultural preservation of indigenous communities" (Makaran, 2016, p.). However, this recognition was sparingly and ineffectively enforced due to a "lack of political will and penalties" (p.). In 1992, ethnic rights were granted constitutional status: the state recognized Indigenous peoples as citizens and guaranteed their rights on paper, but this, too, had limited impact. The discrepancies between newfound law and practice are evident in the continued usurpation of Indigenous land and the disproportionate rates of poverty among Indigenous communities. According to Makaran (2016), 77% of Indigenous peoples in Paraguay live in poverty, and 63% live in extreme poverty, compared to 38% and 15%, respectively, of the whole population. These numbers underscore the inadequacy of any new progressive reforms and point to the economic exclusion of Indigenous communities. The state's solutions have focused on disappearing Indigenous peoples rather than addressing poverty, highlighting the idea that legal recognition does not guarantee substantive change.

8. Paraguay: Indigenous Social Movements

Indigenous communities have taken it upon themselves to enact the change and resistance necessary for their survival. With strategies of selective refusal and engagement with the state, the Xákmok Kásek community in el Chaco, comprised of Sanapana and Enxet-Sur peoples, have "shown that settler state power is not total but can be disrupted" (Correia, 2021, p.). Indeed, Guinier and Torres (2014) write of social movements as arising "when ordinary people join forces in confrontation with elites, authorities, and opponents to change the exercise and distribution of power" (Guinier & Torres, 2014). The Xákmok Kásek community, specifically, was characterized by Correia (2021) as employing dialectics of refusal and engagement of the Paraguayan state. The Marandú Project helped to provide a framework from which to legally advocate for their rights and communities. This organization sought to inform communities about their rights and to cultivate leaders with knowledge of the law so as to better resist the state's manipulative violence (Correia, 2021). It was short-lived—established in 1974 and ended by the Stroessner government in 1976, but it was successful in creating the *Consejo Indígena del Paraguay* (Reed, 2015).

The Xákmok Kásek began their state engagement by advocating for labor rights to combat the labor exploitation and poor working conditions, and then moved onto land rights. In 1986, they leveraged their new legal status to claim 20,000 hectares from the Estancia Salazar landholdings, but resulted in a stalemate, as the ranch owners refused to sell or subdivide, and the Xákmok Kásek refused their counter offer for different land, holding out for their ancestral lands (Correia, 2021). Similar to the cyclical dynamics of the Mbyá and Mennonite ranchers, they refused to drop their claims and stayed on the Estancia Salazar ranch as conditions worsened until they were eventually evicted by the ranchers to relocate nearby. A law outlined a process for land restitution but did little to resolve the Xákmok Kásek land dispute.

Since "relying solely on legal remedies reasserts state and settler colonial power" (Correia, 2021, p.), Indigenous communities turned to direct action and enacted road closures in 2015. A framework of demosprudence is particularly apt here, as it "explores the ways that political, economic, or social minorities cannot simply rely on judicial decisions as the solution to their problems" (Guinier & Torres, 2014, p.). The communities demanded

compliance with the Interamerican Court's 2010 judgment that found that the state had violated the community's "rights to life, property, and dignity" and called for reparations within three years (Correia, 2021). The idea of such a demonstration was to aggravate the Mennonite ranchers, the patrones, by closing roads and disrupting their business ventures because the state was more likely to comply with the landholder's needs since power always listens to power. In these ways, the Xákmok Kásek enacted a dialectic of both legal engagement on the state's terms and refusal on theirs to posit themselves as citizens with rights rather than "subjects of labor exploitation and dispossession" (Correia, 2021, p.).

However, this has not been the only approach to resistance. The Mbyá-Guaraní of eastern Paraguay have unfalteringly enacted complete refusal to engage with the state. As forest people, they were hugely affected by the deforestation that accompanied the state's expansion of cattle ranching and soybean farming. In the three decades following 1980, forests were felled, and the country moved to the fourth-largest soybean producer in the world. Mbyá people bore the brunt of the deforestation (Reed, 2015). Due to the loss of home, many were forced to migrate to cities and found themselves unmoored in the new urban landscape. Still, once there, the Mbyá refused to assimilate. Up until this point, they had successfully isolated themselves within the forest, avoiding state legal processes such as the census and land titles, believing that paper trails could be used against them (Reed, 2015). They traveled to the city only as a last resort and there established an urban identity once again in opposition to the state (Correia, 2021). They refused to take part in any organizations that provided healthcare or legal services, including *the Asociación de Parcialidades Indígenas* (API) or *the Marandú Project's Consejo Indígena del Paraguay.*

The Mbyá-Guaraní opposed any efforts to establish colonies or join any established enclaves in the city due to their previously mentioned moral opposition to titling land. This constant opposition is unique from other Indigenous communities in Paraguay's cities, such as the Maká, who established themselves as a cohesive unit in 1985, and other Guaraní communities who have transitioned more easily into urban life. The Avá-Guaraní, for example, elected a leader, petitioned for urban land, and are recognized as an Indigenous community. The Mbyá-Guaraní, on the other

hand, confront state agencies and assert their opposition to the state even through displacement. They occupied Plaza Uruguaya, a park in La Asunción, in 2007 to press their claims for land. Their occupation lasted for four years until conservative politicians in office removed them from the plaza in 2011. Still, they continued to demonstrate under the imperative of acquiring land in forests to return to: dissatisfied with anything besides large parcels of adequate land. Reed (2015) writes that the Mbyá "wield their presence in the city as a challenge to state authority", embodying an admirably stubborn form of resistance. Their maintenance of opposition and insistence on independence and autonomy represent one of the strategies of resistance and social movements.

9. Bolivia: State Racial Policies

Bolivia's Indigenous communities have also faced a slew of exclusionary policies from the state under the guise of land reform and multicultural policies throughout the second half of the 20th century. Prior to then, the country's Indigenous-state dynamics were defined by a largely feudal style of productive relationships that supported hacienda production. Indigenous peoples were denied citizenship and rights, excluded from inhabiting cities and instead serving in "semi-feudal conditions as peasants or miners" (Horn, 2018). They were thus separated from the economies, politics, and societies of other Bolivian ethno-racial groups (Horn, 2018). Moreover, the attempted destruction of their cultural practices, facilitated and perpetuated by the exploitative labor dynamics, designated them as a low social rank (Tockman, 2016).

The national revolution of 1952 ended 70 years of oligarchies and gave all Bolivians, including Indigenous peoples, the right to vote. It also ushered in an era of agrarian and education reform. In 1953, the president Víctor Paz Estenssoro, signed off on the "first large-scale land distribution" (Fontana, 2014), which sought to end this system of bondage and supported the peasant unions (Fontana, 2014). As with Paraguayan policies, these new reforms did not translate into realized implementation. Bolivia's Indigenous peoples were still marginalized as their political agency was withheld (Tockman, 2016) and the state's formal granting of land did not result in much actual change. Indigenous peoples were allocated land but the plots were small, specific, and all in all unsustainable for traditional lifeways that depended on communal and fertile land.

However, nearly forty years later in 1989, the 169 Convention of the International Labor Organization (ILO) ruled that Indigenous peoples were

entitled to "special territorial, cultural, and self-determination rights" (Fontana, 2014), which was then ratified by Bolivia in 1991. In 1994, the Law of Popular Participation (LPP) was enacted, granting more opportunity for local political participation by Indigenous and peasant groups. The 1995 elections led to 29% of public offices being filled by Indigenous and peasant candidates across 200 municipalities (Tockman, 2016). Law 1715 in 1996 was constructed under the neoliberal government of Sanchez de Losada, which distinguished between individual and collective land tenure rights (Fontana, 2014). Introducing the Tierra Comunitaria de Origen (TCO), it institutionalized the "collective titling of large areas of land to social organizations formally recognized as Indigenous" (Fontana, 2014). Fontana (2014) also notes that this form of collective tenure allowed for a more efficient titling process due to issuing a single property title for a large area of land. Indigenous communities in the lowlands predominantly opted for these collective land titles, and as of 2014, 18 municipalities have begun converting into Indigenous autonomous territorial units (Fontana, 2014).

Despite these successes, which were indeed long overdue, urban Indigenous peoples face disproportionate rates of poverty (Horn, 2018). "Indigenous" has long been considered a synonymous of "rural" and so urban Indigenous communities are excluded from Indigenous rights-based development (Horn, 2018) and recognition of rights only take place in rural areas, "places conventionally associated with indigeneity" (Horn, 2018). Of course, this trend has its roots in colonialism as settler conquest established indigeneity as conflated with primitivism and as an "antithesis to urban life" (Horn, 2018). So, policies that were successful in granting collective land titles to many Indigenous peoples excluded those in the cities: urban legislation recognizes only individual property rights (Horn, 2018).

As the 1990s gave way to the 21st century, Bolivian policy transitioned from multiculturalism, which, similar to Paraguay's approach, combated outright legal erasure but otherwise served as a means for further exploitation, to plurinationalism. In 2009, the constitution was updated with articles 17 and 18 to recognize cities as intercultural communities whose needs should be met through "an intercultural education and healthcare system" (Horn, 2018). In 2010, new Indigenous rights and developmental principles were established. Overall, the Bolivian state has seen some success in transforming its policy towards Indigenous communities and supporting Indigenous autonomy.

10. Bolivia: Indigenous Social Movements

This success was not without significant pressure from Indigenous communities. Indigenous land claims are founded in a "strong ethno-identitarian narrative" (Fontana, 2014, p.), which was often at odds with the class-based identity structure that tends to prevail. Peasant and *campesino* unions of the second half of the 20th century were a dominant form of organization and were contingent upon the class aspect of their identities. Peasants opposed the TCO format of collective land titles, preferring individuality and emphasis on their roles in production while Indigenous peoples primarily sought to restore their homelands and traditional lifestyles (Fontana, 2014). The divisions between identity articulation and priorities solidified separate categories of Indigenous and peasant. Amidst changing political climate of the 1980's, as neoliberalism rose following the end of a dictatorship, the ethno-cultural organization of *Confederación de Pueblos Indígenas de Bolivia* (CIDOB) gathered speed in the lowlands. The *Cosejo Nacional de Ayllus y Markus de Qullasuyu* (CONAMAQ) followed ten years later in the highlands. Both Indigenous organizations protested the disproportionately low numbers of Indigenous circumscriptions and representatives (Tockman, 2016). As the concept of demosprudence seeks to explore, social movements and organizations such as these "enable those who are shut out of a majoritarian political process, to nonetheless open up nodes in the decision-making practices of a democratic society" (Guinier & Torres, 2014, p.).

In the late 1980s, amidst an economic crisis and failed land reforms, rural Indigenous movements exerted pressure on both national governments and international organizations, following a rights-based approach to development and the recognition of Indigenous rights (Horn, 2018). This organized pressure resulted in the aforementioned 1989 ILO 169 Convention on Indigenous and Tribal Peoples. In 1994, Bolivia began its process of recognizing languages and respecting ancestral territory (Horn, 2018). The demands for territorial self-governance were acknowledged when the plurinational state of Bolivia incorporated Indigenous autonomy into its 2009 constitution.

Still, Tockman (2016) notes that relatively few Indigenous communities have taken advantage of the opportunity for increased territorial autonomy and explains the inadequacies of colonial cartography. Though an important space for self-governance, the municipalities are often inconsistent with ancestral territory and must follow a liberal design of governing structure. Conversions

to autonomous municipalities are most likely to happen in the highlands, where 85% of the municipalities (215 of 252) are majority Indigenous (Aymara and Quechua peoples) while the collective land titling is more popular in the lowlands (Tockman, 2016).

Despite the high rates of poverty and exclusion from legislation, Indigenous communities have developed their own forms of politics within neighborhood organizations. In El Alto-Bolivia, communities have "reproduced rural Indigenous governance principles, such as leadership rotation or collective work schemes in the context of their neighborhoods" (Horn, 2018). In Santa Cruz, Bolivia, urban Indigenous communities have both utilized rural governance and claimed official recognition and representation (Horn, 2018). In these ways, urban Indigenous peoples are also constantly revitalizing their identities and practices in some cases, and developing a political voice and agency. Not because it was handed to them, but because they have made it so.

Finally, not all Bolivian Indigenous resistance has stayed in the realm of legal pressure. Disruption and demonstration are also a key method of protest and have been seen used in several instances. This kind of social outcry was used in the face of the 2000 Water War in Cochabamba-Bolivia and the 2003 Gas War in La Paz and El Alto-Bolivia. The fight over natural resources, with one side extractive and the other protective, also demonstrates that Bolivia, with its more radical and effective reform, still maintains trends of disregarding the wellbeing of land and people in the name of profit. In response to such ideologies, *vivir bien* suggests a framework for post neoliberal and pro indigenous development and it emphasizes harmony between human and nature. Therefore, the impacts of social movements extend beyond the law, as Guinier and Torres (2014) articulate their capacity to "narrate new social meanings, often through their interaction with, and resistance to, more conventional understandings".

11. Canada: State Racial Policies

Canada, despite being socially perceived by many as historically and presently "raceless" and "innocent of racism" (Haque, 2015), is decisively neither and never has been. This is particularly evident in its settler colonial past and present, starting with the "doctrine of discovery", which declared conquest to be righteous and justified the colonization of the Americas along with the genocide of its Indigenous people. Settler colonial violence took various forms, and as it spread from east to

west, it manifested as deadly diseases. By the 1860s, when settlers reached western North America, unfamiliar diseases had significantly reduced the Indigenous populations (Canning, 2018). Another frequently employed strategy involved the intentional destruction of food sources. Settlers, hunting for sport, decimated the bison population, which had been a crucial resource for Indigenous communities that used the meat and hides. The colonial project hinged on acquiring land and resources, employing tools such as the outright murder of Indigenous peoples through bounty offers, deceitful treaties destined to be broken, assimilationist agendas, and the imposition of new religions (Canning, 2018).

Canada's residential schools, operational from the 1870s through the 1990s, perpetuated colonial violence by facilitating the assimilation of Indigenous children into the dominant settler culture, aiming to "civilize" Indigenous populations. These schools also sought to sever the tie between land and people, serving the state's interests by vacating the land for white settlers (Haque, 2015). Children in these schools endured various forms of abuse, including malnutrition, beatings, sexual exploitation, medical malpractice and experimentation, and even death (Canning, 2018). An essential component of the "cultural invasion" was the "breaking down of Indigenous spirituality, family relationships, and cultural practices" (Canning, 2018), and the residential schools embodied this agenda. The forced attendance at understaffed and underfunded boarding schools, rampant with psychological and physical abuse, exemplifies Canada's state-sanctioned violence towards Indigenous populations. In contemporary times, these patterns persist through high rates of incarceration for First Nations and Indigenous peoples (Canning, 2018).

Attacks on language and education were also a principal component of assimilationist attempts. The Canadian state used language policies and racial exclusion in an effort to preserve the national unity of the white settler state (Haque, 2015). They posited Indigenous languages as primitive and "barriers to civilization and modernity" (Haque, 2015, p.). The constitution act of 1982 recognized certain treaty rights but failed to make any reference to language rights. Canada, along with most settler states, drags its feet when it comes to making any real change as its government officials were slow to sign UNDRIP and consequently slow to implement it. Canning writes of Canada's policies towards Indigenous peoples, saying they are that of "refusing necessary change, and therefore of allowing, or mandating by policy, the resulting chaos" (Canning, 2018, p.).

12. Canada: Indigenous Social Movements

As the Canadian state has enabled and encouraged continuous attacks on Indigenous sovereignty, specifically via environmental destruction, Indigenous groups rise up in resistance. Many battles are fought in both the courtrooms and in the streets, such as with the trans mountain pipeline. Initially, Indigenous communities sought to be part of the environmental review and consultation processes but when that had little effect, they went to court. Construction continued while it was still being legally disputed and so Indigenous protestors blockaded streets in response. In 2017 and 2018, the construction was slowed and then stopped, which is a testament to the grit and savvy of the protestors. Nonetheless, the federal government has claimed to eventually continue construction, in a promise that disregards Indigenous sovereignty (Canning, 2018).

The trend of mass mobilization and organizing gained momentum in 1969 with protests aimed at blocking the passage of the White Paper. This federal legislation posed a significant threat to "Indian status" by seeking to eliminate treaty rights, transfer federal responsibility to provinces, and abolish the Department of Indian Affairs (Haque, 2015). However, Indigenous scholars responded by releasing publications such as Harold Cardinal's *The Unjust Society*, which declared the policies to be a mechanism of cultural genocide, and the National Indian Brotherhood's *Indian Control of Indian Education*, which advocated for Indigenous agency over education (Haque, 2015). These responses represent a several-pronged approach to resisting state oppression: legal arguments as with the trans mountain pipeline, blockades, and academic responses.

In the spirit of complete refusal, many of Canada's Indigenous social movements have achieved success through large-scale blockades. Blockades prove to be an effective strategy as they garner the attention of policymakers by disrupting society without requiring vast numbers of people. Additionally, as noted by Canning, they subvert the norm of the state enclosing and policing Indigenous peoples because, in this context, Indigenous communities are restricting mobility instead of being restricted. A notable example occurred in 1984 when the Tla-o-qui-aht and Ahousaht First Nations in Clayoquet Sound, BC confronted a logging corporation whose operations posed a threat to their land. The court granted injunctions to both parties, preventing Indigenous blockades and the corporation's plans to clear-cut (Canning, 2018).

Blockades are a very popular strategy. There were thirty Indigenous-led protests and blockades in the summer of 1990, most of which were in response to the Oka Crisis, which was a conflict at Kanesatake in Ontario over the municipality's attempt to build a golf course on sacred burial grounds. In a "serious and widespread shut down of economy and society" (Canning, 2018, p.), protestors across the country enacted blockades in solidarity. In 1995, there was the Stoney Point Ojibway First Nation's occupation of Ipperwash Provincial Park in Ontario as a last resort for reclaiming their land. In 2012, there was another mass mobilization in response to legislation against environmental laws, under the banner "Idle No More", Indigenous peoples took to the streets following Indigenous women and grassroots First Nations leaders (Canning, 2018). Despite being unsuccessful in blocking the legislation, this is an example of the unwavering commitment to resistance. A year later, Mi'kmaq people opposed the drilling and fracking projects planned for Elsipogtog, New Brunswick and won their fight (Canning, 2018).

Blockades serve as an outlet for protest and resistance against the state. They are one strategy of what Guinier and Torres (2014) consider "popular and purposive mobilizations" seeking "significant, sustainable social, economic, and/or political change". Blockades also call into question the nature of trespassing. Can Indigenous peoples ever really be trespassing on their own land while the government forces roads and pipelines through their homes? As Canning writes (2018), direct action becomes "unavoidable, and inevitable, when people who are negatively affected by something are denied the power to change it" (Canning, 2018, p.).

CONCLUSIONS

All six of these countries share histories of settler colonialism in which the imposition of statehood dispossessed Indigenous peoples of their homelands and lifeways. Their timelines take different forms: for example, Paraguay's land reforms don't reach their devastating peak until the late 20th century with the influx of cattle ranching and soybean farming, during which time Bolivia had begun its slow and initially ineffective process of recognition, Peru looked to multiculturalism and neoliberalism, Colombia introduced new rights-based laws but also faces unrest from guerrilla groups, and the governments of Canada and the United States had turned to assimilation as its primary prerogative. We have identified four major characteristics of a settler colonial state's approach to its Indigenous population: eradication and genocide, land theft, assimilation and cultural corrosion, and

labor exploitation. The six countries of our focus incorporate these characteristics into their colonial projects to varying degrees.

Paraguay's genocide of Indigenous people came in two waves: first, with the birth of the nation-state, and second, with the complete deforestation of its eastern border. In the 1900s, Paraguay began its agricultural expansion in earnest, and by the late 1900s, the government had effectively transformed the landscape from that of Indigenous homelands to the sites of environmental violation. The eradication of Indigenous peoples in Colombia, Bolivia, Canada, and the United States was, like in Paraguay, the result of extractive projects and displacement. The genocidal attempts in Canada and the United States were extensive and nearly immediate, as the states explicitly required land for settlement. Land theft and displacement are perhaps the defining characteristics of settler colonialism, as that was the purpose of the states' genocidal attempts. In this way, the governments of all six countries centered their need for land—for natural resources, for agricultural ends, for settlement—in their policies concerning Indigenous peoples. Assimilation and cultural corrosion were and are principal components of the United States and Canada's racial policies, while Peru, Colombia, Paraguay, and Bolivia instead leaned on exclusion. Canada's legacy of residential schools clearly illustrates its assimilationist and "civilizing" agenda as it attempted to purge Indigenous communities of their cultural heritage and replace it with the settler language and practices. Finally, labor exploitation was most central to Paraguay's policies as they required the Indigenous inhabitants to work their new ranches and fields. While all six governments were and are exploitative, it is particularly apparent in Paraguay's history.

There are rich histories of Indigenous resistance in the face of this state-sanctioned injustice. Resistance manifests as small- and large-scale organization, activism, and protest, inside and outside of legal frameworks. The racial policies of colonial states are cause for protest but also inform the states' reception to such protest. Population size and access to resources are consequences of colonial states' various unjust racial policies and have impacts on the possible scale and scope of social movements. Still, our findings have shown that Indigenous resistance is persistent and enduring. As Guinier and Torres (2014) outline in their work on demosprudence, people cannot rely entirely on courts to introduce necessary change or redress harms and so must challenge "unfair laws through the sounds and determination of their marching feet.

Indigenous people everywhere resist colonial states. Indeed, the very continued existence of Indigenous communities proves the failure of settler colonialism. Yet, it is a pervasive project that persists today. Different communities opt for different forms of resistance: many choose to engage with the state for recognition and legal rights, while others opt for voluntary isolation, as with Paraguay's Mbyá people, or partial integration, as with Bolivia's urban Indigenous populations. Others choose direct action, as with Canada's pattern of Indigenous-led blockades. Many do a mix of all three—state engagement, degrees of withdrawal, and direct action or protest—and also resist in their day-to-day revitalization of traditional and cultural lifeways. All in all, despite the undeniable successes, such as Bolivia's plurinational status, this is a fight that will continue indefinitely - until people can live in peace and without the oppression of a settler state.

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NOT OWNERS: LIBERATORS OF THE EARTH! THE MOVEMENT FOR THE LIBERATION OF MOTHER EARTH: AN INTERETHNIC COUNTERHEGEMONIC APPROACH

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ABSTRACT

This study provides an analytical framework for understanding social movements and proposes a corresponding definition. It offers a detailed look at the Movement for the Liberation of Mother Earth (MLME) in Colombia, highlighting its interethnic and counterhegemonic approach in the struggle for land. Drawing upon concepts from social movements and related theories, the study centers on the MLME, which originated in the northern area of the department of Cauca and emerged as a response to the unequal distribution of land and natural resources. Rooted in an indigenous worldview, this movement conceives of Earth as an oppressed mother and seeks her liberation by resisting land grabbing and industrial exploitation. It underscores the importance of viewing the Earth as a living being, emphasizing the relevance of this cosmological perspective within the context of nature's rights. This study emphasizes the need to rethink the relationship between society and nature, advocating for a deeper recognition of the interconnectedness between the two.

RESUMEN

Este artículo presenta un marco de aproximación a los movimientos sociales y plantea una definición de los mismo. Ofrece una visión detallada del Movimiento de Liberación de la Madre Tierra (MLMT) en Colombia, destacando su enfoque interétnico y contrahegemónico en la lucha por la tierra. Mediante conceptos relacionados con los movimientos sociales y las teorías que los explican se centra en el MLMT, que surge en el norte del departamento de Cauca, Colombia, como respuesta a la desigualdad en el acceso a la tierra y los recursos naturales. Este movimiento se fundamenta en una cosmovisión indígena que considera a la Tierra como una madre esclavizada y busca su liberación, luchando contra el acaparamiento de tierras y la explotación industrial. Destaca la importancia de comprender a la Tierra como un ser vivo, resaltando la relevancia de este enfoque cosmológico en el contexto de los derechos de la naturaleza. El artículo enfatiza la necesidad de replantear la relación entre la sociedad y la naturaleza, abogando por un reconocimiento más profundo de la interconexión entre ambos.

KEY WORDS: Social movements, land and conflict, liberation of Mother Earth.

PALABRAS CLAVE: Movimientos sociales, tierra y conflicto, liberación de la Madre Tierra.

JEL CODE: N460, N56

RECEIVED: 08/03/2023
ACCEPTED: 26/12/2023
DOI: 10.26807/rfj.vi14.493

INTRODUCTION

What is a social movement? As is the case with most definitions in the field of social sciences, there is no universal consensus. Therefore, it is necessary to conduct a brief historical review and characterize the theories relating to social movements. In this regard, the definition proposed by Marisa Revilla Blanco (1996) is used, which offers a precise framework for approaching this context. It denotes "the process of reconstituting a collective identity beyond institutional politics, whereby individual and collective actions are imbued with meaning" (p. 10). This process involves a variation, change, or modification of identity (individual and/or collective) in relation to preferences and expectations.

> The hypothesis under consideration here regarding the origin of social movements suggests that they emerge when collective desires concerning social order (the interaction among different societal visions) fail to include and represent all individuals and groups within a given society at a particular point in time and space. […] The emergence of a social movement resolves uncertainty surrounding the collective wills shaping the social order. (Revilla, 1996, p. 12)

In the following, we explore a theoretical approach to social movements and the theoretical frameworks proposed by Rafael de la Garza Talavera (2011) to address such phenomena:

- **Classical approach:** This perspective, grounded solely in the notion of class struggle and political ideology, has undergone significant modifications in response to its evident limitations. These limitations emerged as social needs evolved, giving rise to new forms of struggle. It was acknowledged that the traditional social foundation had changed, and its values had become incongruous with the principles of the classical approach. The adaptations became apparent with the growing prevalence of participatory ideologies, the increasing use of non-institutional modes of political engagement, and the politicization of issues previously considered solely moral or economic (De la Garza Talavera, 2011).

- ***Marxist approach:*** By exclusively focusing on the labor movement, the Marxist approach stripped it of any revolutionary potential, assuming it to be the quintessential social movement (De la Garza Talavera, 2011, p. 113).
- ***Functionalist approach:*** This approach differs from the Marxist approach primarily in terms of the rationality attributed to social movements. It now extends beyond class struggle to also include class domination (De la Garza Talavera, 2011).
- ***Constructivist approach:*** The constructivist approach emphasizes that collective action primarily arises from the internal transformations that individuals experience in response to specific conditions. This approach delves deeper into cultural analysis from a symbolic perspective, emerging from the creation of interpretative frameworks generated by social ruptures and/or turning points. Given the convergence between the two central schools of social movement theory, namely the new social movements theory and resource mobilization theory, this approach primarily addresses the opposition between the idea that the system influences the individual and that the individual determines the system. "Although the analysis centers on the individual, they cannot be conceived as isolated or indifferent to the surrounding environment, especially in light of recent changes, i.e., globalization" (De la Garza Talavera, 2011, p. 114).

Theory	Definition	Common aspects relative to social movement dynamics
Collective behavior	Collective action as joint action of individuals for the defense of common interests.	**1.** Informal interaction networks. **2.** Shared beliefs and solidarity. **3.** Collective action developed in areas of conflict. **4.** Action that takes place outside the institutional sphere and the usual procedures of social life.
Resource mobilization	Emphasis on structural analysis both *within* and *outside* of social movements (modes of interaction).	
Political process	Transformation of participation channels.	
New social movements	Integral to the theories.	

Table 1. Theoretical frameworks focused on such phenomena.

Source: Revilla Blanco, in "El concepto de movimiento social: acción identidad y sentido" (1996, pp. 1–18), and De la Garza Talavera, in "Las teorías de los movimientos sociales y el enfoque multidimensional" (2011, pp. 107-138).

In broad terms, the prevailing idea is that social movements "respond to imbalances within the system, particularly regarding processes of social integration" (De la Garza, 2011, p. 111). Within this framework is a proposal to acknowledge social movements as catalysts for social change. According to De la Garza (2011), this perspective "prioritized defining a social movement based on the context in which it emerges, later evolving into the resource mobilization approach, particularly with the political opportunity structure proposed by authors like Tarrow" (p. 111).

The main contribution of the resource mobilization approach lies in its analysis focused on the internal functioning of social movements. Indeed, this perspective may have a notable connection with one of the key points developed by Lani Guinier and Gerald Torres (2014) on demosprudence. They argue that social movements are crucial to driving cultural changes that enable legal transformations to endure over time. In addition, they highlight that social movement activism plays a role comparable to that of the law or jurisprudence as a source of rights. Ultimately, we will examine whether a movement such as the Movement for the Liberation of Mother Earth in Colombia embodies these approaches. We will analyze whether, as "ordinary people," they succeed in challenging unjust norms through their demands and determination in the streets and fields.

1. New social movements

In summary, the social base of the new social movements has evolved, expanding beyond the working class to encompass a new middle class, alongside sectors outside the market economy (e.g., homemakers, students, unemployed individuals, retirees), as well as members of the traditional middle class (e.g., farmers, small shop owners, artisans, and intellectuals). This diverse social coalition forms the foundation of the new movements, producing different values and forms of action. In fact, the social base constitutes an alliance among various societal sectors, excluding those involved in class conflict. As a result, these movements lack values specific

to a certain class, as their values are determined by universal or specific characteristics.

In the 1960s, the idea of frustration was introduced as a motivation for the emergence of social movements. During this period, many novel mobilizations emerged, including student protests, labor strikes, anti-nuclear demonstrations, pacifist movements, anti-abortion campaigns, environmentalist initiatives, feminist activism, movements for the unemployed, consumer rights movements, and civil rights struggles, among others (De la Garza, 2011). According to this concept, relative deprivation and status incongruity are factors that lead to discontent, driving individuals to participate in these movements:

> [The feeling that only a few receive benefits or privileges at the expense of others' needs] causes discontent, which is what motivates individuals to participate in social movements. This frustration can stem from various factors, such as status incongruity or relative deprivation, which are fundamental to initiating action. […] Confronted with the impact of public policies on their everyday lives, citizens frequently choose to take actions that are often deemed illegal within the framework of existing institutional channels. (De la Garza, 2011, p. 113)

Society's increasing complexity and diversity poses a central challenge concerning the maintenance of social cohesion. According to Claus Offe, this unity can be achieved in two ways, which are defined based on the essence of such unity, either in terms of diversity of interests or of values. Given the continued development of contemporary societies, values are increasingly subject to scrutiny, as interests are, to some extent, structured around them (De la Garza, 2011, p. 114).

	Old paradigm	New paradigm
Actors	Socioeconomic groups acting collectively (in the interest of the group) and engaged in distributional conflicts.	Socioeconomic groups not acting in their own interests but rather representing assigned groups.
Content	Economic growth and distribution; military and social security; social control.	Peacekeeping, human rights advocacy, and non-aligned labor practices.
Values	Freedom and security in private consumption and material progress.	Personal autonomy and identity, opposition to centralized control, etc.
Modes of operation	a) Internal: formal organization, large-scale representative associations. b) External: pluralistic or corporatist intermediation of interests; competition between political parties, majority rule.	a) Internal: informality, spontaneity, low degree of horizontal and vertical differentiation b) External: protest politics characterized by demands predominantly formulated in negative terms.
Commonalities (despite differences)		
	For instance, liberalism, which advocates for minimal state intervention in social life, strengthening civil rights and freedoms.	
Differences		
These extend beyond economic freedoms and into safeguarding and preserving values, identities, and ways of life.		
With conservatives, the new social movements share the idea of the importance of modernization, although they differ in objectives—while conservatives view modernization as a means to preserve traditional values, the new movements see it as a way to break free from those very values.	For socialists, they undoubtedly share criticism regarding the destructive and chaotic impact of industrial and financial capitalism, although they differ in terms of who will spearhead the transformations.	
"The criticisms of the old paradigm are encapsulated in a redefinition of progress, no longer anchored in the state as the primary driving force but propelled by society itself."		
"The value of autonomy [from the state] is central in most contemporary social movements and is expressed through respect for differences, identities, and ways of conceiving the world."		

Table 2. Characteristics of social movements

Note: Source: De la Garza Talavera, in "Las teorías de los movimientos sociales y el enfoque multidimensional" (2011).

The ethical content of the demands of social movements is clearly emphasized, paving the way for contemporary approaches where symbolic content takes center stage (De la Garza, 2011).

According to De la Garza (2011), Alain Touraine's perspective is based on the notion of society as a collective entity that autonomously produces and regulates its development, independent of higher authorities. From the individual's viewpoint, they can only become empowered by taking full responsibility for managing their daily life. The cultural dimension becomes central, to the extent that it strips the workers' movement of its revolutionary nature and transfers this characteristic to social movements. The struggle lies within the individual and their capacity for subjectivation, which involves destroying the self, "defined by the alignment of personal behavior and social roles and constructed through social interactions and socialization mechanisms." In this context, the subject exists solely as action in the form of social movements, and Touraine develops what is known as his sociology of action, which is a significant contribution to the study of social movements (De la Garza, 2011, p. 113). It recognizes diversity as key when explaining the process of forming collective identities.

> Social movements must be understood in terms of the emergence of an "us" that shares common goals, means, and relationships with the environment; this collective identity implies solidarity and unity rather than a precise identification of a conflict or adversary. Additionally, it is crucial for collective action to extend beyond institutional channels. This last factor paves the way for defining a typology consisting of activist, political, and antagonistic movements, resulting from varying levels of conflict. (De la Garza, 2011, p. 118)

With this brief overview and conceptual framework, we aim to provide a concise characterization of a movement that defies conventional categories: the Movement for the Liberation of Mother Earth.

2. The Earth, enslaved mother

The land problem in Latin America has colonial roots that, instead of being resolved over the centuries, have produced multiple conflicts and displacements. The colonial logic of dispossession persisted after the independence movements and the formation of Creole republics. The

subsequent exclusion of indigenous peoples, Afro-descendants, and peasants as political actors deepened land grabbing and exclusion for two centuries, alongside a relentless drive for extraction. In recent decades, the indignations and frustrations inherited from the pre-industrial period have reached levels conducive to the emergence of ethnic social movements. These movements have triggered a range of protest actions deeply linked with land occupation and liberation. There is a vast body of literature addressing the issue of land in Colombia and Latin America. While it may not be possible to provide a comprehensive overview in this article, we aim to offer an approximation of the context of indigenous, Afro-descendant, and peasant land struggles in Colombia. Thus, this study aims to further understanding of the dimensions that have shaped the Movement for the Liberation of Mother Earth, a tremendously complex, independent, interethnic, and ongoing phenomenon.

Land has been one of the central issues of the armed conflict in Colombia. Beginning in the 19th century with the wars between federalism and centralism; continuing through the conservative hegemony in the 20th century, the Liberal Republic of López Pumarejo, "La Violencia" in the 1940s, and the political distribution of the National Front; to the stagnation of agrarian reform in the 1980s, economic liberalization in the 1990s, paramilitary violence in the early 21st century, and, finally, the peace processes, throughout all this conflict and violence, land has remained a central factor. Land continues to be a determining factor for the poverty and social inequality of farmworkers and the population in general. As a result of the war, approximately 8.3 million hectares were seized from the civilian population (Centro Nacional de Memoria Histórica, 2015). It was only in 2011, with the Victims Law (Law 1448/2011), that public policy began to include mechanisms aimed at providing comprehensive reparations to victims regarding land. However, the policy still has many gaps and weaknesses that have rendered it inadequate, insufficient, and even corruptly implemented. Similarly notable is the comprehensive agrarian reform outlined in the Agreement for the Termination of the Armed Conflict with the FARC-EP, which, despite being a historical obligation in Colombian society, remains blocked (Centro Nacional de Memoria Histórica, 2015).

In Colombia, nature has become one more victim of the armed conflict, especially for indigenous peoples[1]. The paradoxical relationship between armed conflict and the environment is complex. Thus far, specialized literature has identified four interrelated dynamics: nature as a cause of conflict, nature as a mechanism for financing and perpetuating conflict, nature as a victim of conflict, and finally, nature as a beneficiary of conflict (Rodríguez et al., 2017, p. 19). This multiple impact becomes more concrete regarding land use and land titling. Decades of informality, land grabbing, and forced displacement have been key components in shaping the agrarian situation in the country.

According to the report "Land in dispute: Memories of dispossession and peasant resistance on the Caribbean coast (1960-2010)," estimates of the extent of land usurped or lands forcibly abandoned vary according to sources. Some have calculated the figure to be approximately 1.3 million (Ibañez, 2008), while the Consultancy for Human Rights and Displacement estimated the amount of usurped or dispossessed hectares at 4.8 million and the Movement of Victims of State Crimes at close to 10 million (Grupo de Memoria Histórica de la CNRR, 2014, p. 49). In this historical context[2], where the struggle for land serves as the backdrop to the internal armed conflict, large landowners, often with support or even illegal favoritism or bribery of state officials, emerge as the main victors, resulting in extreme inequality. The international Gini index, as measured in Colombia by the Agustin Codazzi Geographic Institute (IGAC), is 0.88, which indicates that if 10 people were to divide a pie representing all the land in Colombia into 10 pieces, one person would own nearly nine of them (Parra and Rodríguez, n.d.). It is of utmost importance to recognize the brave struggle of those who choose non-violent means.

The communities of the Nasa people in northern Cauca, Colombia, have raised their voices against capitalist power since 2005. Their resistance not only entails denouncing and confronting the process of privatizing large areas of land but also pursuing cultural liberation. They do not simply seek

1 In this article, territory is defined as the "living integrity and sustenance of identity and harmony, as per the worldview of indigenous peoples, and due to the special and collective bond they maintain with it, it is harmed when violated or desecrated by conflict."

2 The Colombian case is undoubtedly paradigmatic, with extreme figures; however, structural-related conflict can be found in other countries in the region with incomplete agrarian reforms, such as Mexico, Bolivia, and Peru.

to free themselves from the scarcity and exclusion to which they have been subjected as a people, but they propose to stop the alliance between the state and the companies that enslave the Earth itself. For them, territory is the mother of life, not property.

> Our mother is not free to thrive in life; she will only be so when she returns to being the soil and shared home of the peoples who care for her, respect her, and live with her. Until this occurs, neither are her children truly free. All peoples are slaves, along with the animals and other beings, until we succeed in restoring our mother's freedom. (ACIN, 2015)

In a country where more than 8 million people have been displaced by violence, the defense of territory using sticks and stones against specialized armies, as part of protecting a unique worldview, embodies an act of dignity that goes beyond mere land ownership aspirations.

3. Breaking chains

The Movement for the Liberation of Mother Earth continues to generate significant disruptions. In addition to carrying out incursions on private land for its reappropriation and redistribution, participants have constructed a discourse based on interethnic identity, the special bond of indigenous communities with the territory, and a worldview that perceives the Earth as a mother. The counterhegemonic nature of the movement is not limited to the struggle for land; rather, it seeks a paradigm shift.

Entering large private estates, primarily owned by sugar conglomerates with a lengthy history of exploiting natural resources and rural populations, could be viewed as a strategic maneuver to defend the human right to adequate housing or even a boycott strategy against the latifundist industry. However, the movement goes further; the enslavement of the Earth through large-scale industrial exploitation lies at the root of inequality and the violation of indigenous, Afro, and peasant communities. In this regard, the struggle of the Movement for the Liberation of Mother Earth raises a profound questioning of power relations, both in sociological contexts and in a broader cosmological sense.

The liberation of Mother Earth embodies the anti-colonial and anti-extractive struggle, advocating for the autonomy and self-determination of ancestral peoples and communities. The movement enriches the collective identity of the involved communities through the recollection of the historical struggle of the indigenous peoples of Cauca, dating back centuries. Here, their own version of history is reclaimed:

> Many years ago, these valleys were the ancestral lands and home of our peoples, who lived in what is now known as the southwest of Colombia. They lived well, eating, drinking, chewing, offering, weaving, and dancing. Then came 1535, the year of the Conquest. Overnight, we went to sleep as Nasa and woke up as "Indians." Thus began the relentless exploitation of our lands, turning them into battlegrounds. Since then, we have had no peace nor rest. Three years later, weary of the oppressors' claws, a remarkable woman, Gaitana, took up arms to defend our Earth. She organized an army of 20,000 guards from the Nasa, Yalcones, Pijaos, Timanaes…and defended the honor and land of our peoples, the same land we now tread upon, the same land to which we have now returned. The war of resistance she began lasted 120 years, perhaps the longest any people have fought in history. The resistance she started is 478 years old. No peace or rest. (Pueblo Nasa, 2016, pp. 8-9)

The struggles of Gaitana were followed in the 16th century by those of Juan Tama and Manuel de Quilo, who "reached an agreement with the Spanish Empire, and since then, we have lived tightly packed in territories called 'resguardos.'" In the early 20th century, a movement led by Manuel Quintín Lame against land rents involved litigation for the titling of ancestral territories (Pueblo Nasa, 2016, pp. 8-9).

The period of "La Violencia" in Colombia resulted in terrible displacements that unfortunately have not ceased. Shortly after the adoption of the Political Constitution of 1991, on December 16, the Nasa people endured a tragic massacre in which 20 members were killed by the National Police and armed civilians. Three decades later, they continue to be killed[3].

3 Twenty from Nile: Darío, Ofelia, Carolina, Adán, Edgar, Otoniel, Mariana, Eleuterio, Tiberio, Floresmiro, Mario, María Jesús, Nicolás, Feliciano, Calixto, Julio, José Jairo, Jesús Albeiro, Daniel and Domingo; family of the 13 from Gualanday—among them seven 'kiwe thegna' or Guardians—massacred; eight from San Pedro, massacred; 100 from El Naya,

Faced with colonial genocide, political exclusion, forced disappearances and violations, massacres, and the thousands of agreements signed and unfulfilled by the government; amid the crossfire between guerrillas, the army, and paramilitaries, displacement, and the co-optation strategies of large industrial empires and multinational corporations, the Nasa people continue to defend themselves. They protect their culture and Mother Earth through songs, dances, communal gatherings, collective work, and other creative strategies. "A desalambrarte" ("breaking chains") was a collective work program involving artists, indigenous people, and farmworkers involving planting crops and beautifying various reconstructed indigenous villages on liberated lands. The Nasa people have radio stations, produce podcasts, have established a virtual presence, and have joined with other indigenous movements advocating for autonomy, such as the Zapatista Army of National Liberation, and for land recovery, such as the Landless Workers' Movement.

The Regional Indigenous Council of Cauca (CRIC in Spanish) has developed a key leadership role in the Colombian indigenous movement, achieving electoral victories at the local executive and national legislative levels. Disappointed by the limited and occasionally conflicting outcomes of the electoral route, the Movement for the Liberation of Mother Earth has voiced its own critiques of the CRIC and the political figures within their communities. This discontent has led to the emergence of new leaders among the younger generations after 15 years of collective action. Deprived of access to education and job opportunities, with their cultural traditions under threat, and weary of the internal divisions and conflicts inherited from the pioneering generations, they have embarked on a new phase of liberation with young farmworkers from the region. Liberating Mother Earth means embracing illegality, considered valid and sanctioned by a state that enforces a legal framework of dispossession in contexts or areas dictated by market interests and the financial system. The indigenous movement's strength and legitimacy stem from its use of resistance within the bounds of legality and the array of socially accepted illegal practices it employs to defend territory and culture in every scenario, space, and time (Vargas and Ariza, 2019).

massacred, and five from López Adentro, massacred (...); the family of Cristóbal, Marden, Benjamín, Álvaro Nasa Pal, murdered (...); the tribe of Anatolio; the descendants of hundreds of men and women who fell while liberating in an act of genocide, and hundreds of leaders killed in recent months.

4. March for food

One of the actions used by the Movement for the Liberation of Mother Earth to transmit valuable lessons is the March for Food, now in its fifth year. The crops harvested from the liberated farms are donated to communities in neighborhoods in Cali, Popayán, and other municipalities in the region. The transportation of food, along with indigenous families, on[4] chivas to towns and cities turns into a small carnival. The bonds of solidarity established with civil society organizations, urban groups, and NGOs have broadened the movement's identity beyond the Nasa and have communicated a message of efficacy. While marginalized and impoverished suburban areas continue to wait for the promised benefits from the government, indigenous communities provide chemical-free food, traditional cuisine, and, most importantly, bring joy and hope to many families residing in towns and cities out of necessity, fostering bonds of solidarity with rural Afro, indigenous, and peasant populations.

The food is the result of collective labor and thus an outcome of the land liberation. Sharing it has effectively countered numerous attempts to distort their message, bridging the gap with urban citizens through direct interaction and coexistence with the liberation groups. Furthermore, it addresses the challenging food situation prevalent in vast impoverished areas within one of the country's most productive departments. Food sovereignty is a fundamental part of the Movement for the Liberation of Mother Earth's struggle; they have established networks of custodians for indigenous seeds and gathered interethnic gastronomic wisdom.

> Since taking over the farms, we have cleared many, many hectares of the sugarcane monoculture that stretches across thousands of hectares in the northern region of Cauca that are dedicated to the production of sugar and fuel. Sugar that sweetens soft drinks made from the water that comes down from our mountains. Fuel that powers the cars that sell soft drinks and make a lot of money. Money that finances the war, the battalions that are still present in our territory and continue to threaten and kill us. The circle that enslaves Uma Kiwe

4 Used as traditional buses in rural areas of Colombia, chivas are vehicles adapted to transport cargo and passengers, typically very colorful and often overloaded with both.

> [Mother Earth]. We have planted many, many hectares of food: corn, beans, cassava, banana, squash. (Pueblo Nasa, 2016, pp. 31-32)

The fifth Food March has facilitated inter-community agreements on key issues, emphasizing collaborative efforts. These include initiatives such as "Markets for resistance," which aims to promote fair and direct trade between agrarian producers and consumer communities; "Network of gardens for the liberation of Mother Earth"; "Sharing warm experiences," a platform for learning and exchanging knowledge between movements, such as the national strike and communities advocating for the liberation of Mother Earth in the northern Cauca region that are willing to engage with similar movements in other areas; and "Popular and community health system," which seeks to address gaps left by the Colombian state healthcare system (Liberación de la Madre Tierra, 2021).

It is evident that the liberation of Mother Earth extends beyond land occupation; it aims to emancipate and foster autonomy across multiple dimensions while cultivating various levels of solidarity. Since the 1970s, the movement's slogan has been "reclaiming the Earth to reclaim everything."

5. *Uma Kiwe* and conclusion

The Movement for the Liberation of Mother Earth's conception of the Earth as a living entity and an enslaved mother is crucial for not only reevaluating our relationship with nature but also for broaching the concept of the rights of nature.

The struggle of the Nasa people, like that of most indigenous communities, is rooted in their connection to the land, which involves building social and communal identity in relation to nature, considering it an integral part of their existence. Uma Kiwe, which means "mother who teaches and cares" in the Nasayuwe language, symbolizes the living territory.

The Sarayaku people refer to Kawsak Sacha, the living jungle, while the Muisca use the expression Hitcha Waia. Likewise, every community, in its own language, recognizes the living entity from which we all originate. The Movement for the Liberation of Mother Earth communicates the Earth's voice, enriching its discourse through poetry, mythology, and linguistic deconstructions of Spanish, allowing space for that voice to be heard.

> Learning to listen to her and feel her presence, not abandoning her because she is our Mother. / Reflecting once more is a part of the guidance, as everything communicates. We are guided by thunder, lightning, water. / It is said that none of us came alone to occupy this space. / Mother Earth has summoned us to show respect. / If we liberate her today, it is to defend and nurture her. (Ojarasca, 2021, p. 18)

The spiritual or metaphysical dimension, with its inherent complexities, tends to be overlooked in the context of Western legal frameworks. It is the indigenous peoples who have introduced distinct categories to protect the beings in the natural world and Mother Earth. A social movement advocating for human interests, integrity, and the interdependence of all beings can greatly enrich the development of legal frameworks and deepen our understanding of concepts of justice.

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THE MINGA: A SOCIAL MOVEMENT IN SOUTHWESTERN COLOMBIA

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ABSTRACT

This article aims to analyze why the minga, which can be translated as "collective work," is and should be considered a social movement. To this end, it examines the context in which it arises, as well as its range of actions, discourse, and the communicative, organizational, and legal strategies that have been applied since its genesis. Furthermore, this study explores the influence of this indigenous and peasant protest model on Colombian and Latin American politics and the restructuring of regulations. The findings demonstrate that the economic, social, and political conditions underpinning the lives of indigenous peoples are the fundamental pillar of the emergence of the minga and that over time, new social demands focusing on the defense of life, territorial autonomy, and the rights of nature have been incorporated. Finally, they also reveal how its successes have impacted the movement's expansion and social support, as well as the risks posed by this kind of leadership in Colombia and the broader region.

RESUMEN

En el presente artículo se analizará las razones del porqué es, y se debe considerar a La *Minga*, como un movimiento social. Para ello se examinará como surge, el contexto en el que nace, así como su repertorio, discurso y las estrategias comunicativas, organizativas y legales que han sido empleadas desde su aparición. Además, se estudiará la influencia de esta protesta indígena y campesina en la política y en la reestructuración de la normativa colombiana y latinoamericana; se determinará que las condiciones económicas, sociales y políticas en las que se desarrollan los pueblos indígenas son el pilar fundamental del nacimiento de La Minga, y cómo, con el paso del tiempo, se han incorporado nuevas demandas sociales que giran en torno a la defensa de la vida, de la autonomía territorial y de los derechos de la naturaleza. Finalmente, se observará una incidencia en la expansión y adhesión social por sus procesos exitosos, y los riesgos que representan los liderazgos de esta índole en Colombia y en el resto de la región.

KEYWORDS: *Minga*, social movement, indigenous guard, indigenous uprising.

PALABRAS CLAVE: Minga, movimiento social, guardia indígena, levantamiento indígena.

JEL CODE: N460, N56

RECEIVED: 28/07/2023
ACCEPTED: 26/12/2023
DOI: 10.26807/rfj.vi14.483

INTRODUCTION

The *minga*, a Quechua word that can be translated as "collective work," represents a clear example of a collaborative action that, according to Mónica Espinosa Arango, an anthropology professor at the Universidad de los Andes, has become a "political tool of resistance" (Departamento de Antropología, 2019). It is through this tool that fundamental changes are sought to advance the enforceability of the human rights of indigenous peoples. Primarily, the demands include the rights to territory and physical and cultural survival, as well as ancestral rights and those of Mother Earth, although their enforceability does not necessarily occur within the legislative and jurisdictional domains, as the relationship between law, politics, and activism within social movements is complex and multidirectional (Gunier and Torres, 2014).

This article aims to explore the dynamics and interaction between the social movement known as the *minga* and the regulatory restructuring and political advocacy in Colombia, drawing upon what Gunier and Torres (2014) call "demosprudence." This study's analysis is based on two parameters: 1) the examination of why this process of protest and demands on civil society constitutes a social movement, particularly with leadership from the Nasa, Pijao, and Yanacona ethnic groups (Departamento de Antropología, 2019), who have been victims of systematic genocides, epistemicides, and violations of their cultural, collective, and territorial rights; and 2) the investigation of the reasons that led to its emergence, range of actions, and discourse; its organizational structure and successes; and whether these experiences have qualitatively influenced Colombian democracy and the political and regulatory spheres.

This approach not only allows the trajectory and significance of a rural movement such as the *minga* to be observed in the Colombian context, but it also highlights its potential influence on other social, Afro-descendant, peasant, and even urban mobilization processes. In this way, it evolves into a "national minga for life, territory, democracy, justice and peace" (Profesores del Departamento de Antropología, 2019) and, more broadly, impacts social mobilization throughout Latin America.

1. The *minga* as a social movement

In terms of etymology, the word "*minga*" has had many meanings. Traditionally, it has been used to describe an ancestral practice not only in Colombia but in the entire Andean region. This practice involves collective work for a common purpose that promotes the well-being of the community. It has typically been applied to planting, making roads, clearing land, and building health centers and schools, among other activities (Departamento de Antropología, 2019). However, the term is conceived as "collective work done for community benefit," as well as "a pre-Columbian tradition of community or voluntary collective work for social utility or reciprocity that is currently practiced in several Latin American countries" (Sánchez, 2021). The *minga* is a celebration, an opportunity for sharing, exchanging, and strengthening community ties. However, the indigenous people of Cauca have given it another meaning—"the minga of resistance"—which has transformed its use into one of political and social mobilization, born from the rejection of oppression and violence (Rozental, 2009) due to the absence of "opportunities for democratic discussion and participation" (Departamento de Antropología, 2019). According to Alhena Caicedo, an anthropology professor at the Universidad de los Andes and former president of the Colombian Association of Anthropology, "The minga has become a way for the indigenous peoples of Colombia to be heard" (Departamento de Antropología, 2019). The *minga* has been the mechanism through which the indigenous peoples of Cauca have exercised their sociopolitical enforceability in response to the Colombian state's failure to fulfill agreements and how they have spoken out against the humanitarian crisis in their territories that has claimed the lives of their social leaders.

Additionally, through *mingas*, indigenous and other social groups that have joined this social enforceability process have brought to light how these breaches stem from "the prioritization of a development model focused on large extractive and agro-industrial enterprises that brush local communities aside and increase social inequality, especially in rural areas" (Departamento de Antropología, 2019).

In this regard, the *minga* has become a social movement encompassing various elements described by McCann (2006), including the purpose of

achieving true social transformation and the aspiration for a different and improved society. Likewise, *mingas* have employed a wide variety of disruptive symbolic tactics, such as protests and marches, to stop exclusionary social practices and communicate demands to be heard. Thus, it is indeed a social movement, as it involves coordinated actions systematically carried out and many sectors of the population, to the extent that is has become an indigenous, social, and peasant uprising, "a scenario that, without a doubt, has broadly and pluralistically included working class, Afro-descendant and peasant sectors, in addition to students and environmentalists in different departments of the country" (Departamento de Antropología, 2019).

One important, specific aspect of social movements is the convening groups' ability to organize themselves, coordinate their actions, and sustain long-lasting relationships while pursuing their objectives; in addition, leveraging cultural symbols and social networks often leads to significant results. However, not all collective actions are worthy of being called movements, despite the diversity of social and political mobilization; to be labeled as such requires the ability to maintain collective action in the face of challenges from powerful opponents (Tarrow, 2012).

When referring to frameworks for collective action and groups that fight against "powerful opponents," we reaffirm the *minga* as a social movement that has had to confront multiple armed actors, including the Colombian government itself within the framework of enforceability demands. This type of struggle has led to the creation of a nonviolent political action arm called the "Indigenous Guard," which is conceived by communities as an ancestral body and mechanism of resistance that allows them to defend their territorial autonomy. This Indigenous Guard, which initially operated in Cauca, has spread to other departments, including Nariño, Tolima, and Bogotá, as a way of resisting generalized violence (Torres, 2020). At present, pluralistic, cimarrona (which refers to the descendants of enslaved Africans who escaped to form free settlements) (in Chocó and other departments with a high Afro-descendant populations), and farmworker guards are emerging in places besides Cauca.

The *minga* has become a stronger social movement because it encompasses more than just one coordinated collective action—it serves as a mechanism that preserves the historical memory of ancestral peoples

and the continual renewal of participants' intersubjective bonds. Further, it constitutes a social movement because of its openness to other sectors of Colombian society that have experienced the same historical violations of rights as indigenous peoples and a lack of representation and effective participation. In this regard, farmworkers, laborers, trade unionists, students, and many other groups have been part of the movement; from the outset, it has had a clearly political character and has had two main goals. On the one hand, it has aimed to reclaim lessons learned from the peasant movement in the struggle for land, and, on the other, it has attempted to harness the legal framework that has enabled their influence with the state, with their interlocutors being nonindigenous for the most part (Laurent, 2010).

2. Appearance, actions, and discourse of the *minga*

In early 1971, the indigenous peoples and nationalities of the Republic of Colombia began to assert their identity and organize via new regional and national structures. This process began with the convening of 14 councils and autonomous territories, which would culminate in the establishment of the Regional Indigenous Council of Cauca (CRIC in Spanish) (2022). This organization called for the unity of indigenous peoples throughout Colombia, which led to the founding of the National Indigenous Organization of Colombia (ONIC in Spanish) (2022) in that same year. Through ONIC, the demands of historically marginalized peoples began to gain strength. This organization sought to reclaim the people's right to the land and ancestral territories from which they had been dispossessed during the rapid, unchecked agricultural expansion. Since the 1991 Constitution, indigenous communities in Colombia have been recognized as ancestral peoples. The incorporation of the special indigenous jurisdiction into Colombian law effectively acknowledged equality in diversity and included the indigenous normative system and jurisdiction into the national legal framework, recognizing ethnic diversity as a form of legal pluralism (Mora and Correa, 2020).

Despite this normative recognition, the social, economic, and political conditions in which the lives of indigenous peoples were unfolding did not undergo the necessary transformation and remained critical. For example, the impact the armed conflict has had on them has been disproportionate,

to the point that the United Nations High Commissioner for Refugees and human rights organizations have stated that:

> many indigenous groups are in imminent danger of extinction, and the greatest threat comes from government soldiers and army-backed paramilitaries who threaten, intimidate, and accuse them of complicity with insurgents, displacing them from their lands. Indigenous peoples are particularly vulnerable to the effects of displacement, as their culture is highly dependent on the land. (Wirpsa et al., 2014)

Given that the multi-ethnic and egalitarian demands enshrined in the constitution did not achieve the social impact expected by indigenous organizations, they mobilized, organized, and protested in 2008, blocking key roads, especially in the south of the country. Thus, given the characteristics of this protest/uprising and all that has been previously explained, the *minga* emerges as a social movement that has played a crucial role in resistance, mobilization, and the demand for rights, with an impact throughout Colombia.

As a collective phenomenon, the *minga* has advocated for democratic transformations aimed at ensuring the full and effective enjoyment of the rights promulgated in the 1991 Constitution. Throughout its history of social mobilization, the *minga* has experienced several pivotal moments.

> The indigenous and peasant movement in the southern region of the country has carried out over 50 mingas over the last two decades. Although the claim of ancestral communities is long-standing, only since 1999, during the government of Andrés Pastrana, did the state formalize its commitments, such as Decree 982 of that same year, which established public policies for the benefit of these communities. (Bolaños, 2019)

Throughout their involvement in social protests, *minga* participants, with their staffs of authority hoisted on their shoulders and a cumbia anthem proclaiming, "We defend our rights, even if we have to die," have faced successive governments, demanding the fulfillment of their social demands and collective rights (BBC News Mundo, 2020). Seen in this way, the *minga* becomes a means to demand structural changes in response to indigenous peoples' needs, serving as an instrument of pressure on the state to obtain responses to their problems and challenges. Clearly, because of its historical

connotations, the *minga* represents the unity of peoples, but in this case, it unites for protest, resistance, and the struggle for rights.

New social demands have arisen year after year, which is why the rationale for mobilization via the *minga* has diversified. These include: respect for the lives of their leaders; enforceability of guarantees for the defense of rights; stopping the dismantling of the right to make decisions related to their future through prior consultation (El Heraldo, 2022); cessation of the structural and systematic violence imposed on communities by the state and paramilitary groups; termination of judicial persecution and stigmatization in the media; ceasing the criminalization of peaceful social protest; ending the armed conflict; compliance with the Peace Agreements; immediate cessation of mineral exploitation, oil extraction, and megaprojects on ancestral lands that physically and spiritually contaminate the communities; and, finally, the protection of water, land, and natural resources. The demands of 2008, in essence, urged the Colombian state to sign the Declaration of the Rights of Indigenous Peoples, while in 2020, movement participants went on to demand the implementation of the Peace Agreements. The core reasons behind the *minga* since its inception largely remain the same today (Mantilla, 2020). However, these have been supplemented by contemporary issues that have come to play a pivotal role in shaping its political agenda and social mobilization.

There have been attempts to delegitimize the *minga* in the eyes of the public as a violent act that terrorizes citizens (CRIC, 2022), despite the knowledge that the guardians of the territory mobilize peacefully with their symbolic staff as their sole means of defense. Nevertheless, the *minga* has played a fundamental role in supporting peaceful citizen mobilizations in Colombia. The best example of this occurred during the National Strike of 2021, during which the *minga* provided support to the so-called "First Line," a spontaneous youth resistance organized to protect social protesters in Cali, Bogotá, and other large cities in Colombia. Over time, this movement has gained strength, becoming an example for Latin America for similar groups, and has engaged in dialogue with organizations like the CONAIE, FENOCIN, and FEINE from Ecuador, converging as a common struggle for the vindication of the collective rights of indigenous peoples.

The discourse of the *minga*, in short, includes the enforceability of the

right to land and territory; respect for life; social protest as a participatory and legitimate exercise of peaceful advocacy; and the assurance they can exercise indigenous forms of organization and territorial leadership, in addition to their identity as guardians of the territories. The empathy generated for its causes underscores the *minga*'s tireless defense of life, fight for territorial autonomy, and self-government that protects the exercise of indigenous thought and worldview. This pursuit promotes the full development of their lives, spirituality, and respect for their territory, as well as effective democratic and inclusive participation. Thus, the *minga* is one of the most recognized social manifestations advocating for democratic rights and is entrenched within the culture of indigenous and social resistance in Colombia. The recovery of ancestral imagery through the *minga* facilitates the Pedagogy of Resilience for Peace (Mora and Correa, 2020), which ultimately results in the enforceability of an enduring, inclusive, indigenous, and territorial tranquility.

3. Minga communication, organizational, and legal strategies

In terms of communication strategies, given that the *minga* is a social movement led by indigenous peoples, one of its primary actions for raising awareness has been the adoption of the Anthem of the Indigenous Guard (Parranderos del Cauca, cuatro más tres, 2020) as the emblem of its advocacy efforts. This anthem rallies for social protest and has been widely disseminated during mobilizations. It has helped portray guard members as peaceful protectors of protests during times when social mobilization has faced widespread delegitimization, especially from the media and public opinion, which has led to serious police violence.

Although the *minga* has no website, relevant information is shared through the official websites of its member organizations, including the CRIC (2021). In this regard, part of the communication strategy of this social movement, as well as the determination of its target audience for protests, lies in the positioning of the CRIC and its network of allied organizations at both local and national levels. For example, on April 30, 2021, a communication stated, "Once again, the strength of the national indigenous movement has united to convey its disagreement with the government regarding its policies of physical and cultural extermination. *The indigenous communities of Cauca are*

invited to join the great National Minga to reject the national government's policies of death" (CRIC, 2021). In a world where technological globalization, digitalization, and the immediacy of communications, along with the effective use of social media strategy, enable the growth of associations and social movements, CRIC serving as a *minga* ally is significant; it has 258,872 total followers across its four social networks (Twitter, Facebook, Instagram, and YouTube). However, the use of traditional media outlets through CRIC has provided the social movement with communication channels such as the Virtual Radio of the Peoples, whose content is retransmitted through subsidiary indigenous broadcasters of the Association for Indigenous Media in Colombia (CRIC, 2021).

Furthermore, in complicated circumstances, such as the COVID-19 pandemic, the *minga*'s organizational capacity has allowed it to establish the so-called "*minga hacia adentro*" or "internal *minga*" as a strategy of community well-being and survival. Likewise, during this time, aligned with its struggle for territorial governance that incorporates the pursuit of food sovereignty, the *minga*'s organization facilitated the delivery of food baskets to the poorest urban communities in Popayán. Thus, "[o]n May 20, the Regional Indigenous Council of Cauca (CRIC) took to the streets of the Cauca capital to deliver 5,000 food packages to various marginalized sectors affected by food shortages during the quarantine," (Kaosenlared, 2020), fostering alliances, empathy, and reciprocity within the urban area.

Additionally, when *mingas* have been part of uprisings or protests, their organizational strategies have included various elements, the first of which is physical and logistical mobilization facilitated by their own vehicles and traditional *chivas* for transporting members and allies. Participants are also fed through communal kitchens: "During mingas, singing, weaving, and other activities rooted in the traditions, culture, and collective memory of the peoples take place, which also include the participation of elders and children" (Departamento de Antropología, 2019). During *mingas,* their usual activities are paused, which requires a considerable organizational and cooperative effort to avoid negatively impacting *minga* participants' livelihoods after returning to their territories. The second element is security, in which the Indigenous Guard plays a fundamental role in safeguarding the rights of humans and nature, as well as indigenous territory, culture,

and autonomy (Comisión de la Verdad, 2020). The guard protects *minga* participants and shields the process from unwanted infiltrators who incite violence and delegitimize the mobilization.

As previously mentioned, the *minga* process involves a profound respect for the land and territory, manifested throughout the march in deeply sacred rituals; the land, regarded as an intrinsic component of nature, assumes transcendental significance in their collective journey. Accordingly, one of the most significant *mingas* has been that focusing on the liberation of Mother Earth, representing the struggle for respect for nature and ancestral territory (CRIC, 2021). *Minga* organizers also provide logistic support for lodging for participants. Strategies and alliances have been established with different associations, organizations, and student groups for safe accommodations in university facilities, as has occurred on various occasions with the National University (Pérez, 2020) and the Public University of Cundinamarca-Fusagasuga campus (Espinoza, 2008). This illustrates the formation of networks with student sectors that are aligned with the *minga*'s social demands.

Finally, *minga*-related legal strategies are largely focused on legislative work by *minga* political representatives within the Congress of the Republic; following the 1991 Constitution (Political Constitution of Colombia, 1992), two indigenous seats were created in the Senate and one in the House of Representatives. These positions have been occupied by several *minga* participants who, at various times, have represented and voiced the movement's struggles in the legislative branch.

In summary, as previously outlined, the *minga* maintains a direct connection with indigenous communities. Hence, it is relevant to highlight a specific legal case brought before the Constitutional Court of Colombia alleging the violation of indigenous rights. The aforementioned case, T-462A/14, also known as the Salvajina case, alleged that the rights to life, personal integrity, and due process of the communities of the Honduras and Cerro Tijeras Resguardos were violated. The Court ruled, among other orders, that the Empresa de Energía del Pacífico S.A. "complete within six (6) months […] the prior consultation process for the Environmental Management Plan already in progress and guarantee opportunities for consultation and participation to the indigenous communities" (Caso

Resguardos Honduras y Cerro Tijeras, 2014). However, although this ruling was given in 2014, as of 2021, the Court-issued directives had not been fully complied with; thus, on September 17, 2021, CRIC issued the following statement:

After decades of complaints and half-hearted dialogue, the reparation measures have been ineffective. Consequently, the communities in this area determined the necessity to declare a permanent assembly, seeking a sincere discussion with Celsia, the new operating company of the Salvajina dam, which took place with the participation of international organizations and the Office of the Attorney General. (CRIC, 2021)

Similarly, in the context of the armed conflict faced by the Nasa People (who are CRIC members), specifically the communities organized in the Toribio, San Francisco, Tacueyo, and Jambalo Resguardos, in 2011, the Inter-American Commission on Human Rights (IACHR, 2011) granted precautionary measures in their favor due to the homicides, forced disappearances, and other acts of violence committed against this group. Thus, the IACHR requested that the Colombian state:

> take the necessary steps to safeguard the lives and physical integrity of the members of the Nasa People from the Toribio, San Francisco, Tacueyo, and Jambalo Resguardos, to coordinate the measures to be adopted with the beneficiaries and their representatives, and to report back regarding the actions taken to investigate the events that led to the adoption of these measures.

It should be noted that, as a *minga* strategy for the restitution of ancestral territories through de facto means, the process to liberate Mother Earth is consistently involved in legal disputes over land ownership with sugarcane industry landowners. In this regard, land invasion is a mechanism employed by *mingas* that walks the line between legality, illegality, and legitimacy: "The Nasa People from Norte del Cauca resist the dispossession and displacement to which they have been subjected through the liberation of Mother Earth, a political process involving the occupation of plantations" (Vargas and Ariza, 2019).

4. Interactions with other actors outside the movement

The *minga* has followed a robust agenda of direct pressure on the national government, forcing engagement with the state and demanding public hearings through de facto actions such as roadblocks, marches toward the capital, and plantation occupations. In 2008, during dialogues with Álvaro Uribe's government, *minga* participants demanded UN Special Rapporteur on the Rights of Indigenous Peoples James Anaya observe the discussions (El Espectador, 2008). Tensions continued with Juan Manuel Santos' administration, who refused to negotiate with the "agrarian minga" in 2016 (TeleSur TV, 2016)—this was highly contradictory to the peace negotiations with the FARC occurring at the same time. Later in 2017, they agreed to a dialogue, at which time CRIC highlighted breaches of agreements regarding land, education, and autonomy for indigenous communities in Cauca (El País, 2017). The government's strategy of refusing an audience with *minga* representatives persisted until Iván Duque's administration, who chose "to ignore the matter, perhaps with the futile hope that the massacre of its leaders by armed groups would break the movement's will" (García, 2020).

This constituted a moment of exacerbated delegitimization of state actions, particularly due to the police violence against social protest; it was simultaneously unprecedented in terms of the *minga*'s national visibility, with recognition of its leadership within the context of the 2021 National Strike. Since 2019, this mobilization has demonstrated greater persistence compared to the nine previous *mingas* developed over the last two decades (Semana, 2019). Relations with the current national government appear to be more fluid, given its broad social support and agenda that is beginning to be jointly constructed. "Territory, peace, and guarantees are the topics on the agenda of the political commission of the Popular, Social, and Community Minga of southwestern Colombian," bringing together farmworkers, Afro-Colombians, labor unions, indigenous peoples, and urban communities from Valle del Cauca, Nariño, and Cauca (CRIC, 2022). However, the reservations held by *minga* participants, and indigenous processes in general, toward state actions remain, and trust must be built through the fulfillment of demands and the rectification of systematic violations of community rights.

Furthermore, the indigenous *minga* has spurred the mobilization of a southwestern-based *minga* involving indigenous, Afro-Colombian, and farmworker communities and organizations in southwestern Colombia, as well as a national *minga,* particularly during the social protests between 2019 (ONIC, 2019) and 2021 (CRIC, 2021). This interrelation between social movements has led to the emergence of cimarronas and peasant guards, drawing from the experience of the Indigenous Guard, who join forces to support social protest (Caicedo et al., 2022). In addition, the *minga*'s legitimacy has extended to other social sectors, such as academia, with proclaimed support from various public and private universities, including from those around Latin American (Consejo Latinoamericano de Ciencias Sociales [CLACSO], 2019; Profesores Departamento de Antropología, 2019), and from human rights platforms (Comisión Colombiana de Juristas [CCJ], 2020).

CONCLUSIONS

This analysis has discussed the strongest aspects of the *minga,* portraying it as a legitimizing, protective, and propelling force behind the growing social protests in Colombia in recent years. However, this role was gradually constructed through the historical mobilization processes of the 1970s, starting with the assertion of the right to ancestral territory and the liberation of Mother Earth; it then progressed to the demand for the effective exercise of collective ethnic rights proclaimed in the 1991 Constitution, championing respect for life, territory, and nature, within a context of escalating armed conflict. More recently, it has evolved into advocating for the fulfillment of the Peace Agreements signed between the state and the FARC-EP guerrillas.

The *minga* has been relevant not only to the indigenous peoples of Cauca but also to ethnic groups in southwestern Colombia and to Colombian social mobilization in general. It is perceived as legitimate and closely aligned with the feelings and needs of various social sectors, sowing empathy from *minga* participants outward. The National, Social, and Popular Minga of 2021 crystallized this leadership, reaching the cities with the most mobilization and those most emblematic within the framework of the National Strike, such as Cali and Bogotá. Its communication strategies, networks, and alliances have strengthened its impact, and it may have even influenced the

2022 presidential election, which marked the first time in Colombia's 200-year history that a left-wing political movement ascended to power. Further, the strategy to liberate Mother Earth has placed the reclamation of ancestral territories and the necessity of addressing the armed conflict's structural causes—namely, the inequitable distribution of land—front and center on the political agenda. For example, one of the current priorities of Gustavo Petro's administration has been comprehensive rural reform, the first point of the Peace Agreement.

In terms of replicability, for example, the *minga,* particularly the Movement for the Liberation of Mother Earth, can serve as a catalyst for demanding land and territory rights across Latin America and the Caribbean. There are precedents, such as the International Meeting of Mother Earth Liberators in northern Cauca, wherein Latin American indigenous leaders participated (CENSAT, 2017). On the other hand, the success the social movement has had with its self-protection strategy through the Indigenous Guard, which has already been replicated as cimarrona (Afro-Colombian) and peasant guards, has the potential to be applied in other contexts in the region. For instance, in Ecuador, indigenous communities have taken inspiration from Colombia to resist pressure from extractive processes, among other challenges faced by indigenous peoples and nationalities (Alvarado, 2022). Indigenous guards have enabled the reclamation of collective rights, which include self-governance and self-determination, as expressed in the demand for compliance with prior consultation.

The most prominent threats to the *minga* stem from persistent security risks and the lack of guarantees and protection for social leaders in Colombia, which are exacerbated by conflicts among various armed, legal, and illegal actors. Overcoming these challenges requires the current national government to have a strong political commitment. One of its major policies has been the pursuit of Total Peace, which includes negotiation processes with the illegal armed actors proliferating in the territories, perpetrating violence against communities and their leaders. The challenges of restoring ancestral territories under agrarian reform persist, owing to historical disputes with landowners, complicating their resolution. Likewise, improving the conditions of the ethnic population, and that of the most vulnerable groups in general, also poses a challenge

for the current government. Initial hurdles included fiscal constraints and legislative support for structural reforms, alongside ongoing social mobilization in the process of redefining its role in demanding change and confronting a government seemingly open to social dialogue.

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SECTION IV

Open section

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REPARATIONS: A COMPARATIVE ANALYSIS BETWEEN JUDGMENTS ON THE APPEALS AGAINST ORDERS FOR REPARATIONS IN LUBANGA, AL MADHI AND KATANGA

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ABSTRACT

In this article, we will conduct a comparative analysis of judgments on appeals against reparation orders in three cases from the International Criminal Court (Thomas Lubanga Dyilo, Ahmad Al Faqi Al Mahdi, and German Katanga). We will focus on substantive aspects of the decisions, such as the approach to understanding cases of psychological harm, presumption, causality or proximate cause, responsibility, and modalities of reparation. Procedural aspects will also be examined, including general requirements, procedures for the adjudication of reparations, standards of proof and burdens of proof, reparation procedures, the conduct of a fair trial, and the rights of victims, the defence, and the process during the implementation stage. The similarities and differences in the three cases under study lead to the conclusion that the reparations process in cases before the International Criminal Court involves the application of less rigorous standards of proof compared to the trial phase, recognizing the already established criminal responsibility. The importance of balancing the rights of the convicted with the rights of the victims during the reparations process is emphasized. Additionally, the crucial role of the Trust Fund for Victims (TFV) in implementing reparation orders is underscored.

RESUMEN

En este artículo, realizaremos un análisis comparativo entre las sentencias sobre los recursos de apelación contra ordenes de reparación en tres casos de la Corte Penal Internacional (Thomas Lubanga Dyilo, Ahmad Al Faqi Al Mahdi y German Katanga). Nos enfocaremos en aspectos sustanciales de las decisiones como son el abordaje para entender los casos de daño psicológico, presunción, causalidad o causa próxima, responsabilidad y modalidades de reparación. Se analizan los aspectos procesales como requisitos generales, procedimientos para la adjudicación de reparaciones, los estándares de prueba y cargas de la prueba, los procedimientos de reparación; como se da un juicio justo y los derechos de las víctimas, de la defensa y el proceso durante la etapa de implementación. Las similitudes y diferencias de los tres casos en estudio permiten concluir que el proceso de reparaciones en casos ante la Corte Penal Internacional implica la aplicación de estándares de prueba menos rigurosos en comparación con la fase de juicio, reconociendo la responsabilidad penal ya establecida. Se destaca la importancia de equilibrar los derechos del condenado con los derechos de las víctimas durante el proceso de reparaciones. Además, se subraya el papel crucial del Fondo Fiduciario para las Víctimas (TFV) en la implementación de las órdenes de reparación.

KEY WORDS: nature rights, amicus curiae, social movements, democratic deliberation, judicial decisions.

PALABRAS CLAVE: reparaciones, responsabilidad, víctimas, causalidad, Fondo Fiduciario.

JEL CODE: K33, K38

RECEIVED: 03/05/2023
ACCEPTED: 26/12/2023
DOI: 10.26807/rfj.vi14.469

INTRODUCTION

La The International Criminal Court ('ICC') has ruled on reparations in three different cases: *The Prosecutor v. Thomas Lubanga Dyilo, The Prosecutor v. Ahmad Al Faqi Al Mahdi* and *The Prosecutor v. Germain Katanga*.

On 7 August 2012, Trial Chamber I issued the Decision Establishing the Principles and Procedures to be Applied to Reparations and an Order for Reparations in the Case of *The Prosecutor v. Thomas Lubanga Dyilo,* both decision and the order for reparations were challenged by Mr. Lubanga, the Legal Representatives of Victims ("LRV"), and the Office of Public Counsel for Victims ("OPCV"). On 3 March 2015, the Appeal Chambers (AC) issued its decision on the appeals ('Lubanga AC Judgment').

Similarly, on 17 August 2017, TC VIII issued the reparations order in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi*. The LRV filed an appeal against said order. On 8 March 2018, the AC issued its Judgment on the appeal against the "Reparations Order" ('Al Mahdi AC Judgment').

On 24 March 2017, Trial Chamber II issued the "Order for Reparations pursuant to Article 75 of the Statute "in the Case of *The Prosecutor v. German Katanga*, a legal representative of victims, OPCV for victims, and Mr. Katanga, impugned such decision. On 8 March 2018 the AC issued its judgment on the appeals ('Katanga AC Judgment').

The *Lubanga AC Judgment* established a comprehensive set of procedural and substantive principles concerning reparations. The *Katanga* and *Al Mahdi AC Judgments* expanded and explained *Lubanga,* and adopted new findings touching on the rights of the convicted persons, the victims and the role of the Trust Fund for Victims ("TFV").

KEY FINDINGS[1]

1. An order for reparations must contain, at a minimum, five essential elements: 1) it must be directed against the convicted person; 2) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; 3) it must specify, and

1 The conclusions presented here represent a general framework on issues relating to reparation proceedings that were decided by the AC in the *Lubanga*, *Katanga* and *Al Madhi* Cases. The links to the cases can be found in references and the annexes of this report.

provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97 (1) and 98 of the Rules of Procedure and Evidence ("Rules"); 4) it must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; 5) it must identify the victims eligible to benefit from the awards for reparations, or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted.

2. A proximate "cause/but/for" approach to causation applies to individual and collective awards of reparations. Therefore, direct and indirect victims may be awarded reparations. However, judges must carefully establish the link between the crime for which the defendant was convicted, and the material or psychological harm caused to the victims.

3. Victims may be awarded either individual or collective reparations due to psychological harm.

4. Victims have the right to proportional, adequate, and prompt reparations.

5. A trial chamber is not required, in all circumstances, to decide upon the scope and extent of any damage, loss, or injury in relation to individual requests. When there are more than a very small number of victims, it is neither necessary, nor desirable, to award individual and personalized reparations.

6. While there is a general trend to presume psychological harm by the victim's family members, this presumption is discretionary. Nonetheless, the causal link between the crimes and the harm (e.g., transgenerational psychological harm) must be established. The definition of family is case-specific, but sufficient evidence of cultural aspects of the definition is recommended.

7. It is not unreasonable to admit that psychological harm was experienced by those who had lost their family members, whether they were near or distant.

8. The obligation to repair is linked to the harm. The convicted is liable for the full amount of reparations, even though he or she may have shared criminal responsibility with other perpetrators. The fact that other perpetrators shared responsibility may only be relevant if they were also judged and convicted by the Court.

9. Indigence is not an obstacle to the imposition of liability, nor confers the benefit of reduced liability.

10. The Trust Fund may use its other resources to make the reparation order effective. This initiative does not exonerate the convicted from liability. In these circumstances, he or she must reimburse the Trust Fund.

11. The financial situations of the convicted should be monitored and the Court should use the cooperation with the State Parties to make reparations effective.

12. There are two distinct procedures for awards for reparations. The first, related to "individual reparation award is primarily application ('request') based and is mainly regulated by rules 94 and 95 of the Rules. The second relates to collective reparation awards and is regulated in relevant part by rules 97(1) and 98(3) of the Rules.

13. Expert's assistance is possible: 1) before an order for reparations is issued, as regulated by rule 97(2) of the Rules and, 2) after the order for reparations has been issued which is regulated by the Regulations of the TFV.

14. In reparations proceedings a "lower standard of proof" applies which does not exclude the applicant's burden of proof. However, what is sufficient for the purposes of an applicant meeting the burden of proof will depend upon the circumstances of the specific case.

15. A trial chamber has discretion in assessing the evidence and in indicating the content of the burden of proof. As a general approach, the discretion will be linked to the specific circumstances of each case. Circumstances of the case can be, for example, the difficulties applicants may face in supporting their applications, caused, among others the destruction, or even the unavailability of evidence.

16. "Presumption of facts" is possible. Moreover, this standard has been applied, albeit under different denominations, to decisions handed down by international courts, involving massive human rights violations.

17. The reference to the presumption results from the difficulty that the victims may face in obtaining evidence to support their claims which means to "presume a given fact to be established to the requisite standard of proof in the absence of direct evidence".

18. The adoption of the presumption of facts is not unlimited. Reasonableness is an important criterion to limit the use of that presumption and will depend upon the circumstances of the case.

19. Trial Chambers can apply the principle of equity, ex aequo et bono to assess the value of harms suffered by victims.

20. A strict applicability of the ultra petita principle to reparations proceedings is precluded. A trial chamber is permitted to issue a decision on reparations without being seized by any party and this, by definition, entails making an award to victims which has not been sought.

21. Respect for the right to appeal prevents the AC from determining the scope of liability for reparations when a trial chamber did not decide.

22. The conflict between the right of the convicted person to identify the potential victims of reparations and their right to be protected should be resolved in the light of the principle of proportionality, in the sense of balancing the rights and interests of the parties. A trial Chamber should make its determination on a case-by-case basis, taking into account the various interests involved.

23. The TFV is directed to prepare the draft implementation plan, providing in the anticipated monetary amount that it considers necessary to remedy the harms caused by the crime for which a person was convicted, based on information gathered during the consultation period leading up to the submission of the draft implementation plan.

24. The TFV should also include the monetary amount, if its Board of Directors so decides, that will complement as an advance in order that the awards can be implemented.

25. When deciding on the nature of the awards for reparations, the TFV is instructed to take into account the views and proposals of victims regarding the appropriate modalities of reparations and programmes that in the view of the TFV should be part of any reparations awarded on a collective basis.

26. Although the TFV plays an important role in the implementation stage, its functions are limited by the reparations order itself.

27. The role of the TFV should not be understood in any way to suggest that the responsibility of the convicted for the person awards for reparations can go beyond the harms resulting from the crimes for which [he/she] was convicted.

28. A trial chamber shall monitor and oversee the implementation stage, including having the authority to approve de draft implementation plan, and may be seized of any contested issues arising out of the work and the decisions of the TFV.

29. Prior to approving the plan, the parties shall have the opportunity to submit observations to the Chamber. Other interested parties may request leave of the Chamber to submit observations.

30. The Trial Chamber's determination of the amount of a convicted person's liability for the awards for reparations is part of the order and is therefore appealable.

1. Substantial Aspects

1.1. Victims

a. Definition of Victim

In the AC view, in the reparations stage, the definition of victim is closely linked to harm, and such harm must have been the consequence of the commission of crimes by the accused (ICC; 2015, par. 197) (ICC; 2018 B, par. 115). Thus, in the *Lubanga* trial, the AC refused to award reparations to victims of sexual violence since Mr. Lubanga was not convicted of sexual crimes. (ICC; 2015, par. 197).

b. Indirect Victims

The *Lubanga AC Judgment* established: (a) that indirect victims are entitled to reparations as a result of the crimes for which the defendant was convicted, (b) that indirect victims include, among others, the family members of the direct victims and, other persons who suffered personal harm as a result of the offenses, and (c) that family members of death victims may be compensated for psychological harm. *(The Prosecutor v. Thomas Lubanga Dylo),* Amended Order of Reparations, Annex 1 to the Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2". (ICC; 2015, pars. 6, 58, 128, 191).

The principles set in the *Lubanga AC Judgment* were echoed in the *Katanga AC Judgment,* where the AC further elaborated on the definition of family as indirect victims, but specified the flexible nature of the presumption of emotional harm. In the *Katanga* case, the AC rejected a limited interpretation of the term 'indirect victim', and emphasized that, as per articles 75 of the Statute and 85(a) of the Rules, the definition of victim is linked to the existence of harm, rather than whether the indirect victim was a close or distant family member of the direct victim. (ICC; 2018 B, par. 115). The AC in *Katanga* confirmed the Trial Chamber's decision to award reparations where, the death of a direct victim, and the family relationship between the direct victim and the applicant were established. (ICC; 2018 B, par. 98). Furthermore, the AC pointed out that the term indirect victim is not strictly defined to include or exclude particular categories of family members. (ICC; 2018 B, par. 118). But the AC also pointed out that, although there is a general trend in the jurisprudence that a person is presumed to suffer psychological harm after the loss of an immediate family member, this presumption is discretionary (ICC; 2018 B, par. 118).

c. Eligibility

In *Lubanga*, the AC interpreted Rule 85(a) of the Rules and Regulation 46 of the Regulations of the Trust Fund ("Regulations of the TFV"), and established that only victims who suffered harm as a result of the crimes for which the accused was found guilty were eligible to claim reparations

and, that when compensation is awarded to a community, only community members who have the relevant criteria are eligible. (ICC; 2015, par. 8). In *Katanga*, the AC confirmed and expanded by stating that eligibility must be based upon the demonstration of harm rather than the demonstration that the indirect victim falls within a specified class of persons (ICC; 2018 B, par. 119).

1.2. Harm: Psychological: Presumption

When defining harm, the AC in *Lubanga* considered, among other, psychological injuries, trauma, and suffering. (ICC; 2015, par. 191; AnxA par. 58). The *Katanga AC Judgment* applied such findings but further elaborated on the issue of *presumption* of psychological harm.

In *Katanga,* the AC found that it was not unreasonable to presume a psychological harm resulting from the loss of both distant and close family members. (ICC; 2018 B, par. 126). But conversely, while it confirmed the Trial Chamber's decision to award reparations for psychological harm to all applicants who proved material harm but did not personally experience the attack, it recommended that if in the future trial chambers, were to presume psychological harm, they should carefully approach the issue and provide clear reasons as to the basis on which such a presumption is made. (ICC; 2018 B, par. 149).

The AC also recognized the possibility of transgenerational psychological harm but pointed out the need to assess individual applications (bearing in mind that the number of applications alleging transgenerational harm was low to establish whether a causal nexus existed. (ICC; 2018 B, pars. 239, 255, 260).

1.3. Causation / Proximate Cause

In *Lubanga*, the AC established, that the standard of causation is a "but/for" relationship between the crime, the harm and the crimes for which the accused was convicted, were the proximate cause of the harm (ICC; 2015, AnxA par. 59). Thus, the court dismissed the defence arguments that there is an international trend adopting a restrictive approach with regard to causation, and endorsed the possibility of indirect victims being awarded with reparations (ICC; 2015, par. 129).

The *Katanga AC Judgment* confirmed such criterion and the Trial Chamber's decision to grant reparation awards to indirect victims but stressed the need for the judge to carefully explain causality with respect to indirect victims, noticing that further analysis was needed with regard to the notion of family in the concerned community. (ICC; 2018 B, par. 122).

1.4. Liability

a. Indigence

The *Lubanga Judgment* established that indigence is not an obstacle to the imposition of liability (ICC; 2015, par. 103). The *Al Mahdi* and *Katanga AC Judgments* confirmed such principle (ICC; 2018 A, par. 62) (ICC; 2018 B, par.189). The *Katanga AC Judgment e*stablished that the convicted person did not hold any concrete right to have the benefit of reduced liability on account of his present indigence (ICC; 2018 B, par. 190).

b. Joint Liability is Applicable in the Reparations Stage

The *Lubanga AC Judgment* established the general principle that reparation orders are intrinsically linked to the individual, whose criminal liability is established in a conviction and whose culpability for those criminal acts is determined in a sentence (ICC; 2015, par. 151). While the *Lubanga AC Judgment* stated that it he convicted person must remedy the harm caused by the crimes for which he or she was convicted, it established that: a) the scope of a convicted person's liability for reparations may differ depending on the mode of individual criminal responsibility established with respect to that person; b) the convicted person's liability for reparations must be proportionate to the harm and ***his participation in the commission of the crimes*** (ICC; 2015, par.118; AnxA par. 45). The *Katanga* decision modifies such criteria.

The *Katanga AC Judgment*, instead, focused on the *integral reparation* of the harm suffered by the victims. (ICC; 2018 B, par. 182). The CA established that the convicted person is responsible for the total amount of the damage, although other criminals may have shared responsibility, and highlights that the amount of reparations for which a convicted person is held liable will not reflect his or her relative responsibility for the harm (ICC; 2018 B, par.

75). According to the *Katanga AC Judgment,* the responsibility to repair harm under article 75 of the Statutes arises from a criminal conviction, and the modes of individual criminal responsibility that underpin such a conviction are relevant for capturing criminal responsibility, but at the reparation stage, the focus is on repairing the harm. (ICC; 2018 B, par. 179). Moreover, the AC established that criteria such as the gravity of the crimes or mitigating factors (such as characteristics personal to the convicted person) are not relevant, like the goal is not to punish the person, but to repair the harm caused to others. (ICC; 2018 B, par. 184)

1.5. Modalities of reparations

a. Modalities of reparations

The *Lubanga AC Judgment* set the principle that the trial chamber must identify the most appropriate modalities or reparations based on the specific circumstances of the case (ICC; 2015, par. 200). He delved into the modalities of reparations, including but not limited to restitution, compensation, and rehabilitation (ICC; 2015, AnxA par. 32 and 67). Besides stressing the relevance of restitution (ICC; 2015, AnxA par. 35 and 36) and rehabilitation (ICC; 2015, AnxA pars. 41-42). The *Lubanga* decision also described the contexts and situations in which compensation should be considered (ICC; 2015, AnxA par. 37 and 40).

The *Al Mahdi* and *Katanga* decisions reiterated that reparations proceedings are governed by article 75 of the Statute which vests the trial chamber with the power to specify appropriate reparations, including restitution, compensation, and rehabilitation (ICC; 2018 A, par. 34), stated that trial chambers should seek to determine the appropriate modalities for repairing the harm (ICC; 2018 A, pars. 64, 72) (ICC; 2018 B, par. 72), and stressed that the objective of reparations proceeding is remedial and not punitive (ICC; 2018 B, par. 185), which correspond to the general principle of public international law that reparations should, where possible, attempt to restore the *status quo ante* (ICC; 2018 B, par. 178).

b. Scope or Reparations

The *Lubanga AC Judgment* established that individual and collective reparations are not mutually exclusive, (ICC; 2015, AnxA par. 33), that there is no internationally recognized human right to consideration of individual applications for reparations (ICC; 2015, par. 155), that individual reparations should be awarded in a way that avoids tensions and divisions within the communities, and when collective reparations are awarded, these should address the harm suffered by the victims on an individual and collective basis (ICC; 2015, AnxA par. 33).

The *Katanga* decision reiterated that the Court may award reparations on and individualized or collective basis, or both (ICC; 2018 B, par. 146). The *Al Mahdi* decision also applied *Lubanga,* and, thus, confirmed the Trial Chamber's decision is not to grant individual reparations but to extended to family members of direct victims and other members of the community that may have suffered material harm as a result of the commission of the crimes (ICC; 2018 A, pars. 35, 66, 70). The *Al Mahdi AC Judgment* observed that a report in the field of cultural rights reflected the voices of those who saw it was problematic that financial compensation be made a central component of reparations in the particular political and economic context of Mali, ICC; 2018 A, par. 36), thus applying the principle set in *Lubanga* that reparations should avoid creating tensions and divisions within the relevant communities (ICC; 2015, AnxA par. 33). *Al Mahdi* also applied the principles set up by *Lubanga,* regarding collective reparations when addressing the kind of collective reparations that the Timbuktu community may be benefited from (ICC; 2018 A, par. 39).

Meanwhile, although *Al Mahdi AC Judgment* did not modify the definition of victim as interpreted in *Lubanga,* it endorsed the Trial Chamber's decision not to order *individual* reparations but for extended to family members of the direct victims, or other persons who had sustained indirect harm (ICC; 2018 A, par. 39) In *Al Mahdi,* the AC did not address the question of causation, even though it confirmed that the Trial Chamber's decision *not* to grant individual reparations to *indirect* victims of the attacks. Nevertheless, the AC did mention the possibility for that group of people to receive a collective reparation (ICC; 2018 A, pars. 33, 34, 39, 55). The Court considered that indirect victims may be awarded with collective reparations and that it was

within the Trial Chamber's discretionary prerogatives to order individual reparations only to "those whose livelihoods depended exclusively on the protected buildings" and "those whose ancestors' burial sites were damaged in the attack." (ICC; 2018 A, pars. 33, 37, 39, 42,43, 55).

1.6. Harm Must Be Defined and Assessed. Views of Victims and Experts.

The *Lubanga* AC Judgment established that the Trial Chamber must clearly define the harms that result from the crimes, the extension of which may, then be assessed by the Trust Fund, for purposes of determining the size and nature of reparation awards (ICC; 2015, par. 184). The *Lubanga* decision also instructed that the Trust Fund, in designing the awards for reparations, should be informed by the views received in the consultation stage (ICC; 2015, par. 201).

Similarly, *Al Mahdi* and *Katanga* stated that trial chambers should seek to define to determine the appropriate modalities for repairing the harm and remember that the trial chambers have the power to determine the scope and extent of any damage, and that before issuing an order for reparation they may invite and take into account representations from or on behalf of the convicted person, the victims and other interested persons (ICC; 2018 A, pars. 64, 72) (ICC; 2018 B, pars. 72,143).

The *Al Mahdi* and *Katanga* decisions reiterated the principle, set up in *Lubanga,* that the Trial Chamber must define and assess the harm (the latter with the assistance of the Trust Fund) (ICC; 2015, par. 184) (ICC; 2018 B, par. 172) (ICC; 2018 A, pars. 64, 72). But additionally, the *Katanga* decision pointed out that rather than attempting to determine the total sum of the monetary value of the harm caused, trial chambers should seek to define the harm and determine the appropriate modalities for repairing the harm (ICC; 2018 B, par. 72).

The *Katanga* decision also stressed that the objective of the reparation proceedings is remedial, which is inherent in the modalities of reparations available to victims. (ICC; 2018 B, par. 185). Such decision also explained that article 75(1) of the Statute also grants the possibility, albeit in exceptional circumstances, to determine the scope and extent of any damage for the purposes of reparations *proprio motu* (ICC; 2018 B, par. 146).

1.7. Right to proportional, adequate and prompt reparations v. individual assessment

The *Lubanga* AC Judgment established that victims should receive appropriate, adequate, and prompt reparations (ICC; 2015, AnxA par. 44 and 48).

The *Katanga* Trial Chamber went through individual applications of victims for reparations but the monetary value of the harm assessed was not used as a basis for determining what each one of the victims should receive (ICC; 2018 B, par. 68). The AC considered this approach inadequate and advised trial chambers to use a different method, (even though it confirmed the decision).

1.8. Discretion

According to the *Katanga* and *Al Mahdi* AC Judgments, a trial chamber, in making an award for reparations has discretion, circumscribed only by the scope and extent of any damage, loss and injury (ICC; 2018 A, par. 34 and 60). In fact, according to *Katanga,* a trial chamber even has the discretion to depart from an applicant's claim for reparations, if it considered it to be appropriate. (ICC; 2018 B, par. 147).

2. PROCEDURAL ASPECTS

2.1. General requirements. Due process

The *Lubanga AC Judgment* established the principles and procedures to be applied to reparations. These paradigms were not altered in the *Al Madhi* and *Katanga* cases and this remain applicable. At this point, the setting of minimum requirements that every order must contain, in an interpretation of art. 75 of the Statute. ("1. An order for reparations under article 75 of the Statute must contain, at a minimum, five essential elements: 1) it must be directed against the convicted person; 2) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in order; 3) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97 (1) and 98 of the Rules of Procedure and Evidence; 4) it must define the

harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; 5) it must identify the victims eligible to benefit from the awards for reparations, or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted", (ICC; 2015, par. 1).

Ensures respect for due process and indicates the path taken by a trial chamber to develop its reasoning and decision. Lastly, an essential element for the parties is to be able to exercise effectively the right to appeal. ("The AC considers that the inclusion of these five elements in an order for reparations is vital to its proper implementation. It also ensures that the critical elements of the order are subject to judicial control, consistent with rule 97 (3) of the Rules of Procedure and Evidence" (ICC; 2015, par. 34).

2.2. Procedures for awards for reparations

a. Procedures in general

The analysis of the three judgments given by the AC indicates that some important questions about the procedures are faced, and should be followed during the reparations stage. Among these issues, the one related to the functions and attributions of the TFV deserved a separate item in this report given the numerous new aspects that were raised. This section will examine the general guidelines given in *Lubanga* and the specific questions of the experts.

Regarding general guidelines, the AC, in *Lubanga*, emphasized the existence of two distinct procedures for awards for reparations. The first, related to "individual reparation award is primarily application ('request') based and is mainly regulated by rules 94 and 95 of the Rules. The second relates to collective reparation awards and is regulated by rules 97(1) and 98(3) of the Rules" (ICC; 2015, par. 149).

B. Experts

Regarding the experts, the issue was dealt both with in *Lubanga* and *Katanga*. In the first, the issue was considered in more general terms. The AC indicated the stages of the procedure in which expert assistance would be possible, that is to say: 1) before a repair order is issued as regulated by rule 97(2) of the Rules, and 2) after the order for reparations has been issued, which is regulated by the Regulations of (ICC; 2015, par. 178). In *Katanga*, the analysis was more specific, thus complementing the standards established in *Lubanga*. In fact, in *Katanga* was explained that, when determining the costs of repairs, the Trial Chamber can rely not only on experts but also on the assistance of other entities such as the Trust Fund. (ICC; 2018 B, par. 172).

2.3. Standard of proof and burden of proof

One of the most contentious points about the procedures on reparations, which was referred to in the different judgments, although from different perspectives, is the standard of proof. What should be the standard to be adopted by a trial chamber regarding the definition of the harm caused, its extension, and the convicted person's liability?

a. "Less exacting standard" vs. "beyond reasonable doubt"

The consensus in all three judgments is that, at the reparations stage of the process, the standard proof that dictates the trial process does not apply, because criminal liability has already been established by the conviction and it cannot be further discussed for obvious reasons. This is why the reference to the so-called "less exacting standard" was made in AC *Lubanga Judgement.* "81. With respect to the standard and burden of proof, the AC considers that the Trial Chamber correctly articulated the principle that reparation proceedings are fundamentally different from proceedings at trial and therefore "a less exacting standard should apply (ICC; 2015, par. 81). This standard should be interpreted as a degree of judicial conviction not comparable to certainty "beyond reasonable doubt".

b. "Balance of probabilities"/ "Preponderance of proof"/ "balance of possibility"

In an attempt to define better what standards would be applicable at this stage, the AC in *Lubanga,* referred to the "balance of probabilities", an

expression that would have as synonyms of the "preponderance of proof" and the "balance of possibility (ICC; 2015, AnxA par. 65). Although the decision itself does not contain a definition or clarification of what that expression means, footnote 37 of the Order of Reparations contains important references for a better understanding of that meaning.[2] The same footnote also refers to the debate that was raised during the Preparatory Commission when some delegations suggested that evidence should be based on "balance of probabilities" as opposed to the "beyond reasonable doubt".[3]

The "balance of probabilities" is also referred to in the *Katanga AC Judgment,* but not in *Al Madhi AC Judgment.* It is important to note a small, but very important, difference that relates to the application of that standard. Indeed, while in the first case the use of that standard appears to be mandatory ("shall"), in the other the requirement seems to have been relativized ("is generally").

c. Presumption. Presumption of facts

The reference to "presumption", as a standard of proof, clearly appears in *Katanga.* It is not referred to by other judgments, nor it is possible to say that the AC considers the expression as synonymous of the "balance of probabilities". Nevertheless, it uses the expression "presumption of facts", which, according to the AC, could be compared to other expressions found in judgments given by other International Courts, such as: "discretionary presumption", "judicial presumption" or simply "presumption".

How did the AC conclude that the "presumption of facts" would be possible in the reparation phase? And second, what can we understand by this presumption and what would be its scope?

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2 The reference was based on the definition given by Black's Law Dictionary, that is to say: "the greater the weight of the evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other". (Black's Law Dictionary, Eight Edition, Gamer (ed.), 2004, page 1220).

3 "It is important to note that during the Preparatory Commission some delegations suggested that the evidence standard should be based on a 'balance of probabilities' as opposed to the beyond reasonable doubt' standard applied in criminal proceedings. Many reparations programmes dealing with mass claims have also adopted flexible evidential standards based on a 'plausibility test' in order to accommodate the situation of the victims, who usually have difficulties in providing the documentation that is required".

To reach this conclusion, the AC in *Katanga* referred to different decisions handed down by International Courts, especially the Regional Courts of Human Rights (Inter-American and European (ICC; 2018 B, par. 75). There was no precise indication, but it would be possible to deduce that statutory support for this reasoning was given by Article 21.3 of the Statute.

The reference to the presumption results from the difficulty that victims may face in obtaining evidence to support their claims, which means to "presume a given fact to be established to the requisite standard of proof in the absence of direct evidence" There is no exact criterion, and it is up to the trial chamber's discretion to define what would be sufficient to meet the burden of proof (ICC; 2018 B, par. 75). Still in *Katanga AC Judgment* the presumption was even used to acknowledge the psychological damage sustained by all the relatives of a victim who was killed during the attack on Bogoro. (ICC; 2018 B, par. 121).

It is important to note that the adoption of the "presumption of facts" is not unlimited. In *Katanga AC Judgement,* reference was made to reasonableness as an important criterion to limit the use of that presumption. However, here was no indication of the parameters that could guide a trial chamber in the reasonableness test. The question was left to the discretion of the trial chamber and the specific circumstances of each case. (*Katanga Reparations Appeal Judgment*, ICC-01/04-01/07-3778-Conf, par. 76). Following those premises, the AC did not consider it unreasonable to admit that psychological harm was experienced by those who had lost their family members, whether they were near or distant. (ICC; 2018 B, par. 126).

d. Applicant's burden of proof. Circumstances of the case

In any case, although the standard of proof in reparations is "lower" when it is compared to what guides the trial phase, the "relativization" does not exclude applicants' burden of proof. This means that "the applicant shall provide sufficient proof of the causal link between the crime and the harm suffered...". (ICC; 2015, par. 81). It is important to note that in *Lubanga*, the AC expressly stated that what "is sufficient for purposes of an applicant meeting the burden of proof will depend upon the circumstances of the specific case" (*Lubanga Reparations Appeal Judgment,* ICC-01/04-01/06-3129, par. 81).

e. Applicant's burden of proof. Trial Chamber's discretion in indicating its content

The discretion is another important point addressed by the AC. As a matter of fact, in *Katanga,* the AC expressly acknowledged the Trial Chamber's discretion evaluating the evidence and indicating the content of the burden of proof. Although there is no express reference to discretion in *Lubanga AC Judgment,* it can surely be deduced from the reading of such a decision. Reference is also made to the matter of discretion in the *Al Mahdi AC Judgment*.

f. Discretion and specific circumstances of the case

As a general approach, the discretion seems to be linked to the specific circumstances of each case. In *Lubanga AC Judgment* it was decided that "the casual link between the crime and the harm for the purposes of reparations is to be determined in light of the specificities of a case (ICC; 2015, par. 81). In *Katanga*, the AC considered appropriate the standard used by the Trial Chamber regarding the "features of the case (ICC; 2018 B, par. 89). In *Al Madhi*, the AC went even further by stating that it would be expected that the Trust Fund of Victims also is "aware of the standard applied by the Trial Chamber result from its assessment of the various factors specific to the case", and for it to be aware, in particular of the difficulties applicants, may face in supporting their applications" (ICC; 2018 A, par. 42).

At least, from the reading of the written decision presented in *Lubanga AC Judgment*, there is no express reference to examples of possible difficulties. However, in the Order for Reparations, there is a clear mention of the destruction or unavailability of evidence (ICC; 2015, par. 22). The same reference was made in the *Al Madhi AC Judgment* (ICC; 2018 A, par. 42). Obviously, the references are merely examples and do not exclude the possibility that in the future the Court will face other difficulties according to the circumstances of the case.

2.4. Reparations proceedings. Fair trial/Rights of victims/Rights of the defense

Although the presumption of innocence does not apply during the reparation stage, there are other important rights and guarantees of the convicted, related to the due legal process that must be observed. (n *Lubanga*, for example, the AC, expressly stated that the principles guiding reparations do not affect the right to a fair trial. (ICC; 2015, AnxA par. 49). In any case, in addition to those rights, the interests of victims should be observed, which relate not only to an adequate and just reparation but also to an expeditious process in which the right to their security is safeguarded. The need to strike a balance between those conflicting interests was subjected to scrutiny by the AC.

a. Decision in relation to individual requests

In *Lubanga*, the AC decided that a Trial Chamber is not required, in all circumstances, to decide upon the scope and extent of any damage, loss, or injury in relation to individual requests. That is, the existence of individual applications does not establish the duty that all requests should be considered and decided individually. The reasoning behind such a decision was, when only collective reparations are awarded, "a trial chamber is not required to rule on the merits of the individual requests. Rather the determination that is more appropriate to award collective reparations operates as a decision denying (...) individual reparation awards" (ICC; 2015, par. 152).

b. Ultra petita principle

Ultra petita principle was another critical issue to decide. In *Katanga*, the AC ruled that strict applicability of that principle to reparations proceedings is precluded. In the understanding of the AC, a trial chamber has the discretion, under article 75 of the Statute, "to depart from an applicant's claim for reparations" and is permitted to issue a decision on reparations without being seized by any party" (ICC; 2018 B, par. 147). Besides that, a trial chamber may even "invite and shall take account of representations from, or on behalf of the convicted person, victim, other interested persons or interested States" to fulfill its power to determine the scope and extent of any damage. All this indicates that a trial chamber is not limited by the terms of the claims.

c. Issues not decided by a Trial Chamber and the right to appeal

Another relevant issue, addressed by the AC involves the obligation of the trial chamber to include fundamental matters in order for reparations. In *Lubanga,* the AC highlighted the lack of indication of the scope of reparations.[4] According to the AC, such omission, not only violated the basic rights of the convicted person, especially the right to be informed of the terms and the extent of his responsibility resulting from the offense, but entailed another important procedural problem, namely, the violation of the right to appeal. As explained by the Court, such omission would prevent the AC from ruling on that point. Actually, a decision on the level of appeals which faces a point not examined before would clearly affect a fair trial since that question could not be appealed. Thus, in *Lubanga*, the AC noted:

> The AC also notes that if it were to specify the scope of Mr Lubanga's liability in the amended reparation order […] such a stipulation would be made for the first time […]. Accordingly, that stipulation would at the same time be final and, thus, nor subject to appeal. The AC therefore considers that, in the circumstances of the present case, it is not appropriate for it to determine the scope of [the convicted] liability for reparation. (ICC; 2015, par. 239)

The above quotation highlights an important procedural rule to be observed in future decisions on reparations: respect for the right to appeal prevents the AC from determining the scope of liability for reparations when a trial chamber has not decided upon such point.

d. Fairness and expeditiousness of proceedings

Regarding the fair and expeditious trial, in Lubanga, the AC established that where there are more than a few victims, the Trial Chamber will not attempt to take evidence from or enter orders identifying separate victims or concerning their individual claims for reparation (ICC; 2018 B, par. 150).

The same approach was taken in *Katanga*. Indeed, the AC considered that "when there are more than a very small number of victims, it is neither necessary nor desirable, to award individual and personalized reparations" (ICC; 2018 B, par. 3). However, there was no objective reference to the number of victims that could match the criterion "more than a very small number".

4 One of the five requirements that any reparations order must contain. See para. 24 above.

e. Confidentiality and fair trial

A very important issue addressed by the AC decisions involves the confidentiality of victims, identities during reparations proceedings and during the implementation stage. This issue was faced by in *Al Madhi AC Judgment.* The question was raised by the defence because that maintaining confidentiality would be prejudicial to a fair trial, since the convicted person would not be able to challenge any requests made by unidentified victims.

In addressing the issue, the AC made explicit reference to the principle of proportionality "in the sense of balancing" the rights and interests of the parties. Considering such premises, the AC reversed the decision of the Trial Chamber that had determined the removal of confidentiality of the victims. They considered that, for the decision to be generic and without any basis in new facts or circumstances that could justify a change in the situation. In addition, the AC held that the interests of the convicted person would be limited at this stage of the proceedings, which would qualify the decision as disproportionate in view of the interests it would seek to protect. "A wholesale ruling, granting access to all victims' identifying information, at a stage of the proceedings where the interest of the defense is limited in this way is disproportionate" (ICC; 2018 A, pars. 90, 92)

2.5. Proceedings during the implementation stage

a. Trial Chamber and Trust Fund of Victims

The powers and functions of both, the Trial Chamber and the Trust Fund of Victims, were the subject of important considerations in *Lubanga* and in *Al Madhi.* At this point, the two judgments complement each other, thus providing a better picture of the procedure to be observed at the implementation stage.

b. Trust Fund's role

The Trust Fund plays an important role regarding the order of reparations. In *Lubanga*, the AC highlighted the two functions to be carried out by the Trust Fund, namely: (1) implementing the orders given by the trial chamber, and (2) assisting the victims.

Although important, these functions are limited. The limits are given by the order itself. As highlighted by the AC, "the role of the Trust Fund should not be understood in any way to suggest that [a convicted person's] liability for awards for

reparations can go beyond the harms resulting from the crimes for which [he/she] was convicted" (ICC; 2015, par. 237).

These limitations stem from the very administrative and non-judicial function that the Trust Fund exercises. Regarding individual applications for reparations, the Trust Fund is responsible for examining the eligibility of possible victims, according to the criteria set by the chamber, and for the preparation of a draft implementation plan, which will then be presented to the trial chamber, which does not need to be the same chamber in its original composition (ICC; 2015, par. 239). Also, "the Trust Fund is directed to provide, in the draft implementation plan, the anticipated monetary amount that it considers necessary to remedy the harms caused by the crime for which [a person was convicted], based on information, gathered during the consultation period leading up, to the submission of the draft implementation plan" (ICC; 2015, AnxA par. 78).

In the case of collective reparations, as decided in *Lubanga,* the Trust Fund shall "take into account the views and proposals of victims regarding the appropriate modalities of reparations and programmes that, in the view of the Trust Fund, should be part of any reparations awarded on a collective basis". It should also take into account the views and proposals already submitted in the course of the reparation proceedings". (ICC; 2015, AnxA par. 79).

c. Trust Fund and judicial control

The Trust Fund's decisions are not immune to judicial control which will be done by a trial chamber. In the end, a trial chamber will have the final decision on the eligibility of the victims and the implementation plan.

d. Trust Fund, judicial control and rights of the parties

Prior to a trial chamber setting the amount, "the parties shall have the opportunity to appear before or will make submissions in writing on the scope of the [convicted] liability, in light of the information provided by the Trust Fund in its draft implementation plan, within a time limit to be set by [a] Trial Chamber" (ICC; 2015, AnxA par. 80).

e. Trial Chamber's control of "other resources" of the Trust Fund

Not only does the Trust Fund have to obey the limits of its attributions. There are also limits to be observed by a trial chamber. In fact, the trial chamber must refrain from issuing orders that advance over the discretion of the *Trust Fund's Board of Directors.* This issue was very controversial in *Lubanga AC Judgment*. In that case, as a way of enforcing the execution of its order, the Trial Chamber determined that the Trust Fund would make available the amounts allocated from other sources. In addressing this issue, the AC was categorical in stating that:

> Article 79(2) of the Statute provides that '[the Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund'. Notably, this provision does not contain any corresponding power to order the Trust Fund to make its other resources available to the Court. (ICC; 2015, par. 112)

Thus, the decision of whether to allocate other resources is a discretionary decision of the Trust Fund's Board of Directors, a conclusion that is even supported by regulation 56 of the Regulations of the TFV, "The AC considers that the word 'may' in rule 98(5) of the Rules of Procedure and evidence means that a decision to use 'other resources' is a discretionary decision and not mandatory. Regarding who is to make the decision to use these 'other resources', the AC considers that the wording of regulations 50 and 56 of the Regulations of the Trust Fund makes it clear that this decision is to be made by the Board of Directors, not by the Court." (ICC; 2015, par. 108).

f. Indigence. Giving effect to the order

Moreover, as decided in the *Lubanga AC Judgment,* the indigence of the convicted does not remove his responsibility for redressing the damages caused to the victims as a result of the offenses for which he was convicted. Liability is - and always will be – individual (ICC; 2015, par. 103). Thus, indigence does not transfer the obligation to repair the harm caused to other entities, such as the Trust Fund. This one only complies with the orders for reparations imposed on the convicted person. How to proceed in such situations?

Some indications of how to proceed were given in *Lubanga AC Judgment*. The financial situations of the convicted should be monitored, a measure that

should be taken by the Presidency, with the assistance of the Registrar. (Regulation 117 of the Regulations of the Court). Besides that, the Court may make use of the cooperative mechanisms, such as the identification and freezing of property, with States Parties pursuant article 75(1) of the Statute. "The AC considers that the specific reference in article 75(4) of the Statute to the possibility of seeking assistance of States Parties in, inter alia, the identification and freezing of property and assets indicate that indigence is not an obstacle to the imposition of liability for reparations on the convicted person. In this sense, the AC notes that the provision provides that the Trial Chamber may seek assistance from States Parties 'in order to give effect to the reparation order" (ICC; 2015, par. 103).

In any case, even though the Trust Fund may use its other resources to make the reparation order effective, this initiative does not exonerate the convicted from liability. In these circumstances, he or she remains liable and must reimburse the Trust Fund (ICC; 2015, par. 116).

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THE CRIME OF AGGRESSION: NONGOVERNMENTAL ACTORS IN THE RUSSIA–UKRAINE ARMED CONFLICT

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ABSTRACT

Since the crime of aggression was incorporated into the Rome Statute of the International Criminal Court, there has been uncertainty regarding its scope. Essentially, it is a crime perpetrated by political and military leaders. However, with the emergence of scenarios where its applicability and scope are open to debate, this study aims to investigate the possibility of designating nongovernmental actors as active perpetrators of this crime. Accordingly, the study focuses on the international dimension inherent in the crime of aggression, as well as explores the historical treatment of this crime, the procedural rules regarding jurisdiction, and the situation between the Russian Federation and Ukraine amid the new political tensions. Finally, it offers legal conclusions on the feasibility of regarding nongovernmental actors as active perpetrators of the crime of aggression within the international legal framework by closely examining the doctrine that may broaden the understanding of this crime.

RESUMEN

Desde la incorporación del crimen de agresión al Estatuto de Roma de la Corte Penal Internacional, ha existido incertidumbre en cuanto al alcance de este ilícito internacional. En esencia, se trata de un crimen cuyos sujetos activos son líderes políticos y militares. Sin embargo, a medida que han surgido escenarios donde su aplicabilidad y alcance son discutibles, el presente texto tiene como objetivo analizar la posibilidad de considerar a actores no gubernamentales como sujetos activos de este crimen. Para este propósito, se analizará la dimensión internacional inherente al crimen de agresión. Asimismo, se abordará brevemente el tratamiento histórico que ha recibido este crimen, las reglas procedimentales sobre competencia y se estudiará el caso de la situación entre la Federación Rusa y Ucrania en medio de las nuevas tensiones políticas. Finalmente, se presentarán algunas conclusiones de carácter jurídico respecto a la viabilidad de considerar a actores no gubernamentales como sujetos activos del crimen de agresión en el ordenamiento jurídico internacional. Con este fin, se examinará detenidamente la doctrina que podría permitir entender un alcance más amplio del crimen de agresión.

KEY WORDS: Aggression, Rome Statute, nongovernmental actors, criminal responsibility.

PALABRAS CLAVE: Agresión, Estatuto de Roma, actores no gubernamentales, responsabilidad penal.

JEL CODE: K33

RECEIVED: 13/07/2023
ACCEPTED: 20/12/2023
DOI: 10.26807/rfj.vi14.487

INTRODUCTION

1. Elements of the Crime of Aggression

This study delves into the key aspects of the crime of aggression, focusing specifically on the feasibility of attributing responsibility to private actors. To this end, it: a) analyzes certain elements of this crime; b) explores the applicable factual assumptions arising from Articles 8 and 25 of the Rome Statute; and c) reviews relevant cases that may provide support to the proposed hypothesis, drawing from the investigative authority of the International Criminal Court Prosecutor's Office. The objective of this final point is of particular significance, as to date, there have been no convictions regarding the crime of aggression that advance the standards of interpretation and scope of its constitutive elements.

2. The components of the crime of aggression in contemporary international law

Based on the consensus achieved regarding the elements defining the crime of aggression during the Assembly of States Parties (Legal Tools, 2015), it is crucial to outline its significance within the proposed framework outlined in the draft resolution.

First, the text establishes the essential requirement of an actor who has planned, prepared, or initiated an act of aggression. In this regard, the actor must have been in a position to control or direct both the political and military action of the state that committed the crime. In addition, one of the acts defined as aggression must have been committed (Sayapin, 2014, p. 257). Furthermore, the perpetrator of the crime must have full knowledge of the factual circumstances that establish the incompatibility of the use of armed force with the provisions of the United Nations Charter. Additionally, the characteristics, gravity, and scale of the alleged incident must amount to a manifest violation of the UN Charter, as the perpetrator must be aware that such actions constitute a breach of the provisions of said instrument. In addition to these formal elements, it is stipulated that the responsibility for this crime applies exclusively to political or military leaders, as stated by the Coalition for the International Criminal Court (n.d.). However, in practice, this restriction has not been fully observed.

Consequently, it can be noted that the elements of the crime require specific conditions and are interdependent (Salmón & Bazay, 2011). These conditions demonstrate a deep dependence on each other to support the factual scenario outlined in Article 8 *bis* and can be represented as follows:

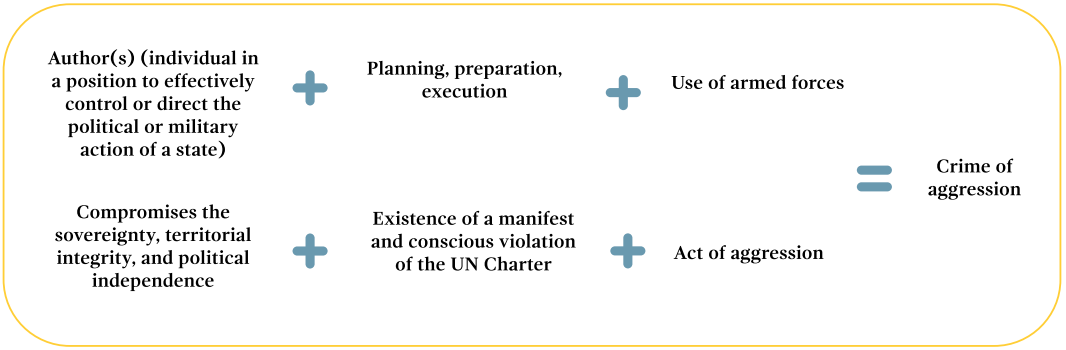

Figure* 1.** *Elements of the "Crime of aggression."* ***Source: *(Legal Tools, 2015; Sayapin, 2014; Salmon and Bazay, 2011). Created by the author.*

3. Acts of aggression

Before analyzing the various manifestations of authorship concerning the capacity to control or direct the actions of a state, it is crucial to examine what has been defined as acts of aggression in accordance with Articles 15 and 16 of the Rome Statute. The rationale behind this approach is rooted in procedural rules, which are under the authority of the Security Council; consequently, the possibility of investigating private actors will depend on it in cases involving permanent members (Sayapin, 2014, p. 307).

The general rule underlying the factual assumptions of Article 8 *bis*, paragraph 2 of the Rome Statute is the attack of one state against another. At the same time, Articles 15 *bis* and 15 *ter* of the Rome Statute establish explicit avenues for exercising jurisdiction over the crime of aggression, specifically: 1) Referral by a state, *proprio motu*; 2) Referral by the Security Council. In particular, Article 15 *bis*, paragraphs 6, 7, and 8 provide the possibility for the prosecutor's office to initiate an investigation without a prior determination from the Security Council. After six months have elapsed since the prosecutor's office notification to the UN Secretary General of the situation before the ICC to initiate a preliminary investigation, and without a pronouncement from the Security Council or its refusal or request

for suspension of the investigation, the initiation of the process can proceed (Sayapin, 2014, p. 307).

In her article "Revisiting the Role of the Security Council Concerning the International Criminal Court's Crime of Aggression" (2019), Jennifer Trahan highlights these premises as one of the mechanisms the Security Council has to deter situations of aggression in political contexts involving certain states. In support of these arguments, Trahan cites the events in Crimea as an example, specifically referring to acts involving the use of armed forces against Ukrainian vessels in 2018. However, this situation did not result in any accusation or investigation by the International Criminal Court (Trahan, 2019, p. 4).

According to Trahan (2019, p. 5), the deterrent power inherent in the Security Council's veto can be applied to private actors in terms of authorship and capacity. Therefore, she argues for the politicization of the "rule of law" within procedures tied to the UN Security Council, as demonstrated by the Darfur case. In line with this perspective, Andreas Paulus (2009) questions the delineation of acts defined as aggression in the United Nations General Assembly Resolution 3314 of 1974. Paulus argues that this resolution was not crafted to support criminal law; rather, its aim was to validate the actions of the UN Security Council regarding the act of aggression under Chapter VII (Durango, 2014).

4. Individual criminal responsibility

To explore private actors' potential authorship and capacity in the crime of aggression, it is necessary to jointly analyze the elements that constitute this offense. The perpetrator's authorship should be construed in relation to their capacity and involvement in the planning, preparation, execution, or instigation of the crime (Salmón & Bazay, 2011, p. 40). In other words, the conduct of the perpetrator should be assessed in accordance with the provisions of Article 25 of the Rome Statute, which addresses individual criminal responsibility.

Paragraph 3 *bis* of Article 25 establishes the forms of authorship applicable to individuals in a position to effectively control or direct the political or military action of a state (International Criminal Court, 2010). As stipulated in Article 25, individual criminal responsibility applies to those who:

1. Commit the crime themselves, with another individual, or through another person, whether or not that person is criminally responsible.
2. Order, propose, or induce the commission of said crime, whether it is completed or attempted.
3. Participate in some capacity in the commission or attempted commission of the crime, whether as accomplices, accessories, or by facilitating the crime through the provision of necessary means (International Criminal Court, 2010).

These clauses are structured to allow for the identification of direct authorship through the governing verbs, "commit" and "order." Furthermore, indirect criminal responsibility is observable in the other governing verbs, including "conduct," "propose," "induce," "facilitate," and "supply."

The orders described may encompass the capacity for control or direction, which in turn become *sine qua non* for the configuration of the crime of aggression. Following the same logic, the outcomes of the conditions of the typical act of planning, preparing, initiating, or executing are subsumed under the extended forms of participation contained, firstly, in Article 25 and, moreover, in the capacity for control and direction.

Article 8 *bis*, paragraph 1, introduces a conditional conjunction when, for the purpose of subsuming the governing verbs in question, it pertains to the capacity to control or direct the political or military actions of a state.

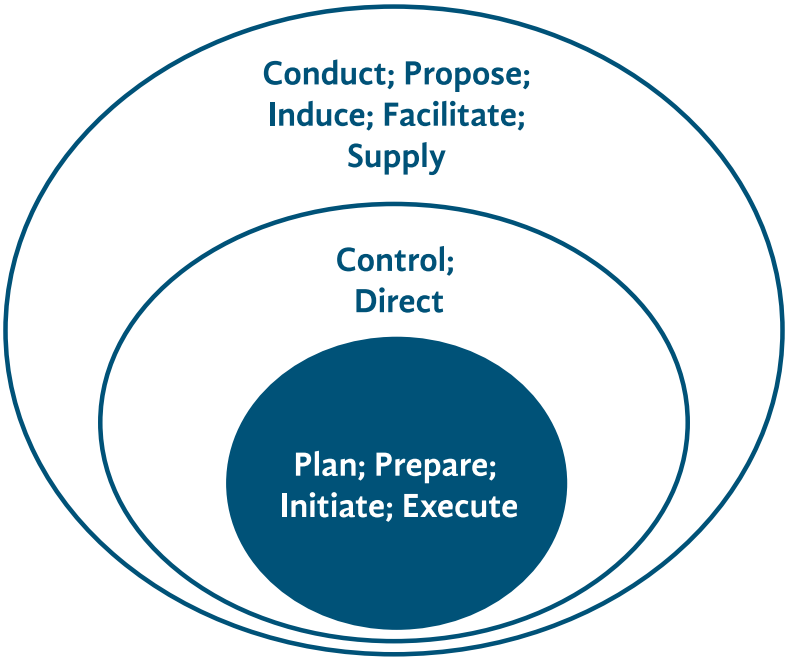

Figure 2. Subsumption spheres of behavior. Created by the author.

In this context, understanding the multitude of governing verbs in the crime of aggression can be interpreted within the sphere of individual criminal responsibility. Hence, whenever there is the capacity to control or direct the political or military action of a state, the verbs "plan," "prepare," "initiate," and "execute" are interpreted within the framework of the previously mentioned forms of authorship and participation.

5. Non-state actors as qualified subjects.

Based on the analysis in the preceding subsection, two entities emerge as potential subjects for individual responsibility under the international framework. First is the figure of mercenaries and the regulations that have emerged in response to phenomena associated with contemporary conflicts (Fallah, 2006, p. 600). However, private and commercial interests have evolved, leading private entities to become providers of specialized services such as military skills, tactical leadership in combat operations, strategic planning, intelligence, operational support, logistics, training, and troop assistance (Singer, 2008, p. 8). These new conflict dynamics and the emergence of non-state actors have led the North Atlantic Treaty Organization (NATO) to refer to these emerging forms of aggression as "hybrid wars."

Both mercenaries and private security firms could be subject to liability. However, to determine individual criminal responsibility according to the terms of the International Criminal Court, it is necessary to analyze the scope of the behaviors examined in the previous subsection, focusing on the perpetrators of the crime. In terms of mercenaries and their definition in international law, the International Convention against the Recruitment, Use, Financing, and Training of Mercenaries (1989) defines them as any person who:

> **1.** A mercenary is any person who:
>
> Is **specially recruited** locally or abroad in order **to fight in an armed conflict.**
>
> Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of **similar rank and functions in the armed forces of that party [...]**
>
> **2.** A mercenary is also any person who, in any other situation:
>
> **a.** Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
>
> **Overthrowing a government** or otherwise undermining the constitutional order of a state; or
>
> **Undermining the territorial integrity** of a state.
>
> **b.** Is motivated to take part therein essentially by the desire for significant private gain and **is prompted by** the promise or payment of material compensation. (United Nations General Assembly, 1989)

Thus, it can be understood that, for example, under Article 1.1, subparagraph a), if a person is hired to engage in combat in an armed conflict and, due to their training and skills, has the ability to direct or facilitate behaviors that, by their nature, grant them the capacity to determine the political or military course of a state, planning or preparing acts related to the armed conflict, the inclusion of the mercenary figure is objective in

the face of the crime of aggression. At the same time, subparagraph b) of the same article raises a fundamental issue: the degree and functions of the armed forces of a party in conflict. If the provision provided by a mercenary to the contracting party is of an intangible nature (information gathered in operations within the conflict), in degrees and functions similar to those who have the capacity to determine the political or military course of a state, the planning and preparation of an act of aggression would classify the mercenary as a special qualified subject within the crime of aggression. Therefore, the qualification would depend, in each case, on analyzing the military structure and functions of the members of the armed forces of the party within the conflict.

Regarding paragraph two of the cited article, the purposes served by the mercenary are vital to understand their conduct as part of the crime of aggression. The United Nations Charter establishes as a commitment undertaken by member states the refraining from resorting to threats or the use of force against the territorial integrity or political independence of any state (Article 2, paragraph 6), the violation of which could be understood as a blatant violation of the charter (Herdocia, n.d., p. 13). It is clear, therefore, that the condition that defines a person as a mercenary (engaging in acts aimed at overthrowing a government or undermining the territorial integrity of a state) is one that constitutes a blatant violation of the UN Charter (Article 2, paragraph 6), and moreover, it is a constitutive element of the crime of aggression (Article 8 *bis*, numeral 1). It can be concluded that these coincidences are not random if the goal is to hold certain non-state actors individually accountable.

The second focus of inquiry is private military companies or entities, commonly referred to as "private security firms." A preliminary examination can be found in the convention regulating mercenaries (1989), particularly in Article 1, paragraph 2, subparagraph b. Given that the incitement to participate in acts related to the conducting of hostilities in an armed conflict for the purpose of material gain can originate from both state and private capital, a new debate emerges regarding the responsibility of nongovernmental actors. Accordingly, Article 2 of the convention establishes that anyone who recruits, uses, finances, or trains mercenaries commits a crime (International Convention…, 1989).

The status of private security firms serves diverse purposes, contingent upon their relationship with the contracting party. The profit or reward derived from their involvement in scenarios requiring technical support, logistical assistance, and intelligence provision has, in some cases, led to the normalization of their demand and the outsourcing of services (McFate, 2019, p. 20).

In such a complex scenario, considering that individual criminal responsibility, over which the International Criminal Court has jurisdiction, does not extend to legal entities, the question arises: Who assumes responsibility when certain acts, classified as aggression, are carried out through companies?

International criminal jurisprudence continues to evolve, demanding a less restrictive interpretation regarding individuals who may be liable for international crimes, with the goal of safeguarding victims (Silva, 2011, p. 152). The International Criminal Tribunal for Rwanda emphasized the lack of precise indications regarding the need for a qualified subject as the perpetrator of crimes, affirming that even a civilian can sustain or contribute to widespread or systematic attacks against a population. Moreover, the tribunal underscored that the connection between the armed conflict and the committed crimes implies the perpetrator's affiliation or membership in a structure or organization, which is an established fact derived from the crime (Silva, 2011, p. 154).

If, as Hernández Campos (1998) suggests in "The International Criminal Court: Foundations and characteristics," international criminal law implies the impossibility of holding legal entities individually accountable because they lack the capacity to commit a crime through action or omission, then extended forms of authorship and participation may be examined to ascertain the extent within non-state structures, thereby determining individual criminal responsibility (p. 445).

In the specific case of companies implicated in alleged responsibility for activities such as strategic planning, providing intelligence, or operational and logistical support, these can be understood within certain lines of jurisprudence regarding the functional control over the act (Kinsey, 2021, p. 13). Doctrine has labeled this phenomenon as "joint criminal enterprise,"

serving as a foundational concept to endorse the idea that individuals committing crimes may be utilized by intervening leaders merely as "instruments" for their commission (Olásolo, 2013, p. 104). The concept of the instrumentalization of a third party, developed in the appeals judgments in the Brdanin (para. 412) and Krajisnik (paras. 220, 225, 226, 714) cases of the International Criminal Tribunal for the former Yugoslavia, aligns with the separate opinion in the 2006 judgment in the Gacumbitsi case, where Judge Schomburg interpreted the scope of the commission of a crime and who falls under the functional control over the act (Olásolo, 2013, p. 105).

Under the same criteria, it is possible to understand the operational structure of a private security firm. Upon exploring the question raised by Kenny Gluck, director of operations for Médecins Sans Frontières-Holland, regarding the potential liability of shareholders (Singer, 2018, p. 7), it is observed that, in principle, the reviewed lines of jurisprudence would not attribute responsibility to these actors. This is unless the acquisition of shares in a company involved in operations during an armed conflict is undertaken by a natural person with the direct intention of using the company and its operators as an "instrument" (functional control of the act) to carry out an act of aggression. This scenario implies enormous complexity in procedural terms to demonstrate such intent (Kinsey, 2021, p. 14).

However, injecting capital to finance technical and logistical support services, providing intelligence, field operations, or strategic planning are just a few of the ways in which one can participate in a conflict as a non-state actor. If the elements analyzed within the crime of aggression are carried out by the operators themselves in the field, ordered or approved by those who hold managerial positions within the private security firm, responsibility exists within the boundaries of the exercise of functional control of the act. For instance, if private intermediaries serve as contractual agents to train, organize, and finance organized "irregular" groups with the intention of intervening in another state, the response in terms of resource redirection and offensives by the affected state could establish the standard of functional control by a private actor. This hypothetical scenario can be illustrated as follows:

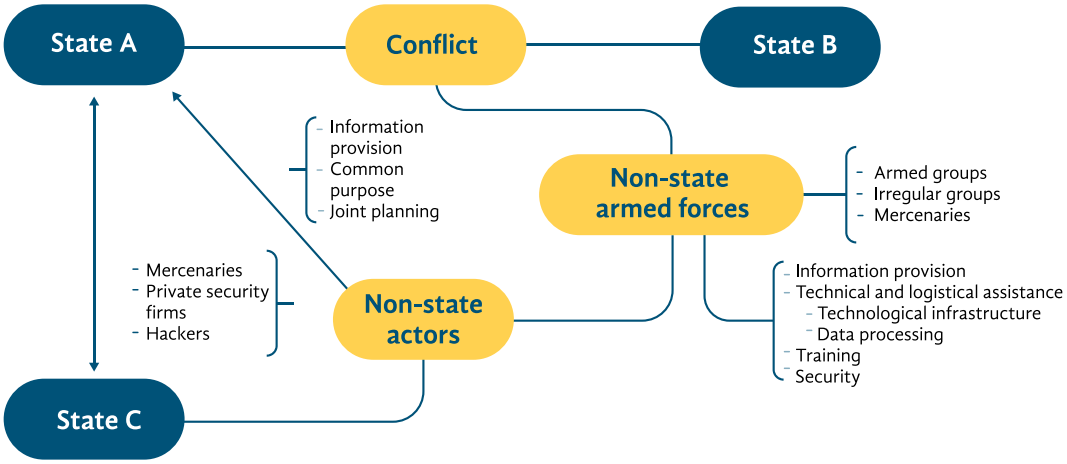

Figure 3. Dynamics of relationships between actors. Created by the author.

The diagram in Figure 3 enables the dual nature of the situations in which mercenaries are involved to be highlighted. Ignoring the possibility of describing the role of a mercenary who works both alongside a state under a joint criminal enterprise and with armed gangs or irregular groups (as per Article 8 *bis*, paragraph 2, subparagraph g of the Rome Statute) would limit the scope of the hypothesis maintained from the outset, which posits that companies are used as fronts for the private operations of mercenaries (Kinsey, 2021, p. 14).

The scenario outlined via the interpretation of the elements of the crime allows for expanding the scope of the crime of aggression to include actors that have not been previously considered by the Coalition for the International Criminal Court (n.d.). The evidence and assumptions presented in this section suggest a possibility whose treatment will be delineated in each case according to established parameters.

The analysis conducted in this subsection has been presented as a theoretical proposal, serving as a prelude for the case study that will be addressed next. The aim is to underscore certain contingencies, events, and limitations associated with all that has been examined up to this point.

6. Case study: Conflict between the Russian Federation and Ukraine

The crime of aggression will now be analyzed through the contemporary conflict between two states: Russia and Ukraine. To this end, the historical context will only be addressed to the extent necessary to contextualize the conflict analyzed in relation to the main topic. Additionally, the current dynamics in which conflicts between states unfold will be explored, such as cyber warfare, corporate and political mercenarism, and sanctions between states, among others. The objective is to identify a standpoint that allows for the examination of various perspectives concerning the potential classification of non-state actors as perpetrators of the crime of aggression.

In her work "Origins of the Ukrainian Conflict," Lucía Byllk Paraschnuck (2018) summarizes the major reasons underlying the contemporary conflict between Ukraine and Russia. While acknowledging and analyzing various historical periods and stages (both of cooperation and friendly relations, as well as cultural differences and conflicts), she identifies one of the main causes as follows:

> It is crucial to underscore its potential and, consequently, the economic and geostrategic interests it generates. Ukraine is arguably the crown jewel and for quite a few reasons. First, the significance of Ukraine being the largest country in Europe, with a population of 46 million people, strategically positioned between Russia and the European Union cannot be overlooked. Situated in the heart of Europe, Halford Mackinder refers to Ukraine as the "pivot area," indicating it "lay at the center of the world island, stretching from the Volga to the Yangtze." This positioning renders it simultaneously fortunate and unfortunate. (Byllk, 2018, p. 16)

Additionally, she points out that the Ukrainian territory is traversed by an extensive network of gas pipelines through which half of the gas Russia sells to European countries passes. In her book *Ukraine between Russia and the West: Chronicle of a conflict* (2014, p. 10), author Ana Lázaro acknowledges and agrees with the importance of the fertility of Ukrainian lands, known as chernozem. This not only makes Ukraine one of the largest producers of cereals globally but also underscores its dependence on Russian air and military equipment (p. 17).

According to ABC Internacional, in 2014, the annexation of Crimea by Russia led to, within the framework of the hybrid war unleashed by the Kremlin against Kiev, the emergence of the private military company ChVK Wagner (Mañueco, 2022). This company has been recognized by the Council of the European Union for its interventions and activities in Ukraine, Syria, Libya, the Central African Republic, Sudan, and Mozambique (PESC Decision, 2021/2197). While it is not the only private military company whose operations have been highlighted over time, the breadth of functions and the wide discretionary spectrum under which it operates can be emphasized, as shown in the following figure:

Figure 4. Analytical framework. Source: (Arnold T, 2020)

Sergey Sukhankin examined the organization of the Wagner Group, addressing various aspects including its leader, Dmitry Utkin, and the training tactics provided at its main center in Molkino, Krasnodar Krai, as well as at decentralized locations. Furthermore, he analyzed aspects related to weaponry and equipment, ranging from light weapons to BM21 rocket launchers and D30 cannons, as well as financial management and resource distribution in "establishment of order" operations, among other aspects.

It remains to mention the last of the relevant actors for the analysis of the first scenario involving nongovernmental actors. During the Crimean independence crisis, pro-Russian separatist forces in regions such as Donetsk and Luhansk were key actors (BBC News Mundo, 2022). Substituting the variables in the scenario in Figure 3 of the previous subsection with the elements of the case study, we can observe a seamless fit with the dynamics previously described. Accordingly, the scenario can be configured as follows:

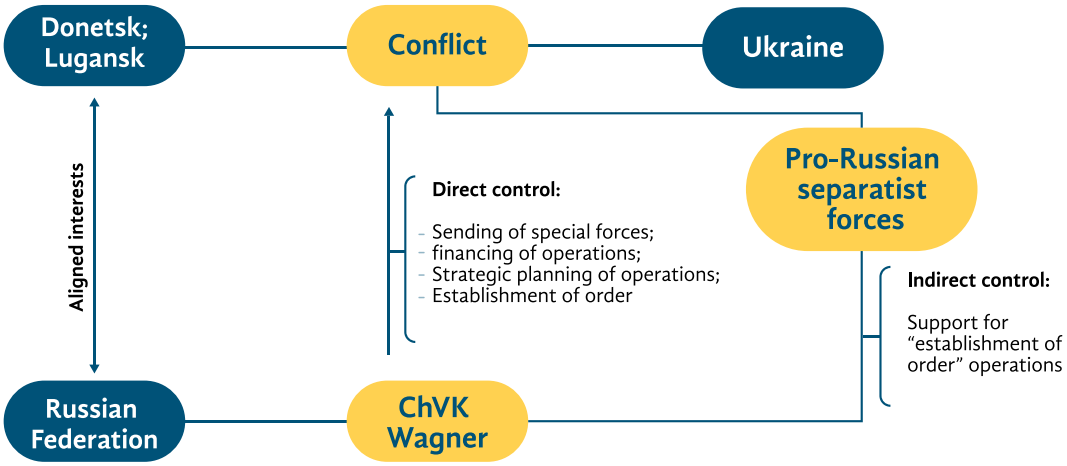

Figure 5. Analytical framework of the actors in the Russian–Ukrainian conflict. Created by the author.

Based on the gathered information, there exist nongovernmental groups whose influence can result in an act of aggression. It is important to clarify that while the self-proclaimed Donetsk and Luhansk Peoples Republics are not recognized as states in the strictest sense, Vladimir Putin's recognition of their independence is enough to interpret the crime of aggression, either in terms of annexation or according to the "overall control test" criteria.

CONCLUSIONS

In analyzing the elements of the crime, concerning the capacity to control or direct the political or military sphere of a state, the Wagner Group, through incursions of direct or indirect control, exercises functional control over the situation, prompting offensive responses from the Ukrainian state. Furthermore, it is evident that the use of force compromises the sovereignty, territorial integrity, and political independence of both Ukraine and the Donetsk and Luhansk Peoples Republics, given that the Wagner Group

holds a "leadership" role in directing or controlling the actions of a state (Salmon & Bazay, 2011). It is also conceivable to interpret the planning and preparation as preparatory acts carried out by the Wagner Group with the aim of *de facto* annexing Ukrainian territory for the Russian Federation.

Likewise, if the dispatch of armed bands, irregular groups, or mercenaries by a state (Russia) to carry out acts of armed force against another state (Ukraine) is done through the private military company in question, it, either by itself or through other groups, could be held responsible for committing a crime of aggression, under the terms already examined through the operational mechanisms of the Wagner Group (Rana, 2022). Certainly, such actions should be understood in accordance with the individual criminal responsibility outlined in Article 25, paragraph 3, subparagraph a of the Rome Statute, as they involve actions carried out via the conduct of others.

Particularly, in this conflict framework, cyberwarfare emerges as a method of conducting hostilities. The low threshold under which it operates is a subject of debate, and there are contrasting opinions regarding its scope in the crime of aggression (Trahan, 2022). Nevertheless, there may be cases in which individual criminal responsibility extends to non-state actors, such as hackers or private security firms.

Attacks on technological infrastructure, databases, and IT personnel accounts are examples of how a state's sovereignty can be compromised. The phases described by Mohan Gazula (2017), which include reconnaissance, firmware replacement, attack, obfuscation, and cleanup, illustrate the demonstrated capacity in attacks against the security of the Ukrainian state in 2015 (p. 35). It is worth noting that these attacks, particularly those involving obfuscation and cleanup through malware, were again reported during the tensions between Ukraine and Russia in February 2022 (Lyngaas, S. 2022). The specificity of these attacks fits within the possibility of perpetration either directly or through others, in accordance with Article 25 of the Rome Statute, as well as in the mode of collaboration. Likewise, as per the same article, preparatory actions such as reconnaissance and system mapping can be considered key steps in the execution of the typical act. Therefore, these forms of individual criminal responsibility must be interpreted within the framework of Article 8 *bis*.

Indeed, the elements of "severity" and "scale" in the attacks on Ukraine are subordinate to the understanding of these as a manifest violation of the UN Charter, necessary to establish the factual assumptions of the crime of aggression. However, we cannot overlook that the circumstances in which the conflict unfolds are highly unlikely to be judicialized and condemned as a crime of aggression, given the procedural rules that grant Russia the ability to veto a draft resolution qualifying the acts as aggression.

Despite the challenges posed in prosecuting a crime of aggression against non-state actors linked to Russia, the examination of this case demonstrates the potential for pursuing such crimes outside the scope of the UN Security Council's interests.

Finally, it is important to highlight the relevance of this case study, as it illustrates the political and military control that certain private actors have to influence acts that could be classified as "aggression."

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RFJ REVISTA FACULTAD DE JURISPRUDENCIA

DANCE-RELATED PUBLIC POLICIES FOR INDIVIDUALS WITH DISABILITIES: A CRITIQUE OF ABLEISM AND DECOLONIAL THEORY IN THE SOCIOLOGY OF LAW

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ABSTRACT

The aim of this counterargumentative essay is to outline a theoretical framework within the sociology of law for studying public policy, specifically focusing on how it facilitates dance learning among individuals with disabilities in Ecuador. Additionally, it presents a debate from two perspectives: ableism theory and the decolonial epistemological model. As a qualitative exploratory study, it reviews Spanish-language studies published in 2018 onward and engages in a debate within the framework of the sociology of law. The results enhance the understanding of equality for individuals with disabilities regarding dance-related cultural matters within Ecuador's public policy framework.

RESUMEN

El propósito de este ensayo de contra argumentación es describir un marco teórico de las políticas públicas como campo de estudio de la sociología jurídica para el ejercicio del aprendizaje de la danza de personas con discapacidad en Ecuador y presentar un debate desde dos posiciones: la teoría capacitista y el modelo epistemológico decolonial. Se trata de una investigación exploratoria cualitativa con una metodología de revisión documental de estudios en idioma español con un filtro desde 2018 y un debate en el marco de la sociología jurídica. Los resultados que arroja la investigación apuntan a fortalecer la comprensión de la igualdad de las personas con discapacidad en el espacio de la gestión cultural de la danza dentro del marco de la política pública del Ecuador.

KEYWORDS: Public policy, disability, dance, inclusion

PALABRAS CLAVE: Política pública, discapacidad, danza, inclusión

JEL CODE: I12, Z11.

RECEIVED: 08/03/2023
ACCEPTED: 26/12/2023
DOI: 10.26807/rfj.vi14.482

INTRODUCTION

The elegance of dance and movement brings humanity together; its tangible value is apparent in legal regulations, public policies, and individual empowerment alike. Ecuador's rights-based Constitution prioritizes equality as a guiding principle for the exercise of rights. Thus, recognizing dance education as an opportunity for all citizens to uniquely connect through movement while sharing a sense of equality in their emotions is important.

1. Overview of dance-related public policies

This section provides a general outline of public policies relevant to dance. Sánchez Arcos' work, titled "Bodies, echoes, and presence: cultural affairs management and the politics of performing independent dance in Quito," underscores the importance of critical cultural management in recognizing the bodies and interpersonal and professional dynamics sustained within the established space. Although it focuses on the work of the Independent Dance Front in the 1990s, the conclusions extend to the concepts of recognizing, reassessing, and reinterpreting with the perspective provided by the passage of time. It ultimately presents a challenge regarding the commitment to demonstrate practices to combat "convenient amnesia" (Sánchez Arcos, 2019). Aschieri also emphasizes the importance of the critical analysis that brought cohesion to the event "Cidade em movimento," highlighting the promotion of inclusive practices and equal rights for individuals with disabilities in the area of dance. Her study highlights how the methodology was adapted during the pandemic, with its transition to a virtual environment (Aschieri, 2020).

According to Bonin and Rubio in their study "Vocation and job insecurity in the dance profession in Spain: effects of ineffective cultural policy," there is a need to emphasize the social and labor support given to artists. This occurred in Spain during the 20th century. To achieve this objective, they identify various underlying factors, such as the scarcity of employment opportunities in stable dance companies and the "unsustainable rise of professional and higher conservatories in autonomous communities, as well as in the discourse of Spanish dancers within the paradigm of the new spirit of capitalism" (2019). Capasso, Mora, and Sáez (2020) highlight

the diverse demands made by performing artists in Buenos Aires during the pandemic-induced social isolation. They underscore the significance of recognizing "the active role of the sector and a new approach to the practice of performing arts" (pág. 0). Ortíz Vásquez's work provides a gender and class analysis of the experiences of street artists who identify "the appropriation and reinterpretation of the body as a feminist demand." This assertion is framed within the context of social protests, with the theoretical framework drawn from authors including Judith Butler and David Le Breton (Ortiz Vásquez, 2021). According to Schiro Díaz, it is crucial to highlight the cultural dimension of integration within Mercosur.

He highlights the case of chamamé and its process of heritage recognition in the Argentine littoral region and neighboring countries, all framed within the constructivist theory of international relations (Schiro Díaz, 2021). Navarro (2022) goes a step further by analyzing the concepts of corporality in Grupo Nzinga's Capoeira Angola in the city of Salvador, based on the idea of constructing and deconstructing the concept of the body. Addressing the topic from the perspective of Latin American critical theory, Navarro highlights the imperative of identifying how power discourse seeks to whitewash popular cultures. She argues that decolonization cannot occur without de-patriarchalization, emphasizing the importance of analyzing the role of Afro-American bodies in the capoeira circle. This space notably showcases the presence of women, advocating for the diversity of identities both within the group and in the world. The study employs a valuable methodology, gathering oral testimonies associated with capoeira practice.

To summarize, while the cited authors acknowledge the critical lens necessary for assessing public policy in dance, they are also mindful of its broader implications within macro-level policy, particularly the influence by the current capitalist model with its strong emphasis on technology. Furthermore, they emphasize the importance of mobilizing civil society organizations of performing dance artists to advocate for their demands and seek solutions from public policy. The theoretical frameworks are enriched by insights from gender theory and constructivist international relations, particularly in highlighting the importance of considering the body within feminist analysis, as well as regional integration through the promotion of chamamé's artistic heritage. These themes closely align with the current

study's examination of the normalization and functional standardization of the body's relationship with space in national contexts. Additionally, the discussion of body and dance normalization, as well as the exploration of capoeira, is strengthened by an analysis of the discourse used by powerful elites and its extrapolation in popular and oral narratives.

2. Identification of elements in the relationship between public policy and disability

We can now proceed to identify elements in the relationship between public policy and disability. We begin with Meléndez Rojas' "Inclusive education and disability in Costa Rica: a public policy perspective." This study explores the laws and public policies relevant to the education of visually impaired individuals. Aiming to increase the amount of data and the "available information concerning people with disabilities and the institutions implementing public policies in this area, it reviews related evolution, challenges, and endeavors. It determines a need for more disaggregated and systematized data to more effectively evaluate policies aimed at those with disabilities" (2018, pág. 0). Palacios' research is framed within the context of the pandemic and its widening of gaps for people with disabilities; it draws upon General Comment No. 6 from the Convention Committee, which outlines three dimensions for mitigating these disparities. The first involves formulating redistributive economic policies; the second combating prejudices, stigmas, and stereotypes via a conceptual framework of functional diversity and intersectionality; and the third expanding participation. Lastly, it is crucial to ensure the "guarantee of the right to universal accessibility, encompassing support systems and reasonable adjustments" (Palacios, 2020). Linares, García, and Rojas underscore the examination of the interplay between territorial appropriation, accessibility, space, and mobility as factors determining the social inclusion of population groups within a city who share a territory, in this case, the city of Bucaramanga, Colombia (Linares García, Hernández Quirama, & Rojas Betancur, 2019). Pineda López's study was also conducted in Colombia, specifically in the department of Quindío, and departs from conventional social theories of disability to emphasize the notion of "unlimited capacity," prompting a reevaluation of autonomy.

However, it anticipates criticism regarding the importance of considering the mechanisms of collective participation. Further, Villalba Rodríguez explores the significance of communication for social change within the public policy cycle in the context of Statutory Law 1618 of 2013. The study employs a qualitative approach, using a hermeneutical framework through a case study and semi-structured interviews with three groups: representatives from civil society, the government, and academia. It determines that, on the one hand, communities fail to recognize the importance of communication, while on the other, communication strategies have not been developed with the communities in mind (Villalba Rodríguez, 2020). The study "Analysis of Bogotá's public disability policy (2007-2017)" examines eight elements, including: document and testimonial analysis of Decree 470 of 2007, a conceptual framework of disability, an overview or diagnosis, the supplemental framework stemming from the aforementioned legal instrument, and the outcomes of implementing the "Q methodology," a research method in psychology and social sciences aimed at studying subjectivity to identify relevant issues and priorities for system actors. It also provides recommendations for reformulating public policy to effectively conclude the cycle (Roth, Gordillo Motato, González Moya, & Suárez Higuera, 2019).

Misischia, Angelino, and Méndez emphasize the significance of recognizing the strengths of networking, particularly through initiatives like the Latin American and Caribbean Interuniversity Network on Disability and Human Rights, as well as the Interuniversity Network on Disability in Argentina. This networking facilitates collective construction by bringing together experiences, opportunities, inquiries, endeavors, and proposals, thus contributing to the creation and advancement of public policies that ensure the right to higher education (Misischia, Angelino, & Méndez , 2020).

To summarize, the research noted in this section establishes the connection between the public policy cycle and disability and emphasizes the need to improve data quality to facilitate the technical evaluation of policy implementation. While different types of disabilities are considered, the first case focuses on education for individuals with visual impairments. The importance of national public policy's adherence to the General Comments of the Convention Committee, particularly in the case of General Comment

No. 6, is indicated, given its complexity, breadth, and the international commitments it generates at the country level. Furthermore, territorialization criteria are taken into account, and once again, the issue of participation arises. While working within a theoretical framework of disability and society, it is crucial to establish opportunities for dialogue to frame decision-making processes essential for formulating public policy. Moreover, the research underscores the significance of communication, alongside the requisite adjustments to ensure the message effectively reaches the target demographic and elicits a response aligned with their interests. Consideration is given to the conclusion of the public policy cycle, which results in an assessment for potential reformulation. Additionally, the use of research methodologies that facilitate an exploration of subjectivity despite communication obstacles is emphasized. Other studies highlight the role of civil society via national and international networks to enhance their influence in shaping public policy.

3. The relationship between disability and dance

Having characterized various elements of public policy related to disability and dance, this section presents some considerations concerning the same.

Walker shares the conclusions drawn from the choreography *Unspoken Spoken,* highlighting the normative and regulatory framework in which life unfolds. These are self- or externally imposed rules that take time to recognize. This approach, which offers the opportunity to challenge norms, is crucial in addressing disability equality because historically, normalized environments persist without scrutiny. The choreography includes five characters, each with their own rules for questioning, surrendering, or fighting. The story is told through voice and movement by dancers with and without disabilities. The fundamental question concerns our own limits: What changes if we face what stops us (Walker, 2018)? The film is available on YouTube as *Unspoken Spoken - a new dance film from Candoco Dance Company* (Candoco Dance Company, 2018); the link is provided in the references.

The campaign "Disability and digital tools: dancing to raise awareness" showcases the use of virtual technology to conduct educational artistic activities through mixed dance. It aims to educate the general public on diversity and inclusion, bringing together artists, educators, human rights

professionals, and audience members both with and without disabilities (Madrid & Zérega, 2021). In another study, Colchado and Roncal analyze the "Present Body" project by the Kinesfera Danza Organization. This project encourages participation and interaction between people with and without disabilities through contemporary dance. The study notes that Peru has few avenues for addressing social issues through the art of dance or for making dance and culture available to everyone while considering their individual circumstances and embracing, respecting, and appreciating diversity (Colchado Olivera & Roncal Tello, 2020).

Similarly, Carrera and Ninahualpa present the outcomes of implementing the "Dance, movement, therapy" technique to improve volitional aspects affected by schizophrenia and intellectual disability. Using the volitional questionnaire, they determine that all patients given the technique showed improvement in volitional aspects (Carrera López & Ninahualpa Sánchez, 2019). In this therapeutic context, the use of folk dance has also been found to enhance attentional processes in students with intellectual disabilities (Herrera Guevara & Villamil Montaño, 2020). Analyzing inclusive dance experiences in Peru and Colombia, Riva Muñoz determined these serve as spaces for individuals both with and without disabilities where they can recognize, integrate, and exchange with each other (Riva Aguero Muñoz Najar , 2019).

In the intersection of dance as an art form and its practical application is the pioneering method of María Fux. Fux works with individuals who have diverse learning backgrounds and limited mobility, harnessing their strengths to create inclusive environments through dance and dance therapy (Tarazona Barbetti, 2020). This approach links "the concepts of educational inclusion, disability, artistic education, and dance therapy." The methodology also incorporates an analysis of the legal framework concerning the evolution of disability rights, thus underpinning "the implementation of dance therapy as a pedagogical resource for inclusion." Valla's research indicates a pathway to fostering diverse corporeal expressions through gymnastics, particularly within its curricular component of dance (Valla, 2021). This seemingly tangential idea becomes significant when dance is institutionalized within the framework of public education policy implementation, anchoring and ensuring its progress. During the concluding session of the adolescence

seminar within the master's program in dance movement therapy at the National University Institute of Art in Buenos Aires, a strategy was proposed utilizing dance movement therapy as a nonverbal communication channel for adolescents, considering the sexual maturation phase they are in. This approach was meant to equip adolescents with protection mechanisms. The identified challenges included the fact that information tends to target children, often excluding adolescents (Gil Ogliastri, 2014).

Ferreira dos Santos, Gutiérrez, and Odilón argue that "dance can serve as a catalyst for personal and social transformation by providing opportunities for experiences and reflections on the acceptance of different bodies and expressions without disqualifying or belittling any form of diversity" (Ferreira dos Santos, Gutierrez, & Odilón, 2019). Pineda Niño's study, "Dance as a strategy to enhance communication processes in children with cognitive disabilities," finds that "dance can act as a positive mediator not only in educational contexts but also in various processes for individuals with disabilities." This concept of communicative mediation through dance could be of interest to cultural affairs administrators, enabling them to have an impact that will likely yield positive results. This experience is a component of Bolivia's IED, which is affiliated with IDARTES's CREA program (Pineda Niño, 2020). Another study examines the intersection of special education and performing arts education, with a specific focus on dance for individuals who are deaf. This study is part of the NUNA Dance Studio project, which seeks to train dancers in the necessary knowledge, skills, and attitudes via a qualitative methodology to "highlight their motor, cognitive, social, and affective values through body language" (Guzman Bustillos, 2022).

Another study, "The creation of collectives as a means of transforming the subjectivity of individuals with disabilities: a case study of the inclusive dance group," aims to systematize the experience of the Inclusive Dance Group. This group follows the danceability methodology of Alito Alessi. The qualitative approach facilitates the defense of the definition, recognizing its potential ambiguity within discourse (Calzada González , Vargas Calderón, Peregrina Sámano, & Lara Silva Andrés, 2022). Additionally, the study "The benefits of dance in improving the quality of life of people with intellectual disabilities" demonstrates dance's positive impact and potential across various dimensions related to quality of life and human functioning among

individuals with intellectual disabilities. The empirical evidence indicates that this artistic activity fosters behavioral patterns and enhances specific dimensions of quality of life (Mercado García, Merino Gallego, & González Casas, 2021). Although various points are raised for discussion, including the societal perception of functionality requiring significant effort to conform to cultural norms, engagement in these activities has helped raise awareness for this community. That dance improves the quality of life of individuals with intellectual disabilities is indicated by the importance the community places on this activity and its association with growth potential, particularly in terms of opportunities, social relationships, and social participation. The study "Dance as a tool for promoting social inclusion in individuals with intellectual disabilities" systematically and methodically investigates the causes of social exclusion and marginalization faced by individuals with intellectual disabilities, with the intention of addressing and reversing them (Muñoz Benito, 2019). In the study "Dance in spatial perception development in schoolchildren with visual disabilities," Zapata Mocha and Castro Castro indicate the importance of dance's inclusion in the physical education curriculum. Using a qualitative pre- and posttest methodology, they determine dance "has positive and beneficial effects on the daily and academic lives of students with disabilities, particularly those with partial or complete visual impairment" (Zapata Mocha & Castro Castro , 2022). Another study integrates virtual elements into dance practice within physical education classes. The participants (n=7) had been formally diagnosed with a disability. Nine videos, a WhatsApp group, and the Teams platform were used to create a Spanish dance group choreography. The major identified challenge was "participants' own perceived motor deficiencies" (Uríos, Llanos Tornero, & Abellán, 2020).

To summarize this section, the choreography *Unspoken, Spoken* and the projects "Disability and digital tools: dancing to raise awareness" and "Present Body" explore existential questions concerning the limits and rules imposed both externally and internally on individuals. This idea holds true for individuals with or without disabilities.

Furthermore, the art of dance engages with significant social contexts, offering an opportunity for individuals to cultivate an ethic of respect for diversity through their appreciation of this art. Extensive consideration of

therapy-focused projects, particularly those employing dance movement techniques to improve volitional aspects in individuals with intellectual and psychosocial disabilities, is crucial. A review of inclusive dance experiences involving individuals with and without disabilities is included, spanning both Peru and Colombia.

María Fux's method combines dance expertise with rights-based training, promoting empowerment. Incorporating dance into the gymnastics curriculum led to improved evidence and institutionalization. The seminar on adolescence within the master's program in dance movement therapy at IUNA indicated that while dance therapy was highly aligned with the needs of the target group, the available information was primarily geared toward children. Considering dance as a mechanism for mediating communication with individuals with disabilities should also be considered. Individuals with hearing disabilities exhibit motor, cognitive, social, and affective abilities within the dance experience, highlighting their strength in utilizing body language as a form of expression. Although the outcomes of dance prove beneficial for the quality of life of individuals with disabilities, social barriers emerge as the primary challenges to continuing this approach. Applying a quantitative approach and focusing on visual impairment, pre- and posttest assessments showed dance positively impacts the daily and academic lives of students both with and without disabilities. The dance class for individuals with intellectual disabilities (n=7), which incorporated tools such as videos, a WhatsApp group, and the Teams platform, enables students to express motivation despite their self-perceived motor deficiencies.

4. Insights from the field of sociology of law

Before comparing the doctrinal approaches identified in the literature review of public policy, it is relevant to offer a concise introduction from the perspective of sociology of law.

Lescano (2020) highlights Juan Agustín García's perspective of "always considering the law as a social construct" (p.). In turn, Fucito refines the analysis by introducing a "precise proposal for change, typical of positivism" (Year, pp.) and identifies the influence of tradition in "implementing progress inherent in the ideology of the Argentine intellectual class of the

time." The next step is one that "distinguishes law from the norm," reflecting the perspective of social phenomenology. In this context, a perspective emphasizing the interaction of law with other disciplines arises, prompting the advancement of political science through a critical examination of the phenomenology of power. The author raises a key question: can policy and law be considered separately (Lescano, 2020)?

Roberto Esposito articulates a political theoretical perspective that criticizes phenomenology. He challenges the idea of an interpretation that applies an ontological lens to policy, ultimately arguing that its essence is centered on the community. This idea is understood as that which is not individual but rather communal, drawing from the word's Latin etymology, where the essence of the term is characterized by *munus,* signifying what is common rather than proprietary. Another prefix, such as *in,* can elucidate the concept of immunity, which ontologically pertains to the *munus.* This is a departure from the interpretative problem posed by phenomenology, giving rise to an essential idea for the political domain unrelated to moral interpretations. This exposition is crucial for this study, as it introduces the concept of "governmentality," which refers to the technique through which policy is developed for the *munus,* bounded at one end by the prefix *com* and at the other by the suffix *in*. One could argue that policy technique aims to address the individual as a member of the community, taking into account their diversity (Hernández , 2018). The issue of phenomenological interpretation, which extends to questioning the moral quality of judges, is discarded in favor of a focus on investigating governmentality. In this case, this relates to the execution of the public policy cycle for addressing the needs of individuals with disabilities and the practice of dance.

5. The concept of "impolitics" by Espósito as the foundation for the public policy outlined in Ecuador's National Agenda for Disability Equality 2021–2025.

Here, it is worth revisiting Espósito's concept of the "impolitical" ontology of politics, which delves into the essence of political existence. Drawing on this approach as a technical mechanism of immunity, we can characterize the National Agenda for Disability Equality 2021–2025. This analysis will identify the policies, relevant indicators, and goals, as well as determine the

presence or absence of a baseline. It will also examine the institutions tasked with administering the benefits, thus serving as the governing bodies of sectoral public policy.

The National Agenda for Disability Equality (NADE) is a national planning tool designed to promote equality, specifically through affirmative actions targeting individuals with disabilities. It operates on a periodic cycle that coincides with the start of a new government, encompassing phases, such as evaluation, that lead to formulation, cross-cutting integration, observance, and monitoring. The agenda is structured around 12 thematic areas that advance rights as per the Convention on the Rights of Persons with Disabilities. This allows for the assessment of the country's progress in fulfilling international commitments, within both the inter-American system and that of the United Nations.

Concerning the exercise of rights to art and culture, the state objective is to promote the advancement of art and culture for individuals with disabilities across diverse societal domains. The governing and executing institutions responsible for implementing the benefits include the Ministry of Culture and Heritage, the Ecuadorian House of Culture, and decentralized autonomous governments. The National Council for Disability Equality (NCDE) also serves as a supporting institution.

Its four public policies are:

1. Promote the participation of artists and cultural affairs administrators with disabilities in artistic and cultural projects.
2. Encourage the provision of cultural goods and services for people with disabilities.
3. Develop training opportunities for artists and cultural affairs managers with disabilities.
4. Promote universal accessibility in cultural spaces. (Agenda Nacional para la Igualdad de discapacidades ANID 2021 - 2025, 2022)

The NADE 2021–2025 has been approved by the Secretary of Planning and has received academic recognition from the Pontifical Catholic University of Ecuador. Policies, before being implemented, undergo a participatory and consensus-based formulation process with service-providing institutions following participatory evaluation with civil society.

As a complementary methodology, guidelines aimed at bridging gaps are created. Furthermore, it is essential to specify the relevant sector institutions tasked with implementing these policies, particularly those focused on mitigation. Subsequently, the indicator, baseline for the year 2021, and target for 2025 are established. This approach aligns with Roberto Espósito's work regarding examining the essence of policy within its technical implementation. In Ecuador, the constitutional framework emphasizes direct democracy, featuring a fifth function of the state dedicated to citizen participation and social oversight. This organizational structure encourages dialogue between the public and private spheres.

The formulation of indicators generally follows a standard technique, unless particular specifications are needed. In terms of the present study, certain indicators exist that that incorporate dance for individuals with disabilities without specifically highlighting distinctions based on disability type. The eight indicators are as follows:

1. Projects with competitive funding proposed by decentralized autonomous governments, where the baseline is seven and the target is to reach 21 by the year 2025.
2. Number of artists and cultural affairs administrators with disabilities participating in the National Culture System. This indicator currently lacks a baseline, which will need to be developed.
3. Evidence of artistic events featuring the involvement of artists and cultural affairs administrators with disabilities, facilitated by decentralized autonomous governments. This indicator currently lacks a baseline, which will need to be developed.
4. Development of audiences with disabilities for the arts. This indicator currently lacks a baseline, which will need to be developed.
5. Evidence of training for artists and managers with disabilities in arts, culture, and heritage programs. This indicator currently lacks a baseline, which will need to be developed.
6. Number of museums and libraries meeting accessibility standards.

These indicators aim to demonstrate and measure participation,

training, and accessibility in the cultural sphere for people with disabilities.

This argument aligns with the concept of the technical management of public policy as the essence of governance. The gathering of evidence will depend on the monitoring of service-providing institutions by the designated employee within the NCDE.

As a preliminary conclusion, it is important to highlight the significance of formulating equality-focused public policies within a protection-oriented framework. This approach aims to demonstrate material and substantive equality for the entire population. In this sense, equality is conceived as affirmative action for people with disabilities who have historically experienced marginalization. These categories fall within the legal domain and establish organizational mechanisms that are of interest to the field of sociology of law. This analysis can help answer the aforementioned question posed by Lescano, demonstrating that the interplay between law and policy constitutes part of a cyclical dynamic.

5. Debating public policy for disability equality through the lens of ableist theory and decolonial theory

The following section outlines points for debate for this approach, incorporating sociological insights by critically examining the concept of ableism, alongside perspectives from decolonial theory and the sociology of absences.

Ableism and functional diversity

The concept of ableism, as described by Toboso, "generally denotes an attitude or discourse that devalues disability, in contrast to the positive valuation of able-bodiedness, which is equated with a supposed essential condition of human normality" (Toboso, Capacitismo, 2017). He revisits the topic to bridge the gap between ableism and functional diversity. Following this, he positions the concept of functional diversity within "six distinct and interconnected dimensions of human experience: bodily, relational, political, ethical, social, and cultural, in relation to their corresponding dimensions within society. The idea of functional diversity emerges as a fundamental

element across all six dimensions, ranging from the bodily to the cultural" (Toboso, Afrontando el capacitismo desde la diversidad funcional, 2021). Ableism has been extensively studied in the Anglo-Saxon context. Some researchers, such as Fiona Campbell, have defined ableism as:

> a network of beliefs, processes and practices that produces a particular kind of self and body (the corporeal standard) that is projected as the perfect, species-typical and therefore essential and fully human. Disability then, is cast as a diminished state of being human. (Campbell, 2008)

The issue raised by ableism is particularly significant in Ecuador given the continued prevalence of the traditional concept of legal capacity for safeguarding individuals with disabilities. Ecuadorian law has introduced mechanisms such as guardianships, as described in Article 367 of the Civil Code, which stipulates it as a responsibility imposed on behalf of those unable to manage their own affairs. Article 371 of the same legal code adds clarification, specifically mentioning those subject to interdiction, while Article 478 establishes that individuals "habitually in a state of dementia shall be deprived of the administration of their assets, even if they have periods of lucidity" (Código Civil , 2005). Article 1462 of the same code states that every person is legally capable, except those who are declared incapable by law. Moreover, the following article, which was amended in 2012, seeks to update the definition of those who are absolutely incapable, namely: "individuals who are mentally incapacitated, minors, and deaf persons unable to communicate verbally, in writing, or through sign language. Their actions do not establish natural obligations and preclude the provision of surety" (Código Civil , 2012). In other words, interdiction may be declared as a protective measure for the incapable individual.

According to Otaola and Huete, ableism is intertwined with socioeconomic factors that affect individuals with disabilities within a social model of disability, as outlined in the public policy agenda for disability inclusion. This could be understood in terms of the individual's socioeconomic status within their assigned stratum, determined by their poverty quintile in relation to the benefits provided by social welfare programs (Otaola & Huete, 2019). Herrera and Vera contribute another perspective with their research on the participation of individuals with disabilities in university education; despite their presence in academia, barriers complicate the

advantages of their position (Herrera & Vera, 2021). Additionally, Danel and Gabrinetti review the "discussions surrounding social protection systems and the tensions arising from targeted policies," aiming to address the following questions, all within the legal framework of rights: "Has this policy been designed and implemented considering social protection as a goal to be achieved? Are these programs linked to other state interventions, and are they framed within a social protection system? Do non-contributory pensions for individuals with disabilities remain embedded within social protection systems, and are they being aligned with employment-generation strategies?" (Danel & Gabrinetti, 2018).

Decolonial theory and disability

On the other hand, and to provide a critique of the approach to public policies regarding inclusion in dance for individuals with disabilities, one can draw upon the influential perspective of decolonial or postcolonial philosophy, as articulated by Boaventura de Sousa in his 2022 book *Postcolonialism and Decoloniality*. De Sousa, citing Mignolo, defines this approach as the criticism of colonial thought with interests of subjugation, focusing on "the underlying logic driving the establishment and development of Western civilization from the Renaissance to the present day" (De Sousa Santos, 2022).

He identifies five challenges that must be faced by authors identifying a Eurocentric colonial logic and intentionality in the intellectual production of Western modernity must confront: "the antinomies of the epistemic South in diaspora, the problem of matrioshkas, the issue of the strata of colonialism, the inertia or excessive life of dominant ideas, the eternal return of reaction, and realistic utopias." For the purposes of the current study, the first challenge is highly relevant, as it focuses on the concept of the "antinomies of the epistemic South in diaspora" and identifies the challenges regarding the authorship of intellectual anticolonialism, which leads to questions about the possibilities of communication for the subaltern subject, understood here as individuals with disabilities.

While the discourse of modernity includes the concept of equality among its foundational ideas, it has been established, thanks to the rights-based paradigm, that there exist both a legal and a substantive equality achieved through affirmative actions for certain groups historically marginalized from

power. The author asks: "Can the subaltern subject speak? What happens when, instead of a misrepresentation, there is a false representation, an ignorance, an absence?" In the context of disability, the use of sign language within the deaf community raises an important question: can this linguistic barrier be perceived as part of a decolonial agenda aimed at concealing specific cultural identities? De Sousa Santos' concept of a sociology of absence could also be applied here. There is an evident need to recover nonacademic, popular, vernacular, and traditional knowledge, as well as the accumulated best practices across various activities, for people with disabilities to exercise their rights, given the outlined challenge of "developing a postcolonial and decolonial consciousness within pervasive colonial institutions via the use of languages, narratives, and colonial stereotypes" (De Sousa Santos, 2022).

The concept of matrioshkas introduces the debate on co-creation and co-self-destruction as foundational elements in the appropriation of space by individuals with disabilities. De Sousa Santos cautions against solely focusing on analyzing the discourse of the colonizer; it is important to also consider how individuals with disabilities position themselves in relation to expressions that perpetuate their dispossession and dependency. A third issue highlights the strata of colonialism, referring to the successive layers over time in the co-creation relationships between the logic of the oppressor and the oppressed, to the detriment of their dignity and identity. A fourth challenge identifies the intellectual inertia that perpetuates dominant ideas, particularly within academia, despite criticisms of Eurocentrism, rather than proposing positive, constructive alternatives, both in terms of epistemology and methodology, as well as real-life policy (De Sousa Santos, 2022).

Lastly, the final challenge is characterized as "the eternal return of reaction," often expressed collectively as a safe haven to perpetuate dependency. In most cases, reactionary ideology takes the form of apocalyptic visions and fundamentalist religious dogmas. While postcolonial or decolonial studies indicate the challenges, they also identify spaces of resistance utilized by oppressed social groups, such as individuals with disabilities. These expressions do not involve direct confrontation, and as such, they are not recognized as political actions aimed at positioning themselves against political power. At this point, De Sousa Santos references James Scott and discusses "everyday forms of resistance" that challenge material domination,

the "hidden transcripts," like those that dispute situational domination, and the "development of dissident subcultures" that confront ideological domination (De Sousa Santos, 2022). In the context of disability care in Ecuador, practices implemented by mothers, teachers, caregivers, and individuals with disabilities span various fields. However, these practices remain largely undocumented due to associated stigma and concealment.

Thus, the counterargument can be summarized into two main avenues. First, criticism emerges from the epistemological model of modernity, which identifies a framework characterized by a binary logic of ableism and functional diversity. Second, it highlights an inclination toward subjugating the group of people with disabilities to perpetuate a colonial logic of subordination. These criticisms, one pertaining to the epistemological model and the other to the ontological understanding of policy, are reflected in legal expressions that, in turn, respond to the sociological understanding of the facts.

The question posed by Lescano regarding the separation between policy and law, as discussed herein, implies the need to delineate the epistemological model and political theoretical framework more clearly to identify the position of individuals with disabilities and uphold their dignity. This encompasses not only cultural rights, such as engaging in dance, but also the challenges they face due to their marginalization in terms of bodily beauty, movement, and, in some cases, the perception of sound. The sociology of law offers an apt social context for engaging in these reflections.

CONCLUSIONS

Although facts drive the theoretical apparatus of the sociology of law, having a robust theoretical framework enables the examination and extension of understanding to other phenomena. For instance, critical ableist theory arises as an extension of feminist theories, illustrating the exclusion of the subject, namely the person with a disability.

1. Decolonial theory, as an epistemological model, can shed light on the boundaries of exclusion experienced by individuals with disabilities, thus indicating areas of inquiry within the sociology of law.

2. Theories of the sociology of law benefit from insights drawn from other disciplines, such as contemporary political theory, which focuses on the ontological nature of its subject matter.
3. Public policy provides the minimal legal response to establish a foundation for addressing the needs of people with disabilities.
4. According to the ableist perspective, functional diversity falls outside the scope of equality policy within a rights-based model.
5. Ensuring the right of people with disabilities to engage in dance can be achieved through public policy, establishing governmentality as a technical mechanism that interprets policy based on results rather than metaphysical or moral considerations.
6. Drawing from Roberto Esposito's theoretical framework, disability presents a challenge to impolicy's coverage. In some cases, individuals within the community may be unable to express their personality due to cognitive impairments or psychosocial conditions, limiting their awareness and agency.
7. Incorporating dance into the physical education curriculum allows it to be firmly integrated into the domain of public policy, ensuring its sustainability and facilitating effective outcome evaluation.

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SAME-SEX ADOPTION AND THE "BEST INTERESTS OF THE CHILD" DOCTRINE IN ECUADOR

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ABSTRACT

This article aims to analyze same-sex adoption and the doctrine of the "best interests of the child" in Ecuador. There has been considerable discussion regarding the right to be adopted and the applicant's right to adopt; nevertheless, beyond the argument of whether adoption is a right, paramount in both contexts are the best interests of the child. This perspective is necessary to ensure their proper development, well-being, and other guarantees established by current legal regulations, which are complemented by international treaties on children's rights.

The methodology applied considers the requirements, purposes, and most prominent aspects of adoption, and whether it is legal in Ecuador. The findings show that national legislation requires adopting couples be heterosexual, which contradicts the concept of family and family diversity promoted in the constitution. Several studies have indicated that applicants' sexuality or sexual orientation within the adoption process has neither constituted a turning point nor determined the individual's suitability. This assessment should be based on their abilities, attitudes, attributes, and other relevant factors that qualify them to responsibly care for and nurture a child or adolescent entrusted to them by the state.

RESUMEN

El presente artículo tiene como objetivo principal analizar la adopción homoparental y el principio de interés superior del niño en Ecuador. Mucho se ha dicho sobre el derecho a ser adoptado y el derecho del solicitante a adoptar, pero más allá de discutir si adoptar es o no un derecho, lo que debe prevalecer en cualquiera de ambas acepciones es el interés superior del niño. Esto se hace necesario para garantizar su desarrollo, bienestar y demás garantías establecidas por la normativa legal vigente, que se complementa con los tratados internacionales en materia de niñez.

La metodología usada para este artículo describe los requisitos, fines y los aspectos más emblemáticos de la adopción, y si esta es legal en Ecuador. Se concluirá que la legislación nacional ha impuesto como un requisito para adoptar que las parejas sean heterosexuales, lo cual es contrario al concepto de familia y diversidad familiar promovida en la constitución. Varios estudios han demostrado que la sexualidad u orientación sexual de los solicitantes dentro de un proceso de adopción no marca un punto de inflexión ni determina la calidad de idóneo de una persona. Esta debe ser calificada en función de sus aptitudes, actitudes y atributos, y demás consideraciones válidas que permitan su calificación como apto para que el Estado ponga en sus manos la tarea de la crianza y desarrollo de un niño o adolescente.

KEY WORDS: Same-sex adoption, best interests of the child, family, rights of the child, filiation.

PALABRAS CLAVE: Adopción homoparental, interés superior del niño, familia, derechos del niño, filiación.

JEL CODE: I31, I38, D13, J12, I38

RECEIVED: 12/05/2023
ACCEPTED: 12/12/2023
DOI: 10.26807/rfj.vi14.471

INTRODUCTION

This article addresses the issue of same-sex adoption, examining specific aspects through the perspective of the "best interests of the child" doctrine, as well as exploring related concepts including family, adoption, and marriage. It also reviews the relevant international and local legal frameworks and examines what comparative law has synthesized through jurisprudence regarding adoption by same-sex couples.

1. The best interests of the child and the scope of guardianship considering a child as a subject of protection

The concept of the "best interests" of children is one of the most important principles of the Convention on the Rights of the Child, which was unanimously adopted by the United Nations General Assembly on November 20, 1989, and ratified by Spain on December 6, 1990 (Sillero, 2016). This fundamental principle must be prioritized in all matters involving the rights of children and adolescents. The first paragraph of Article 2 of the Convention on the Rights of the Child delineates the scope of this principle in relation to institutions involved in ensuring children's comprehensive development. In this regard, the best interests of children constitutes the paramount and obligatory principle in processes involving childhood and adolescence, as fundamentally established in Article 3 of the Convention on the Rights of the Child (López, 2015).

The "best interests" principle is based on promoting rights such as physical integrity, ensuring healthy personality development, and growing up in a nurturing environment, all with the "primary purpose of the general well-being of the child" (Court of Justice of Guatemala, 2012). Other factors also contribute to the best interests of the child; the Legal Status and Human Rights of the Child (IACHR, 2002) indicates that the dignity of the human being and the unique characteristics of children must be considered, as should the particular characteristics of the child's circumstances. Further, this interest comprises several factors, serving as a fundamental principle for childhood development and the protection of the rights of children as recognized subjects of protection by the state, the family, and society. This underscores the tripartite duty aimed at ensuring the comprehensive well-

being of children. Moreover, this best interest doctrine "is the foundation for the effective realization of all human rights of children" (Aguilar, 2008); it must be a primary consideration to ensure it is evaluated and implemented in any decision affecting children (Cañarte, Cantos and Espinoza, 2022).

The doctrine analyzed herein is not merely a statement of what should be assured for children; it must be complemented by procedural safeguards and measures in accordance with the various aspects, rights, duties, and obligations involved in their overall well-being. The purpose of guardianship for children is to ensure comprehensive protection of their rights from childhood through adolescence while gradually recognizing and enabling their autonomy to exercise these rights (Guío, 2022). Ultimately, the best interests of children and adolescents should be a primary consideration in all legal matters concerning the effective exercise of their rights; its elements have been identified as components of social well-being and general welfare to "achieve the good life" and their holistic and comprehensive development.

2. Adoption as a legal act to preserve the rights of the child

Adoption is defined as "[t]he legal status by which the adoptee is conferred the status of son or daughter of the adopter(s) and the latter the duties and rights inherent in the parent–child relationship" (Pérez, 2010). From this definition arises the question: is adoption a right?

The Chilean Clear Language Commission (2018) has clarified that adoption is a judicial act that establishes a new kinship bond for a child or adolescent. A more specific definition indicates that full adoption is when there is a surrogate process to establish filiation in the absence of biological ties. Beyond being a judicial act or a legal status that protects the interests of the child, adoption is established as an opportunity that supports the right to family, as it allows children to have parental figures who guide their development into good citizens. Molinier (2012) has asserted that there is no right to adoption but rather an obligation of public authorities to select those who can adequately protect the interests of vulnerable children. Chaparro and Guzmán (2017) agree that the right to adopt is not expressly enshrined, but instead, the right of children to be adopted and live in an environment of respect and tolerance is protected, more than the act of adopting itself. Any

regulations relating to adoption should promote the interest of the adoptees, not the adopters.

Ecuador is recognized as one of the nations that has not adequately regulated the issue of adoption, and it is particularly concerning that little or no attention has been given to same-sex adoption (Quintero, 2015). However, regardless of the scope of same-sex adoption, the country still needs to address the bureaucracy in the adoption process. The Ministry of Economic and Social Inclusion (MIES, 2020) itself acknowledges that the adoption process undermines children's rights, as many fail to find a family due to delays and bureaucratic difficulties, despite the Constitution of the Republic of Ecuador recognizing families in their various forms and supporting nondiscrimination, as well as the "best interests of the child."

Adoption (Abad, 2017) is, therefore, an action undertaken by institutions responsible for children in care facilities that aims to secure a family and identity for each child and adolescent. The term "adoption" has been understood as an "institution," "judicial act," "false right," and "legal status," but beyond its definition, what truly matters is the scope of its protective power and the impact of safeguarding a child who lacks a family, even if it is not being implemented as effectively in reality.

3. Same-sex adoption

Before analyzing the concept of same-sex adoption, it is necessary to deconstruct the family diversity recognized in contemporary legislation, which acknowledges, to a certain extent, the right of families to freely form themselves, eradicating the traditional concept of the family (i.e., the man as father, woman as mother, and children). Indeed, what family diversity seeks is to recognize and embrace the rights of nontraditional family structures. This is a challenge that society must face, but, along with this effort, new needs and challenges arise for same-sex couples, such as parenthood and, correspondingly, adoption (Maroto, 2006).

Formally, there is no doctrinal impediment to same-sex adoption (Portugal and Araúxo, 2004). No arguments can be made against it from the perspective of mental health or any other discipline, except when reasons based on religious doctrines are invoked. Thus, barriers to same-sex

adoption, should they exist, cannot be unequivocal or definitive if they firmly indicate the suitability of homosexual couples to pursue adoption, and under no circumstances do they support the idea that it is detrimental to the child's development. A study by the American Psychological Association (2004) determined that gay and lesbian parents are just as likely as heterosexual parents to provide healthy and nurturing environments for their children. Similarly, child development studies have shown almost imperceptible differences in children raised by same-sex couples compared to by traditional families, which could easily occur among children raised by heterosexual parents. It was also found that children of same-sex couples, as a result of adoption, have normal social relationships with peers and adults. Consequently, the requirement of adoption suitability involves an assessment of their abilities, circumstances, and capacity to become an adoptive family (Bermúdez, 2007), which has nothing to do with an applicant's sexual orientation.

Thus, same-sex parenting is not a pretext for denying adoption, as various anthropological studies lend no support to the idea that civilization or a viable social order depend on the family as a heterosexual institution (Federación Española de Sociedades de Sexología, 2005). Based on the aforementioned conceptions, it has been asserted that the primary objective of adoption is to ensure the "protection of children who require a stable family environment conducive to their comprehensive development, with this being the prevailing interest for both the administration and the judge" (Martínez, 2007). The doctrine also establishes the need for further research into same-sex adoption and the recognition of rights for same-sex couples, such that the structural changes of contemporary families and recent changes in legal norms can be identified and incorporated (Nusdeo and De Salles, 2006).

Families built on natural, not solely legal, bonds are integral to the social fabric. According to Acevedo et al. (2017), same-sex foster families commit to providing affection, solidarity, respect, protection, and support, similar to traditional families, as guaranteed and recognized in the Ecuadorian Constitution. Reiterating this last idea, the scope of adoption in the Ecuadorian Constitution is unequivocal and does not allow same-sex adoption per se. According to Bernal (2015), the Supreme Norm regarding adoption is "openly at odds with the protective stance of the constitution, particularly concerning children, and emphasizes the defense of children's right to have a family" (p.56).

The prioritization of heterosexuality over the best interest of the adoptee, as asserted by the doctrine, distorts the true purpose of adoption (Basoalto, 2019). However, how does the sexual orientation of the adopter or applicant factor into this? Opponents of same-sex adoption are typically religious leaders and individuals with conservative views who reject same-sex unions based on their religious texts, arguing that only what they term as the "natural family" should exist (Vidal, 2017). Yet, the scope of the natural family cannot be limited to what a specific group wishes to impose, as this would undermine its "naturalness."

Countries such as Argentina, Mexico, and Brazil have moved away from conservative views and those against same-sex adoption, passing laws to allow it. This reflects the historical outcome of legal precedent established through the analysis of landmark cases, which have paved the way for legal frameworks governing adoption that transcend requirements such as heterosexuality, despite their continued provision in Ecuadorian legislation.

4. Legal analysis: Does Ecuadorian legislation allow adoption by same-sex couples?

According to Article 7 of the Universal Declaration of Human Rights, "all are equal before the law and are entitled without any discrimination to equal protection of the law" (United Nations, 1948). Article 16 establishes: (i) individuals' right to marry and form a family and that (ii) the family is the natural and fundamental unit of society.

Further, Article 20 of the International Convention on the Rights of the Child regulates the state's obligation to protect the family environment of children, while Article 21 regulates adoption, stating that the state must prioritize the best interests of the child with special primary consideration and ensure that all necessary safeguards are in place to guarantee that adoption is permissible (UNICEF, 2006). That being said, Article 67 of the Constitution of Ecuador states, "The family is recognized in its diverse forms" (Asamblea Nacional, 2008). As a cornerstone of society, the family merits special protection from the state, beginning with the recognition of these "diverse forms," reflecting the complex and evolving nature of society over time. The concept of family is no longer solely tied to marital bonds; this notion has gradually diminished in importance, without detracting from

the significance of marriage itself. Nevertheless, the Ecuadorian Civil Code states that one of the purposes of marriage is "procreation"; adoption would also serve the formation of a family.

Concerning marriage, the aforementioned article states that "[t]he union between a man and woman shall be based on the free consent of the contracting parties and on the equality of their rights, obligations, and legal capacity" (Asamblea Nacional, 2008). The Constitutional Court has ruled that marriage extends beyond the union between individuals of opposite sexes; rather, it encompasses the right of same-sex couples to marry. This interpretation challenges the restrictive nature of the second clause of Article 67 of the Constitution. Hence, it required supplementation through the pronouncement of the country's highest constitutional oversight body. The Constitutional Court has asserted that, under the principle of favorability, "[t]here is no prohibition on marriage between same-sex couples; instead, marriage between same-sex couples complements the constitutionally and legally recognized marriage" (Corte Constitucional, 2019).

Nevertheless, in terms of both traditional and diverse forms of marriage, Article 68 of the Constitution of Ecuador states in its second paragraph that "[a]doption shall only be granted to different-sex couples" (Asamblea Nacional, 2008). At first glance, this represents a requirement mandated by constitutional law and whose spirit should prioritize the well-researched concept of the child's best interests rather than solely considering the rights of the applicants. However, the interpretation provided in the preceding paragraph is succinct, given that the current article has cited and analyzed evidence suggesting that the adopter's sexuality should not be a determining factor, as it has been shown not to adversely impact children's development. Therefore, in this case, invoking the principle of the best interests of the child as a pretext to deny same-sex adoption would not make sense. In summary, it has been demonstrated that same-sex couples in Ecuador face this discrimination, as they are restricted by an apparent suitability requirement despite evidence that the sexual orientation of the adoption petitioner neither impacts nor compromises the development or personality of the child within the framework of marital equality.

The paradigm shift has allowed the Civil Code to perceive marriage as the union of two individuals, as stated in Article 81 of the aforementioned

legal framework. Article 314 sets forth the following fundamental concept of adoption: "Adoption is an institution by virtue of which a person, called the adopter, acquires the rights and assumes the obligations of a parent, as set forth herein, with respect to a child, called the adopted" (Congreso Nacional, 2005). Article 319 establishes that married persons may adopt persons of either sex without distinction, by mutual agreement. Further, consistent with this analysis, Section 151 of the Children and Adolescents Code stipulates that the purpose of adoption is to secure a suitable, permanent, and definitive family for children or adolescents who are socially and legally eligible for adoption (Congreso Nacional, 2002). Likewise, Article 152 of the aforementioned source states that full adoption is that recognized by the law, as it encompasses all rights, attributes, duties, responsibilities, prohibitions, disqualifications, and impediments inherent to the parent–child relationship. However, when discussing the requirements for adoptive parents, Article 159, clause 6, reaffirms what is expressly stipulated by the constitution. Consequently, it specifies that "[i]n cases of adoptive couples, they must be heterosexual and have been in a marriage or common-law union that meets the legal requirements for over three years" (Congreso Nacional, 2002).

According to Judgment No. 11-18-CN/19, the Constitutional Court has stated that "[t]he right to family is a right or goal to which every person can aspire without any discrimination. Marriage is a right or means that allows access to forming a family" (Corte Constitucional, 2019). Thus, heterosexual marriage implies "a prohibition on alternative ways of constituting a family beyond the marriage contract" (Corte Constitucional, 2019). This jurisprudential precedent makes it evident that contemporary law has openly moved away from the concept of "traditional family," thereby highlighting the contradiction. The family, as the cornerstone of society, should prioritize the best interests of the child and not concern itself with the sexuality of the applicant in the adoption process.

Ensuring the genuine well-being of children hinges on granting them access to a family during this process. This family should comprise suitable individuals who meet specific requirements; under no circumstances should sexual orientation be used to justify suitability or qualification to be a parent. The Constitutional Court (2019) has stated that if people, regardless of their sexual orientation, are endowed with equal dignity and deserve equal respect, then they should be comparable in exercising the right to marriage;

therefore, why should forming a family not be considered constitutionally valid for all? Denying gay marriage causes "excessive harm that is not commensurate with any benefit, as it does not affect heterosexual couples' right to marriage" (Corte Constitucional, 2019). The same principle should apply to the denial of same-sex adoption in Ecuador, as it constitutes an unjustified, discriminatory, and unconstitutional measure.

National law, primarily because of the requirement of heterosexuality for adoption, overlooks the fact that the child is not an object or a right. Instead, as stated by the Constitutional Court (2018), the child is "the focal point of right protection, meaning the one to whom the right is owed." Similarly, the Constitutional Court (2018) defined the best interests of the child as a *sine qua non* requirement to be considered when adopting any administrative, legal, or other type of decision in which the rights and guarantees of children are determined. Finally, it is incorrect to argue that imposing a heterosexuality requirement on the applicant is in the best interests of the child. Such an imposition has not been proven indispensable or vital for child protection; on the contrary, studies have demonstrated the opposite. In Ecuador, same-sex adoption is not permitted, as constitutional regulations limit the right to form a family to children whose applicants or prospective parents are heterosexual couples or of a different sex. This restriction effectively denies children the opportunity to have diverse role models thanks to the conservative biases within the framework of a "constitutional state of rights and justice."

Based on the preceding discussion, the erroneous belief that prohibiting same-sex adoption protects the child lacks support from scientific or reliable studies. This does not mean that the behavior of same-sex families with adopted children has not been analyzed but that previous research has not shown any deviations in children's sexual orientation. Therefore, this misconception reflects stereotypes within a conservative society (Andrade, 2022).

5. A comparative legal perspective

Mexican jurisprudence has established that "[t]he existence of marriages and families with homosexual members neither promotes nor prohibits, much less excludes, the continuation and growth of heterosexual families" (Corte Suprema de Justicia Mexicana, 2010). Therefore, same-sex adoption is and should be legal, as it aims to ensure the social protection of the child.

Subsequently, the Mexican Supreme Court of Justice (2012) argued that excluding same-sex couples from the institution of marriage perpetuates the idea that they are less worthy of recognition than heterosexual couples, thus undermining their dignity as individuals. In 2014 in the State of Campeche, Mexico, it was concluded that sexual orientation cannot be a determining factor in deciding adoption suitability, regardless of whether the applicants are in a heterosexual marriage or same-sex partnership (Comisión de los Derechos Humanos, 2014). This is because sexuality itself is not a *sine qua non* requirement for assessing applicant suitability.

Toward the end of the 20th century in Argentina, the court emphasized that the establishment of a family is crucial in the adoption process; the institution of marriage was seen as particularly significant in ensuring the stability and preservation of the adopted child's family unit (Juzgado Civil de Mendoza, 1998). In Uruguay, "[t]he social assessment of homosexuality is changing, and states and their legal systems must facilitate this social change and not legitimize or support forms of discrimination that undermine human rights" (Rey, 2014). This suggests that in Ecuador, the legalization of same-sex adoption will likely require a comprehensive process that involves interpreting the second clause of Article 68 of the Constitution. Ecuador's Constitutional Court may interpret that within the context of "couples of different sexes," this difference is a subjective component of each individual and their identification at the time they complete an application. Otherwise, the only way to allow same-sex adoption would be to reform the Supreme Norm.

Colombia stands out as a country with notable advancements in same-sex adoption. Its Constitutional Court has asserted that there is no valid reason to deny a child the opportunity to be placed with a same-sex couple. This is because the administrative officer overseeing adoption processes evaluates the suitability and stability of each couple on a case-by-case basis, ensuring the doctrine of the child's best interests is upheld (Corte Constitucional Colombiana, 2009). Same-sex adoption in Colombia is subject to the following arguments set forth by Judgment C 802/09:

1. Scientific evidence indicates that children adopted by same-sex couples experience no negative impact on their overall development. Restricting adoption by homosexual couples means limiting children from being part of a family.
2. According to the Colombian Constitution, an individual's sexual diversity or gender identity cannot be an indicator of unsuitability for adoption.
3. From the perspective of the child's best interests as outlined in the Constitutional Norm, the law cannot establish a justified difference regarding the sexual orientation of couples seeking to adopt.
4. Adoption processes are aimed at guaranteeing the doctrine of the best interests of the child, irrespective of the sexual orientation of the applicants. Competent authorities must assess whether the applicants meet the necessary criteria, without considering the sexual orientation of the adopting couple (Corte Constitucional Colombiana, 2009).

CONCLUSIONS

The doctrine of the best interests of the child is not merely a statement of what should be ensured; it must also be complemented by procedural guarantees and processes that address the various aspects, rights, duties, and obligations involved in the overall well-being of children and adolescents as subjects entitled to protection and care by the state, family, and society.

Barriers to same-sex adoption, should they exist, cannot be absolute or definitive if same-sex couples' suitability to access adoption is solidly supported. In no case has the conclusion that same-sex adoption is detrimental to the child's development been substantiated.

Same-sex couples in Ecuador experience discrimination, as they are limited by a narrow requirement of apparent suitability. This constraint persists despite the understanding that the sexual orientation of adoption applicants does not adversely affect the child's development or personality within the context of marriage equality.

In Ecuador, same-sex adoption is not allowed, as constitutional rules have restricted the right to form a family only to children whose applicants or prospective parents constitute couples of different sexes or those that are heterosexual. This effectively prevents children from having a role model due to the conservative biases of a "constitutional state of rights and justice." It is incorrect to argue that requiring applicants be heterosexual is in the best interests of the child, as such an imposition has not been justified as vital for the protection of children. On the contrary, studies have shown the opposite. In countries such as Uruguay, Mexico, Argentina, and Colombia, same-sex adoption is allowed and recognized through jurisprudence. The adoption process has been established as a mechanism to ensure the doctrine of the best interests of the child, wherein the sexuality of the adoptive parents is neither a barrier nor a requirement for assessing adopter suitability. It is the responsibility of regulatory bodies to verify if applicants meet the necessary requirements to assume parental responsibility for a child and grant them filiation rights; under no circumstances should sexuality be considered for such a declaration.

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