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**A-Legal space as a political strategy:  
an analysis of constitutive power  
and democracy based on case studies from  
Latin America**

**Carys Hughes**

**Thesis submitted for the degree of Doctor of Philosophy**

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## Abstract

This project develops a theory of a-legal space as a political strategy. A-legal space refers to the space created by initiatives which assume a quasi-legal or quasi-institutional form without any official basis, or where they exceed their recognized institutional basis. Examples include peoples' tribunals such as the *World Tribunal on Iraq*, in which the US and UK governments were tried for war crimes in Iraq; the *Aboriginal Tent Embassy* where aboriginal activists protesting for land rights erected tents outside the Australian Parliament and declared it an embassy; and unauthorized referenda such as the first Catalan independence referendum in 2009. The use of a-legal space is an under-studied and un-theorised tactic employed with increasing regularity by social movement, civil society, and sometimes, state and sub-state actors.

The project explores several case studies from Latin America including the Bolivian based *International Tribunal on Climate Justice*; an unofficial recall referendum on Venezuelan President Carlos Andrés Pérez in 1992; an unauthorized ballot organized by the Colombian student movement in which two million people participated and led to the creation of Colombia's Constituent Assembly; and Honduran President Zelaya's planned non-binding poll in 2009 which led to his removal in a coup. It is argued that the use of a-legal space is a discursive strategy whereby actors imagine, legitimate and being to institutionalize a counter-hegemonic order. Specifically, a-legal initiatives have the potential to create 'tipping events' which shift the political grammar and open up new political possibilities.

**Key words:** a-legal space; a-legal initiatives; a-legality; tipping events; political grammar; constitutive power; Latin America; new Latin American constitutionalism; radical democracy.

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## Introduction

Is there a space for action between the legal and the illegal? In 1992, in Venezuela, a marginal political party called *The Radical Cause* organised a referendum on the continued rule of President Carlos Andrés Pérez. The referendum had no official basis in Venezuelan law, and no binding implications. But up to 500,000 citizens are reported to have participated, with almost ninety percent voting that ‘No, Pérez should not continue governing’ (Harnecker 2007). Inspired by this event, Chilean theorist Marta Harnecker coined the term ‘a-legal space’: a “whole other arena” which “is neither legal nor illegal” (2007, p. 138). According to Harnecker (ibid.), this referendum helped to create the political situation in which Pérez was forced to resign, less than a year later: “the massive participation of the citizenry – although the results were not recognised – meant it was now a political fact” (2008, p.145). There are, she contends, countless other examples of a-legal spaces, which offer great potential for social movements to “raise consciousness, mobilise people and have them participate in a way that builds the anti-system social force” (2007, p.112). However, Harnecker leaves this intriguing idea undeveloped. The aim of this thesis is to pick up where Harnecker left off, and to develop a theory of a-legal space as a political strategy.

I argue that there are, as Harnecker suggests, many cases around the world which can be characterised as a-legal spaces. These include unofficial referenda, like the Venezuelan referendum against Pérez, but also unofficial tribunals, commissions, debt audits, monitoring projects and even an embassy - amongst other forms. Examples include the UK’s *High Pay Commission*, established by campaign group

*Compass* to investigate the effects of high pay on society; peoples' tribunals such as the *World Tribunal on Iraq*, in which the governments of the UK and the US were tried for war crimes in Iraq; and citizens' debt audits such as the Ecuadorian *Public Debt Audit Commission*, which was initiated in 2007 by the Ecuadorian government and civil society to assess the legitimacy and legality of Ecuador's foreign debts. These are activities that are not normally grouped together. However, I argue that it is helpful to understand them as variations of the same phenomenon. Despite the variety of political, historical and cultural contexts in which they have taken place, these activities share certain common characteristics which distinguish them from other forms of contentious politics. Most notably, they assume a quasi-legal or quasi-institutional form, emulating the symbols, language and procedures of formal institutions of constituted power, without any formal basis or exceeding a recognised institutional basis. This tactic is employed with increasing regularity by social movements, civil society, and sometimes state and sub-state actors, yet remains under-researched and un-theorised.

There are a number of questions which I take as the most fundamental and which serve to guide this research project:

1. Can we sustain the notion of a-legal space as an ontologically distinct category of action which transcends the dichotomy between the legal and the illegal?
2. Why do actors adopt this approach and what do they hope to achieve?
3. By what mechanism might this tactic function to bring about social or political change?
4. How do different forms of a-legal space differ and to what extent do they really

constitute a common tactic?

5. When has this approach been successful and what factors may influence its impact?

In this introductory chapter I explain the approach I have taken to investigate this phenomenon. I start by discussing the theoretical framework within which the project is situated, and then describe the particular research design and methods used. I discuss the specific case studies which I selected and why. I then discuss some of the methodological challenges faced in the course of this research, and how I attempted to overcome them. Finally, I provide an overview of the structure of the dissertation and the argument which I will develop.

## **i. Theoretical framework**

Discourse theory, originally formulated by Ernesto Laclau and Chantal Mouffe (1985), provides the theoretical framework within which this project is situated. There are several reasons why this is the appropriate framework. Firstly, within this framework, social reality is discursively constituted: objects, people, actions have no objective meaning, but are constructed in language through discourse. This is not to reduce everything to discourse: there is a real world, external to language, but it can only be conceived and represented through discourse (Howarth and Stavrakakis 2000). Politics is the struggle to define social reality. More specifically, competing political projects, defined as 'hegemonic projects', struggle to expand their discourse and ultimately to hegemonise the 'field of discursivity' (ibid.). The use of a-legal space, I suggest, is best conceived as a particular type of counter-hegemonic discursive

strategy. Unlike strikes, boycotts or occupations, organisers cannot hope for *direct* material impacts. And unlike a formal legal strategy, they cannot hope for binding legal implications. In fact, unlike many forms of contentious politics, these activities do not generally disrupt normal life at all; or at least not in the immediate future. Instead, they function at a discursive level, contesting the dominant construction of reality, and prefiguring an alternative. Moreover, as I will show in the case study chapters, organisers' descriptions of what they are doing and what they are trying to achieve reflects the logic of hegemonic struggle. These initiatives are intended to advance their marginal counter-hegemonic discourse and thereby shift the range of political and legal possibilities available. My central thesis is that a-legal space has potential as a way to shift the political grammar, thereby opening up a new range of political possibilities in a given context. I draw on a range of conceptual tools and theories located within the political discourse theory tradition, to elaborate a conceptual framework through which to explore this idea.

## **ii. Research design**

I explore the phenomenon of a-legal space through an analysis of four case studies. For various reasons a case study design is the most suitable approach for this research. Case study research is particularly well suited to new areas of enquiry, where the research has an exploratory purpose and the goal is to support the development of new theory (Yin 2009; de Vaus 2001; Eisenhardt 1989). I sought to explore preliminary and fundamental questions about the use of a-legal space, in the absence of an already existing body of literature on the phenomenon: when and why do these initiatives come about? How should we understand the organisers' objectives? And indeed to what extent should a-legal space be considered a distinctive



approach or strategy? A case study design allows for an exploration of such “‘how’ and ‘why’ questions” (Yin 2009, p. 4). Moreover, case studies suit the study of phenomena for which there are a large number of variables, and relatively small numbers of cases (de Vaus 2001). One of the interesting features of a-legal space is the diversity of contexts in which it has been employed; hence there are countless known and unknown variables, which it would be impossible and undesirable to try to isolate. Through an in-depth exploration of four particular instances where actors have taken an a-legal approach, the intention was to develop an understanding of the phenomenon, which could then be tested, revised and expanded upon through subsequent research studies.

The case studies are explored through a range of qualitative research methods, in addition to secondary sources, where available. The first two are explored primarily through secondary sources, with some original analysis of documentary data including presidential statements, Decrees and court rulings. The other two are explored in-depth through mixed methods including semi-structured interviews with informants, archival research of newspaper coverage, and textual analysis of publicity materials. For several reasons, qualitative research methods were most appropriate at this stage of an investigation into the topic of a-legal space. The research questions I seek to explore are preliminary and fundamental, pertaining to the nature of this form of political action and, indeed, the extent to which it can be conceived as a distinct political strategy. I want to understand how organisers construct what they are doing and how they assign meaning to their actions, and I don’t want to impose preconceived categories and assumptions onto the research process. The project is situated within a discourse theoretical framework, according to which politics

involves the struggle to define social reality (Howarth and Stavrakakis 2000). If a-legal space is conceived as a particular form of counter-hegemonic strategy, then central to this is understanding how organisers and other stakeholders use this form of action in their efforts to hegemonise the wider discursive field. This is best understood through in-depth interviews in which they can explain their actions in their own words.

Future research into a-legal space could fruitfully employ quantitative methods to explore a range of important research questions. One might use a survey method to assess the demographic status, political preferences and other specifics of a-legal space participants (those who attend a peoples' tribunal or vote in an unofficial referendum, for example). Alternatively, one might explore correlations between the prevalence of different forms of a-legal space and contextual factors such as regime type, governing party, levels of independent media, and so on. But quantitative research methods will build on, and cannot precede, this more preliminary exploration of foundational questions such as: what is a-legal space? How is it used? What is its value?

### **iii. The case studies**

As Stake (1994, p. 243) points out, in a case study research design where cases must be chosen from a number of possible alternatives, "nothing is more important than making a proper selection of cases". The four examples of a-legal space which were chosen for exploration through secondary and empirical research were carefully selected for their potential to contribute to a theory of a-legal space. Various specific features were important in their pertinence to emerging research questions and

hypotheses, which I outline below.

All four case studies selected come from Latin America. The decision to focus on the use of a-legal space in Latin America is based partly on the prevalence of this approach in the region. A-legal initiatives can be found all over the world, but there has been a proliferation of this type of activity in Latin America over the last twenty years. Civil society-based debt audits; peoples' tribunals; and non-binding referenda initiated by governments, social movements and other political actors are just some examples of the phenomenon in this region.<sup>1</sup> However, the motivation to focus on Latin America was based on more than the prevalence of the approach there. The appearance and increased frequency of a-legal tactics has correlated with important shifts in Latin American politics associated with the so-called 'pink tide' and I argue that the phenomenon can be better understood when situated in the context of these wider political and social transformations. Specifically, I suggest that the use of a-legal space in Latin America reflects the turn to a new kind of constitutionalism by left governments and social movements across the continent. Therefore, through exploring the use of a-legal space in this context the intention was to explore its relationship to this wider phenomenon.

The first two case studies were selected mainly because of the seemingly extraordinary impact that they have had. Both involve unofficial, non-binding referenda, initiated in the context of wider struggles for a constituent assembly to re-

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1 For information on peoples' tribunals in Latin America see Saguier (2012) "Peoples' tribunals in Latin America", for a discussion focused on peoples' tribunals intended to promote corporate accountability. The first citizens' debt audit was initiated in Brazil in 2001, and the first 'official' debt audit was the Ecuadorian *Public Debt Audit Commission*, which had the support of President Correa's government. For more information and a history of debt audits in Latin America and elsewhere see Dearden (2011).

write a national constitution. However, the two cases involve very different actors and had very different outcomes. The first is the case of the '*seventh ballot*' which took place in Colombia in 1990. In a context of profound social and political crisis, the Colombian student movement organised an unofficial ballot on the possibility of convening a constituent assembly. The students called for citizens to insert an additional unauthorised ballot paper into the ballot box, during the formal congressional and regional elections in March 1990. Despite the initiative's informal status, over two million Colombians reportedly participated (Novoa García 2011; Van Cott 2000) and the event is generally credited with bringing about the convocation of Colombia's Constituent Assembly which re-wrote their hundred-year-old constitution, and was a precursor to a wave of constitutional reform across Latin America.

The second case study is Honduran President Zelaya's proposed '*fourth ballot box*', which was a non-binding poll intended to allow Hondurans to express their support or opposition for convening a Honduran constituent assembly. Like the *seventh ballot*, the *fourth ballot box* poll had dramatic (though unintended) consequences. After ignoring a series of legal rulings against the planned poll, President Zelaya was removed from power in a coup on the morning it was due to take place. Hence, as I discuss in more depth in chapter 3, both initiatives had a profound impact on each country's political future. It is for this reason they make exciting case studies. Through analysing the course of events and existing scholarly analyses, in each case, I hope to better understand when and why this tactic might have impact.

These first two cases are explored primarily through secondary sources, in addition

to some documentary evidence including court rulings and government statements. The analyses of each case prove illuminating; however, various questions are left unanswered and in need of further exploration. How did organisers understand what they were doing? What did they hope to achieve? And does this support or challenge the account of a-legal space so far developed? A deeper understanding of this tactic, and the motivations of organisers, is dependent on more in-depth empirical research. On this basis I decided that it was necessary to visit Latin America to carry out primary research into further case studies.

The third case study – and the first explored through in-depth primary research – is the Venezuelan *Radical Cause* party's referendum on the continued rule of President Carlos Andrés Pérez in 1992, which was described by Harnecker (2007; 2008) in her original discussion of a-legal space. The final case study, also explored through primary research, is the *International Tribunal on Climate Justice*, an international peoples' tribunal based in Bolivia, organised by Bolivian civil society which held hearings in 2009. For this case study I was able to make use of interview data I had gathered two years earlier when researching the case as part of my Masters' degree.<sup>2</sup> For both cases I conducted a series of semi-structured interviews with key organisers of these initiatives, and other participants and commentators, and collated publicity materials and newspaper coverage, in addition to reviewing the (limited) secondary sources available on each case. The result is a deeper analysis of the a-legal space tactic, as it played out in these two initiatives.

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<sup>2</sup> I explored the idea of a-legal space and the *International Tribunal on Climate Justice* for my final year dissertation for an MA in Communication for Development. This research was the precursor and original motivation for this doctoral project.

These two cases were selected as the subjects for empirical study, out of the many possible alternative options in Latin America, for a number of reasons. Firstly, I included both a referendum and a peoples' tribunal in the hope of exploring two 'most different' forms of a-legal space. Inductive case study research, such as this, tends to consist of a sample of cases chosen for their diversity, in order that diversity and convergences in practice can be uncovered (Yin 1993). There are several potentially significant differences between peoples' tribunals, citizens' debt audits, informal commissions, unofficial referenda and the various other activities here labelled 'a-legal space'. However, one particularly notable difference is the role played by new information and 'evidence' in different types of a-legal space. Peoples' tribunals, peoples' commissions, and citizens' debt audits, amongst other forms, tend to involve the compilation and presentation of large amounts of technical information as a central component to their activities. This component, however, plays no role in other types of a-legal space such as unofficial referenda. The choice of a peoples' tribunal and a referendum was intended to capture the two extremes with respect to this characteristic. My understanding of the two forms, upon embarking on the empirical research, was that peoples' tribunals develop an elaborate case to support a particular perspective or discourse, drawing on reams of legal, scientific, and other expertise. However, referenda ask for the affirmation or rejection of a specific proposal ('should we create a Constituent Assembly?'; 'should President Carlos Andrés Pérez continue governing?'), for which the case has already been made elsewhere. This difference is significant. If a-legal space be conceived as a hegemonic strategy intended to change the way a particular issue is understood and constructed within wider discourse, then how one understands and theorises the process of discursive change is central. Yet these different emphases on information provision

and ‘education’ could suggest quite distinct models of discursive change. Through analysing organiser accounts in both cases I hoped to assess the extent to which these initiatives indeed exemplify a common political strategy; what features peoples’ tribunals and popular non-binding referenda share, and how they differ.

In addition to the desire to include both a referendum and a tribunal in the project, there were reasons for the selection of these specific cases. Despite both taking place in South America within a twenty-year period, the social and historical contexts of the two cases are very different, as are the actors who initiated them. Whilst the *International Tribunal on Climate Justice* is a contemporary initiative (the focus of the analysis is the 2009 hearing), the *Radical Cause* party’s 1992 referendum on Pérez took place prior to the Latin American left turn, under a neoliberal government and the old model of pacted democracy. And this referendum was organised, for the main part, by a relatively small political party (although community groups and members of the public helped to varying degrees in different instances – as I discuss in more depth in chapter 4). The *International Tribunal on Climate Justice*, on the other hand, was a collaborative effort of a coalition of NGOs, community organisations and social movements in some instances from across Latin America, (though headed up by one specific NGO). Hence the choice of these two cases allowed me to explore the use of a-legal space in significantly different contexts and by somewhat different actors, thereby contributing to the analytic generalisability of my findings (Miles and Huberman 1994). Through in-depth exploration of this type of tactic at such different historical conjectures, I hoped to develop an understanding of the logic of this form of hegemonic practice.

One objection to this choice of cases might be the excessive emphasis given to referenda. However, I was keen to include a referendum in the empirical research, given the limitations of secondary research, and the value of including strongly contrasting forms of a-legal space. The reason that the *seventh ballot* and the *fourth ballot box* were not selected for in-depth analysis was so that I could better test the theory that these cases inspired. Recent scholarship in democratic theory and constitutional law has championed a new kind of constitutional regime which has been adopted in countries across Latin America (Colón-Ríos 2012; Martínez Dalmau 2008). Venezuelan, Bolivian, Ecuadorian and Colombian constitutions all now include the provision for citizens to trigger the creation of a constituent assembly to re-write the national constitution. As Joel Colón-Ríos (2012, p. 103) puts it, this democratic development provides “an opening, a means of egress, for constituent power to manifest”. The Colombian *seventh ballot* and the Honduran *fourth ballot box* referenda were, I suggest, attempts to create such an opening where none exists within the formal system. They should be seen as part of a constitutional process which took place in these countries. Drawing on these cases, I suggest that this might be a helpful way to understand the use of a-legal space more generally. However, in initiatives which don't seek to initiate a process of constitution writing through a constituent assembly, this claim is more contentious. The suitability and the utility of this characterisation are more complex questions. Therefore, investigating less obviously constitution-orientated initiatives in more depth allows for an exploration of this idea. Finally, studying the *Radical Cause* referendum provides the opportunity to re-visit the event which was the original inspiration for Marta Harnecker's idea of a-legal space.



Of course, a study of only four instances, and only two in-depth, where actors have made use of a-legal space as a tool to bring about change is necessarily limited in what it can tell us about the phenomenon in general. This project is constrained, by time and resources, to a study of these few case studies. However, through this study I hope to develop a preliminary account of the phenomenon of a-legal space as a political strategy. Further research would explore other types of a-legal space, such as citizens' debt audits, which have become important tools of Latin American left governments and of civil society in Latin American and Europe.

#### **iv. Methodological challenges**

Whilst promising a deeper and richer account of the a-legal space tactic, empirical research on these initiatives entails methodological challenges not encountered with secondary research. I discuss now some of the particular challenges encountered in the two empirical studies I carried out and explain how I attempted to deal with them.

Researching the *Radical Cause* party's 1992 referendum on President Pérez involved various challenges. I was investigating an event that had taken place over a single day, twenty years ago, initially with no contacts in the *Radical Cause* party or with anyone who had been involved, and with only a limited period to spend in Venezuela. This prevented various difficulties for obtaining data about the event. However, verifiable and reliable data was acquired. In 1997 the *Radical Cause* party divided, with the majority of members leaving to form a new party (*Patria Para Todos*, which would go on to form part of the government in 1999). Most of the individuals who

played key roles in the referendum against Pérez in 1992 were in the group who left the *Radical Cause*. As a result, there is no organisation with an institutional memory of this informal referendum or which has sought to preserve a record of the event. Perhaps, partly for this reason, none of the materials from the referendum such as voter slips, or lists of voters had been retained.<sup>3</sup> Therefore, I was dependent on the accounts of organisers and other possible witnesses, supported by newspaper coverage, for information such as the voter turnout, levels of participation in different areas, numbers of voting points and other specifics.

Moreover, there is reason to be cautious about relying on the accounts of interview participants: in some cases they may have provided an inflated or otherwise distorted account of the referendum. Most of the individuals interviewed who organised the referendum are still in professional politics, several in the *Radical Cause* party, and therefore have an incentive to inflate the impact and importance of an event in which they played a key role. Aside from the motive to self-aggrandise, is the concern that participants might have told me what they thought I wanted to hear. Participants knew I had come from the other side of the world to research this single event that they were involved with twenty years ago: they may have felt a pressure to assure me it was an important event in their eyes (de Vaus 2001).

One solution was to counterbalance key organisers' accounts with other witnesses to generate a triangulated account. However, an additional challenge was locating informants from a range of different backgrounds and positions. An ideal case study design draws on interviews with a diverse range of stakeholders (Yin 2009), which

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<sup>3</sup> A couple of organisers I interviewed made efforts to find these kinds of materials, but were unable to locate anything useful.

build a three-dimensional picture of the case. I would have liked to conduct multiple interviews with organisers from all levels of the party hierarchy; from individuals who participated in this event but were not organisers nor involved with the *Radical Cause* party; members of the public who voted; and individuals who chose *not* to engage with this event, for whatever reason. In practice, whilst I had expected to encounter problems gaining access to key organisers, in fact this was easier than locating ordinary participants or lower level party activists. It was relatively easy to track down a couple of individuals who were well-known militants with the *Radical Cause* party in 1992, in Caracas, and who had been involved with organising the referendum. Through these contacts I was introduced to a group of other key organisers from the National Leadership of the *Radical Cause* party in 1992. However, more challenging was finding the grassroots party activists who had made the action happen on the ground, through running polling stations, publicising the action, and engaging the public. And searching for ordinary people who had voted or simply remembered the event was like looking for a needle in a haystack. I eventually interviewed one rank-and-file party activist, who helped organise the referendum in Caracas and one middle ranking party deputy, (in addition to the key organisers from the party's National Leadership). I also interviewed two members of the public who participated in the referendum, an academic who had studied the event and a minister from the Pérez administration in 1992. These interviews provided fascinating data from diverse perspectives, but it would have been ideal to interview multiple subjects from each of these groups.

Another (to some extent related) problem was the gender balance of interview subjects. All informants were men, apart from one woman (a journalist who had

participated in the referendum). This reflects the dominance of men in the party leadership during this period. However, as with the dominance of party elites, it impacts upon the quality of the data I received. In researching the use of a-legal space through interviews with stakeholders, authorship is important. A-legal space is a response to exclusion. Actors turn to the use of a-legal space in response to formal institutional closure, when they perceive no opening within the formal system through which their discourse can be heard and can help to define the terms of debate. Accordingly, the project is based on a radical democratic conception of politics, in which the political extends beyond the institutional arena (c.f. Laclau and Mouffe 1985; Howarth 2004; Norval 2009). The inclusion of traditionally marginalised and excluded voices, as well as an “attentiveness to the possibility of ‘deprivation of voice’” (Norval 2009, p. 308, emphasis added) are fundamental to political analysis within this theoretical framework. In unintentionally privileging the voices of party leadership and men, I may have foregone a more complex, contested and nuanced picture of this event and how it was experienced and constructed by stakeholders.<sup>4</sup>

Drawing on the data I did receive, I did not notice particular differences between the interviews with party leadership, and middle ranking and rank-and-file level activists. Indeed, one interesting finding was the broadly similar discursive constructions of the referendum which were used by informants from the party elite and the rank-and-file, as well as participants from outside the *Radical Cause* party. For example, as I discuss in-depth in chapter 4, the rhetorical construction of the referendum as

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<sup>4</sup> Indeed, this would be an important area of further research on the patriarchal privileging of discursive political and legal spaces, drawing on feminist critiques such as Meehan (2013), Fraser (2013), and Dean (2013).

“offering a way out of the crisis” was found in all organiser and participant accounts. However, this is not to claim discursive divergences would not emerge through analysis of a wider data set.

However, another kind of difference in informant interviews *was* evident. This is a difference of style rather than content, and relates to the challenges of interviewing political elites. Many of the interview subjects from the National Leadership in 1992 remain in professional politics, are well-known and in various instances now head-up different political parties. As already noted, they may have felt an incentive to inflate the significance of the action or cast events so as to support a particular political position. More generally, conducting qualitative interviews with politicians involves a unique set of challenges (Berry 2002; Harris 1991). As interview subjects they are unusually accustomed to being interviewed; to presenting a carefully constructed narrative of past events and decisions; and to saying no more than they intend to. At times, during my interviews with key organisers, I had the impression I was hearing a well-crafted narrative, which had been rehearsed many times before. This is not to suggest that their responses are unreliable, but is important to keep in mind. Key organisers told me what they wanted me to hear, and tended to avoid the revealing slip-ups and contradictory statements more typical in interviews with ordinary members of the public.

An additional, different kind of problem with all interview data – organiser and non-organiser alike – is the passage of time since the event. This initiative took place twenty years ago, in a year in which there were two coup attempts, regular protests, occupations and rioting, and the president was soon to be impeached. Expecting a

detailed and accurate account of the events of a single day is perhaps unrealistic. Part of the objective of the research was to understand why organisers adopted this approach, what it meant to them, and how they defined success. The problem here will be that twenty years of hindsight shapes their accounts. Certainly, we can know that how they construct this event and its meaning will not be the same today as it would have been at the time.

To some extent these problems cannot be overcome and it is necessary to simply be aware of the limitations of the data, and exercise caution when drawing conclusions. However, I took several measures in an effort to triangulate the information I gained from different sources and improve the reliability, balance and depth of the emerging account of the *Radical Cause* referendum on Pérez. Through utilising the Venezuelan National Library newspaper archives, I was able to locate much of the newspaper coverage of the event, which appeared in several different national newspapers. Press coverage can help substantiate organiser claims regarding turn-out, levels of participation nationally, and other features of the event. Granted, there was no independent election monitor, and participation figures printed in the newspapers came directly from the *Radical Cause* party at the time, and so also require a degree of caution. However, from press coverage it is possible to get a sense of the impact on the day and the levels of public participation. For example, photographs of the crowded plenary room where organisers sat across the floor counting piles of ballot papers can be used to support organiser descriptions of 'the count'. And photographs of people queuing up to vote further substantiate organiser accounts (see appendix A).

Another approach I used to test and deepen the emerging picture of this event was to compare and contrast participant testimony in relation to different factors including current political affiliation; current involvement in professional politics; and involvement with the *Radical Cause* party then and now. I also used the accounts of interview participants whom it would seem have little or less to gain from inflating or otherwise distorting their experience of this event, as a counterbalance against the reliance on organiser accounts. For example: Roberto Rodriguez was a rank-and-file *Radical Cause* activist in 1992 and helped to organise the referendum. In his interview he describes his experience of the event based in the 'situation room' in Caracas. He recalls mass participation and the ensuing debates in the media, and talks passionately about his experience of the event. Rodriguez was never involved with politics professionally and is now a librarian at the Venezuelan National Library, which is where I met him. Accounts such as his are less likely to have been influenced by the desire to construct a narrative of personal or party glory and can be used to support the accounts of other organisers. Similarly, useful counterpoints are provided by participants who were not involved with the *Radical Cause*, including activist Juan Contreras and journalist Delia Castillo, who have nothing apparent to gain from inflating the significance of the party or this particular initiative.

Investigating the *International Tribunal on Climate Justice* in Bolivia brought a different set of methodological issues, as well as some of the same. As a contemporary project, issues around the reliability of memory were far less relevant. At the time of the interviews, the tribunal's 'Preliminary Hearing' had taken place just a few months earlier and organisers were engaged in planning the next event. Their testimony is fresh, detailed, and provides insight into their motivations and thoughts about the

project whilst it is still taking place. On the other hand, this comes with different problems. Key organisers would be unlikely to articulate doubts or criticisms of the project, should they have them. As an ongoing campaign with an international target audience, interviews with a foreign researcher would be to some extent a promotional opportunity, rather than the space for critical reflection that would be ideal.

Also important to consider was my role as the interviewer. As Burgess (2002) points out, the position of the interviewer and the relationship between the interviewer and interviewee will always play a role in determining the responses given. We were discussing an emotive and political subject, which, for interview subjects from indigenous communities, is understood as an immediate and personal existential threat. For my part, I was an outsider from the part of the world and the system that is seen as the problem. At various points during the interview process I felt that this dynamic was influencing the conversation. As one informant exclaimed during his interview: “my family is dying because of how your family lives!” (Cristian Dominguez, CSUTCB Union, 2010). It is not immediately obvious how this relationship will have influenced organiser accounts of the *International Tribunal on Climate Justice*, but it is important to appreciate how this might have shaped the qualitative data I received.

With respect to my interview subjects: there was a bias towards NGO stakeholders, over representatives from grassroots social movements and indigenous movements. Of the six individuals interviewed, four were from Bolivian NGOs and just two were activists from indigenous and campesino social movements. As with the Venezuelan case study, these imbalances in the profile of interview subjects



matter. A consideration of authorship and voice is important to really understand the a-legal space tactic. As I discuss in-depth in chapter 5, the elite-led structure of many peoples' tribunals is one of their more problematic features, which can threaten to undermine their emancipatory value. In the Bolivian context, NGOs are a category of elite, often staffed by highly educated, non-indigenous, middle-class, city-based individuals. And, moreover, often beholden to the requirements of Northern funders. With this in mind, one might question the emphasis on NGO voices within my data. The ideal research design would have included multiple interviews with a range of different stakeholders who had engaged with the climate tribunal in different capacities. However, with limitations on time and resources, I prioritised gathering data from the small group of NGO workers who were most central to the organising process in this initiative. However, I was careful throughout the research and analysis process to remain conscious of and sensitised to the limitations of my data. I discussed with organisers how they negotiated the structural inequalities inherent to this action and, in chapter 5, I critique their relative success at occupying an 'interlocutor' role, representing the interests, viewpoints and demands of marginalised and oppressed groups.

As a final reflection, having highlighted the methodological challenges and inherent limitations to empirical research based on qualitative interviews, it is important to note also the unique added-value of this approach. The experience of personally meeting and interviewing individuals who were involved in both initiatives helped provide a depth of insight into these events that cannot be achieved through secondary sources and documentary data alone. Through witnessing organisers' reactions to certain questions and topics, their willingness to meet, their openness or

otherwise, as well as other anecdotal observations, I gained a richer impression of both initiatives and what they had meant to those involved. As one example, nearly all organisers of the *Radical Cause* referendum with whom I made contact agreed to meet me, usually the next day and always giving an hour or more of their time, often going out of their way to provide further assistance.<sup>5</sup> Also, despite the number of years and however many countless actions since the event, they appeared to remember it in some detail. In different instances, for example, organisers were able to recall the rough number of voters in the Caracas region, and the states in which the event took place,<sup>6</sup> in addition to details about their own experiences.

As another example: I brought photocopies of newspaper coverage and publicity materials, which I had found in the newspaper archives at the National Library to most interviews, to help as a memory aid. Interview participants in most cases showed intense and excited interest in the materials, studying them, pointing out aspects and almost always asking for copies. One ex-*Radical Cause* leader, who now heads a different political party, studied the materials intently for some time, laughing loudly, before exclaiming '*I did this!*' On many occasions, I got the impression that this referendum was a significant event which captured a period in history, for the individuals involved.

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5 Two individuals were unavailable to meet but both were currently working for the government, one as ambassador to the US who was only in Caracas for a short period; the other was engaged with the presidential election campaign but sent her assistant to the interview instead.

6 Accounts which were consistent with information given in newspaper articles from the time.

## **v. An overview of the thesis argument and structure**

In chapter 1 I define and analyse the concept of a-legal space as a tactic, in more depth. I identify the defining characteristics which distinguish this tactic from other kinds of contentious political action and I present a preliminary typology of a-legal space, where I discuss various examples of the phenomenon from around the world. In the final part of the chapter I consider existing theorisation of these activities. A-legal initiatives have, for the main part, been ignored within the scholarly literature. This is with the exception of peoples' tribunals, which have generated a small but growing body of literature, which I review in this chapter. I highlight the limitations to a dominant account within this literature which sees peoples' tribunals as a kind of adjunct to the formal legal system, which "serve as a corrective mechanism" where formal structures fall short (Klinghoffer and Klinghoffer 2002, p. 5). More useful are accounts which consider the constitutive function of peoples' tribunals. Drawing on the work of scholars such as Sally Engle Merry (1996; 1995) and Jayan Nayar (2006; 2003; 2001) I argue that peoples' tribunals, as with other a-legal initiatives, should be seen as attempts to contest the extant legal, political and cultural order and help promote an alternative.

I build on this starting point in chapter 2 where I elaborate a theory of a-legal space as a political strategy. This outlines a conceptual framework through which to understand and explore the use of a-legal space, which I test and develop in the subsequent case study chapters. In the first part of the chapter I seek to define a-legal space from an abstract ontological perspective and in the second part I consider a-legal space from a functional point of view. The central question for the first part is

whether these activities indeed constitute a distinct category of action, which transcends the dichotomy between legal and illegal activity, as Harnecker claims (2007; 2008). Harnecker's claim can be better understood when contextualised: she is responding to the historical debate within the Latin America left, in which strategy has been conceived as a choice between 'reform' and 'revolution'. The *Radical Cause* party's unofficial and unauthorised referendum transcends this dichotomy: they do not accept and participate in the formal political system, but nor do they break any laws. Hence we can understand how their action transcends a historically contingent dichotomy. But does it do anything more than this? The *Radical Cause* party's referendum was not *legal*, in the sense that it was not official and legally sanctioned, and it was not *illegal*, in the sense that it was lawful; but this does not entail a contradiction. *Official, legally sanctioned* activity and *illegal* activity do not comprise a dichotomy into which all social and political practices must fit. Hence, on the basis of Harnecker's account alone it is difficult to sustain the notion of an ontologically distinct "whole other arena... which is neither legal nor illegal" (2007, p. 138).

However, the concept of a-legal space can be rescued, through drawing on a different theoretical account of the a-legal. In his novel theory of legal order, Hans Lindahl (2013) describes how strange and disruptive behaviours he denominates as 'a-legal' resist designation as legal or illegal, through questioning how a legal order draws the distinction between the two. Crucially, a-legality is conceived as a relational concept: a behaviour or situation is a-legal with respect to a particular legal order, because it questions the way in which the categories of legal and illegal have been organised within that legal order. I argue that peoples' tribunals, unofficial referenda and other a-legal initiatives should be seen as a variant, or sub-category, of the broader

phenomenon which Lindahl denominates as a-legality. Specifically, they challenge the extant legal order and how it defines what is legal and what is illegal, through enacting an institutional process which belongs to a different legal order. This insight forms the basis for a definition of a-legal space, which I expand upon in subsequent case study chapters.

Having established a theoretical basis to the notion of a-legal space as an ambiguous alternative category of action, I turn in section 2.2 to consider its potential utility. Harnecker suggests that this space has great potential as a tool to “raise consciousness, mobilise people and have them participate in a way that builds the anti-system social force” (2007, p. 112). However, she does not elaborate on the mechanism by which it might do this. This section is devoted to providing this theoretical development. Drawing on the large body of literature which has emphasised the constitutive power of law, I argue that a-legal space has the potential to create ‘tipping events’ (Hausknost 2011): rupturing events which shift the ‘political grammar’ and thereby open up new political possibilities. Peoples’ tribunals, citizens’ debt audits, unofficial referenda and other a-legal initiatives have significant potential to create these tipping events due to their interesting relationship to the oppositional concepts of constituted and constituent power. Whilst emulating the form, processes and symbols of existing institutions of constituted power, organisers commonly claim that they express and gain legitimacy from the ‘constituent will’. Where they are successful in this dual claim they arguably have a unique potential to re-constitute social meanings. I conclude by considering how recent research into the notion of ‘receptivity’ and into the formation of democratic subjectivities might support this thesis. The conceptual framework elaborated in this chapter is intended as a way to

understand the status and potential of a-legal initiatives. In the following three chapters I test and develop this theory through exploring its applicability and explanatory value in relation to specific case studies.

In chapter 3, I situate the use of a-legal space in the context of contemporary Latin American politics. I show how the use of a-legal space by social movements and governments in the region has correlated with significant shifts in Latin American politics, including the emergence of new social movements and the turn to a new kind of constitutionalism on the part of left governments and social movements alike. Exploring the use of a-legal space through this lens helps to illuminate how this tactic might be understood, and in turn can contribute to existing debates on new Latin American constitutionalism. In this chapter I also discuss the first two case studies: the Colombian students' *seventh ballot* and Honduran president Zelaya's *fourth ballot box* poll. Analyses of these unofficial referenda prompt several insights towards a general theory of a-legal space. Firstly, they are undertaken at critical moments in the struggle for creation of a constituent assembly: suggesting that the concept of a-legal space fills a gap in scholarly accounts of how constitutional change sometimes comes about. Secondly, their extraordinary influence on subsequent events facilitates an exploration of when and why the use of a-legal space has impact. I show that these cases support the theory of a-legal space elaborated in chapter 2, and in particular they underline the centrality of successfully appearing as constituted and constituent power in achieving impact through this strategy.

These cases also prompt various other insights into the a-legal space tactic. I introduce the notion of two 'axes of legality' along which the actions of those

employing this tactic - and those opposing them - can be pitted. The use of a-legal space involves a two-dimensional struggle to define (il)legality. On the one hand, organisers attempt to legitimate and institutionalise what they are doing through actions directed at the 'axis of institutionalisation'. On the other hand, opponents seek to ignore, repress, prohibit and criminalise the a-legal initiative. Attempts to prohibit and criminalise the initiative engage with a different axis of legality: the 'axis of criminalisation or prohibition'. The two-dimensional nature of this struggle reflects the struggle to invoke and promote a different legal order, through legally ambiguous behaviour. Finally, I use the case of Zelaya's planned *fourth ballot box* poll to explore the use of a-legal space by actors in positions of constituted power.

In chapter 4, I discuss the Venezuelan *Radical Cause* party's referendum on the rule of Carlos Andrés Pérez. The first two sections of the chapter are devoted to an account of the referendum as an historical event. For this case study, detailed contextual information is essential to understand informants' responses, and the possible meanings and significance of this event for the wider Venezuelan public. Drawing on informant interviews, documentary evidence, and secondary sources, I describe the social and political context and the events of the referendum and I explore the impact and legacy of the action. As I show in this chapter, this a-legal referendum is best understood when situated in its historical context. It represented an attempt by organisers to capitalise on a particular historical moment. In a context of growing economic, social and political crises, organisers consciously constructed the referendum as 'a way out of the crisis', a construction which makes sense when we appreciate these multiple crises which paralysed Venezuelan politics during this period. Moreover, the case highlights how a-legal space, and a-legal referenda in

particular, can be critical at times of ‘crisis’, when there is a degree of dislocation within the hegemonic discourse.

In section 4.3 I turn to an analysis of the organisers’ aims and objectives. I explore how they articulated the purpose of this referendum and its relation to their wider theory of change. Finally, in 4.4, I use the case as a jumping off point for a deeper theoretical discussion of a-legal space as a political tactic. I consider several potential problems with the theory of a-legal space as it has so far been developed, and attempt to resolve these problems drawing on the case of the *Radical Cause* referendum. What emerges is a revised account of the a-legal space tactic in which the relationship with and differences from Lindahl’s conception of a-legality are delineated.

In chapter 5 I discuss the Bolivian *International Tribunal on Climate Justice*. In this case I omit a detailed discussion of contemporary Bolivian politics. Unlike the previous case study, this initiative was not directed at achieving a change in national politics. Its target audience was international and primarily the Global North, and as such, details of the social and political context in which it took place are less central to understanding this particular application of a-legal space. Instead, I provide a brief description of the events of the tribunal itself: the cases, the jury members, the organisers and the format of the event. I then move, in section 5.2, to a discussion of organiser aims and objectives, and how they describe what they were trying to achieve. Finally, in section 5.3, as in chapter 4, I use the case as a platform to discuss issues pertinent to a general theory of a-legal space. Specifically, I explore three possible critiques. The first concerns the differences between some forms of a-legal space. I consider the role of information and ‘evidence’ in the *International Tribunal*



on *Climate Justice* and what this tells us about the coherence of a single a-legal space strategy. The next two critiques question the emancipatory value of a-legal space, from different angles. The 'elite-led critique' points to the influence and centrality of elite groups in this form of resistance. The 'Foucauldian critique' wonders whether we can hope to contest and challenge the hegemonic order through replicating central symbols and procedures of this order. I consider the significance of each critique to the *International Tribunal on Climate Justice*, and the implications for a general theory of a-legal space. I conclude the thesis by drawing together the insights and conclusions of earlier chapters, and summarising the consequences for a theory of a-legal space as a political strategy.

## **Chapter 1: Introduction to a-legal space**

There are many cases around the world in which actors have attempted to occupy a kind of alternative legal space. Examples include unofficial referenda such as the Venezuelan referendum on President Carlos Andrés Pérez, but also unofficial tribunals, commissions, audits, and even an embassy. These are activities that are not normally grouped together. However, I argue that it is helpful to view them as variations of the same phenomenon. Because despite the variety of political, historical, and cultural contexts in which they have taken place these activities share certain common characteristics, which distinguish them from other forms of contentious politics. Most notably they assume a quasi-legal or quasi-institutional form, appropriating (to varying degrees and in varying ways) the symbols, language, and procedures of formal institutions of constituted power, yet without any official basis or at least exceeding their recognised institutional basis. In most cases, they emerge from civil society, organised by social movements and NGOs. However, in some cases they involve local or national governments. The common feature is that organisers make a claim to democratic legitimacy and authority not recognised in international or domestic law. Finally, in all cases these initiatives are framed as a response to institutional or democratic failure, and as exemplifying and promoting an alternative, better system. On this basis, I take the following three criteria as the defining characteristics of the initiatives which make use of a-legal space:

1. Adopts a quasi-legal or quasi-institutional form, imitating the language, processes, and symbols of an institution of constituted power, without any official basis or exceeding a recognised institutional basis.

2. Makes a claim to democratic or legal authority, which is not recognised within the formal state or international legal system.
3. Framed as a response to institutional and/or democratic failure, and as exemplifying and promoting an alternative, better system.

The aim of this chapter is to make the case for this new conceptual category. I do this in several parts. In section 1.1 I discuss some of the different forms this type of activity has taken and highlight their common characteristics. This can be taken as a preliminary and not exhaustive typology of a-legal space(s). In section 1.2 I discuss each of the key characteristics in more depth. Despite sharing these broad characteristics, there are notable variations between initiatives. On this basis I suggest that these characteristics be taken as an ideal type definition of a-legal space(s). In the final section I review the existing scholarly literature on political actions of this kind. Only peoples' tribunals have previously been considered as a modular form of action, as such the small but growing literature set on peoples' tribunals provides an important starting point for theorising the broader category of a-legal space.

### **1.1. A typology of a-legal space(s)**

The following is not an exhaustive typology of a-legal space, but these are some of the main forms this kind of activity tends to take. For each type of a-legal space I discuss some of the significant cases, and suggest how they satisfy the defining characteristics of a-legal space which I described above. In the following section I turn to a more in-

depth discussion of how different forms and specific cases of a-legal space have met these characteristics.

### **1.1.1. Peoples' Tribunals**

Peoples' tribunals are the most researched and probably the most familiar form of a-legal activity. Conventional peoples' tribunal history starts with Bertrand Russell's 1967 *International War Crimes Tribunal* (also known as the '*Russell Tribunal*') into US atrocities during the Vietnam War. Organised by anti-war activists, it involved an unofficial public trial of the US government for actions in Vietnam. The US was charged with breaking international law through acts of aggression, civilian bombardment, the use of experimental weapons, the torture and mutilation of prisoners and genocide. A panel of international academics, legal scholars, and well-known intellectuals, including Jean Paul Sartre and Simone de Beauvoir, were brought together to act as jury. The tribunal met for several hearings in Denmark, Sweden and Japan throughout 1967, hearing extensive evidence, in the form of reports, video footage and witness testimony, compiled by the specially established legal, historical and scientific commissions of the tribunal (Duffett 1968). On December 1<sup>st</sup> 1967 the tribunal issued a verdict of "guilty on all counts" (ibid). In Russell's final address he urged the need to build resistance to the war and appealed for "everyone the world over to redouble his efforts to end this barbarism" (cited in ibid., p.654). In the less than fifty years since the *Russell Tribunal*, hundreds of peoples' tribunals around the world have copied this approach in an effort to challenge injustice of many forms, from the Israeli occupation of Palestine to

indigenous rights to neoliberal capitalism. Almost invariably, contemporary peoples' tribunals reference the 1967 *Russell Tribunal* as their inspiration and model.

However, two earlier lesser known peoples' tribunals predated the Russell Tribunal by several decades; both took place in the 1930s and responded to cases of political persecution. Klinghoffer and Klinghoffer (2002), authors of the most in-depth review of peoples' tribunals to date,<sup>1</sup> credit the 1933 *Commission of Inquiry into the Origins of the Reichstag Fire*<sup>2</sup> as the first peoples' tribunal and in their view “the most successful” (ibid., p. 11). The Commission held a series of hearings in London to investigate the fire at the German parliament building, which had been used as a pretext by the Nazis for the arrest and detention of thousands of Communist party members. Organised by European and American lawyers, the event was intended to raise awareness of what was taking place in Germany and to assemble and present evidence which they expected to be excluded from the German trial (Tigar and Mage 2009). As with the *Russell Tribunal*, extensive investigatory work was carried out as part of this counter trial, assembling physical evidence and finding witnesses.<sup>3</sup> The proceedings, described as “formal and fairly rigorous” in one account, involved lengthy, detailed evidence about the incident itself and the Nazi party's reaction (ibid., p. 30). This apparently transparent and rigorous approach, in addition to the

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1 International Citizens' Tribunals: Mobilizing Public Opinion to Advance Human Rights, by Klinghoffer and Klinghoffer (2002).

2 Also known as the International Juridical Investigatory Commission on the Reichstag Fire (Klinghoffer and Klinghoffer 2002).

3 Investigatory work was funded and conducted by the *World Committee for the Relief of the Victims of German Fascism*. Particularly significant findings which were presented at the trial, and which had not otherwise been in the public domain, included the fact that multiple fires had been set in the Chamber of the Reichstag; 1500 arrest warrants for Communist and Socialist activists had already been read for the German police on the day before the fire; and evidence of a secret tunnel leading from Goering's residence to the Reichstag (Mage and Tigar 2009). For some these findings were taken to support the suggestion that the fire had been planned by the Nazis as a pretext to persecute Communist party members.

organisers' reputation, are cited as factors in the positive reaction to the trial in the international media (Tigar and Mage 2009). In September 1933 the Commission concluded that there was no evidence connecting the three Communist party members standing accused with the Reichstag fire. Three months later the three were acquitted in the official German trial, on the basis of a lack of evidence. It is argued that the London based counter-trial, which took place immediately before the official trial and successfully captured the support of international media, had a significant influence on this outcome (Klinghoffer and Klinghoffer 2002).

Four years later another 'Commission of Inquiry' was initiated, this time to challenge the trial of Leon Trotsky by the Soviet Union for 'revolutionary arson', as part of the Moscow Show Trials. The 1937 *Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Show Trials* (also known as the 'Dewey Commission'), held sessions in New York, Paris and at Trotsky's home in Coyoacan, Mexico. Like the Russell Tribunal, this one was named after its famous philosopher chair, John Dewey, and involved months of extensive investigatory work (Klinghoffer and Klinghoffer 2002). Its findings were published in a 422 page book titled *Not Guilty*, in which it concluded that the Moscow Show Trials were "frame-ups", and Trotsky was innocent of all charges (Dewey and Glotzer 1937, p. 19).

Despite the obvious differences, the Nuremberg and Tokyo Trials of 1945 to 1948 are repeatedly cited in the literature as historical antecedents to the peoples' tribunal model (Klinghoffer and Klinghoffer 2002; Blaser 1992; Falk 1981; Cover 1984). Richard Falk argues that peoples' tribunals are "keeping Nuremberg alive" (cited in Blaser 1992, p. 343), whilst Jayan Nayar (2001) makes the same connection with a

more critical take. Reflecting on the 1967 *Russell Tribunal* on the Vietnam war, he comments:

The standards by which the crimes were judged were those laid down by the Nuremberg and Tokyo Tribunals. Renouncing the historic limitations of these standards as those of a 'victor's justice', the Russell Tribunal sought to reinvokethe spirit of Nuremberg/Tokyo that the universality of human dignity serves to justify the universality of application of standards of (il)legality and standards of culpability.

Following the *Russell Tribunal* on Vietnam a series of new Russell Tribunals were established to address repression in Latin America (1973 – 76),<sup>4</sup> freedom of opinion and public sector employment in West Germany (1978 – 79), and the rights of Indians in the Americas (1980). More recently, the Russell Tribunal has reconvened to investigate the rights of psychiatry patients in 2001 and the Israeli occupation of Palestine (2009 – 2013) (Klinghoffer and Klinghoffer 2002).

In 1979 The *Permanent Peoples Tribunal* was established as a “direct continuation” of the *Russell Tribunal*, and has since held nearly forty sessions on cases where there is seen to be a “systematic violation of fundamental rights” and in particular where “national and international legislation fails to defend the right of the people” (Lelio and Lisli Basso Foundation 2014). As just one example: in 1983, following a complaint from the Guatemalan Human Rights Commission, a session was held on the treatment and alleged genocide of indigenous communities in Guatemala. All Guatemalan governments since 1954 were found guilty of war crimes, crimes against humanity

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<sup>4</sup> From 1973 to 1976 the *Russell Tribunal II* held hearings on repression in Brazil, Uruguay, Bolivia, and Chile, with an emphasis on US human rights violations. The hearings, which took place in Rome and Brussels, delivered a verdict that crimes against humanity had been committed in all four countries (Klinghoffer and Klinghoffer 2002).

and genocide. The USA was also found guilty for its complicity and involvement in Guatemalan politics. Interestingly, the hearing ruled that indigenous violence was justified “as a necessary response to oppression” (cited in Klinghoffer and Klinghoffer 2002, p. 169). More recently, a “*Mexican Chapter*” of the *Permanent Peoples’ Tribunal* has been established, following calls for such a body by Mexican civil society. The first large scale case, running from 2011 to 2014 was entitled “Free Trade, violence, impunity and the rights of the peoples”, and included ten large scale hearings and many local level “pre-hearings”, with the participation of several hundred civil society organisations and social movements, on subjects including food sovereignty, environmental destruction, and violence against workers (TPP México 2011).

Another significant large scale peoples' tribunal is the *Latin American Water Tribunal* which was established in 1998 and has conducted hearings, forums and workshops in countries across Latin America, on issues related to water privatisation, management and access (Tribunal Latinoamericano del Agua 2015). Yet another large scale international initiative is the *Courts of Women*; peoples' tribunals on violence against women which have taken place in Asia, Africa, Central America, the Arab world and the USA. Organised by international NGOs *El Taller* and *Asian Women’s Human Rights Council*, and supported by national networks, to date more than forty hearings have taken place (El Taller 2015). Other efforts of global civil society have included the 2011 series of *Women’s Tribunals on Climate Justice and Gender*, which took place across Asia, Africa and Latin America, and were organised by the Southern-led global civil society networks, *Global Call to Action Against Poverty (GCAP)* and *Feminist Task Force* (GCAP 2015). Climate justice has also been the subject of various smaller scale peoples' tribunal initiatives including the Bolivian based *International Tribunal on*



*Climate Justice* (which is discussed in detail in chapter 5) (Fundación Solón 2009a; Fundación Solón 2009b).

As might already be apparent, peoples' tribunals are often large scale, well-funded international initiatives, involving broad coalitions of NGOs, civil society networks and other civil society actors. In many cases tribunal sessions have lasted several years, with dozens of separate hearings taking place around the world. However, there are also instances where the form has been adopted on a much smaller scale. One example is *Precarity: A Peoples' Tribunal*, a one-day event organised in 2011 by the *Precarious Workers Brigade*, who describe themselves as “a UK-based group of precarious workers in culture and education organised around the issue of precarity” (Precarious Workers Brigade 2011). The peoples' tribunal was seen as a format in which they could share their research on the issue of precarity and “a method of continuing a collective conversation... as well as holding the conditions that allow it to continue to account” (ibid.). Another example is the *People's Tribunal Against Police Brutality and Misconduct*, which took place on January 15<sup>th</sup> 2011, in Philadelphia, USA. Described as an “independent community legal proceeding”, the initiative was organised by the civil society network *Askia Coalition Against Police Brutality*. Organisers explained that:

It is not a “mock trial.” The tribunal will gather testimony from victims of police brutality for submission to the U.S. Commission on Civil Rights and the Human Rights Commission of the United Nations. In addition, the tribunal will serve to educate community residents about their legal and constitutional rights as they pertain to “stop and frisk” and mobilize community residents to take action at the polls during this year’s mayoral and city council elections (Askia Coalition Against Police Brutality 2011).

There have also been attempts within global civil society to systematise support for local peoples' tribunal initiatives such as these two. In July 2014 the International Conference on Human Rights and Peace in the Philippines resolved to support a Local Peoples' Tribunal project (Boehringer 2014). Legal scholar and *Permanent Peoples Tribunal* panelist Gill Boehringer (ibid.) has been a prominent advocate for the development of such a project, emphasising their importance as a tactic against the “onslaught” of neoliberalism:

Today, “globalization” and neo-liberal policies are wreaking havoc across the world in a “second great transformation”. To aid in resisting this onslaught, there is a need for the establishment of on-going local institutions with local people taking control of the specific issues affecting their lives. Local people’s tribunals should be included in the movements to resist the depredations of international- and national- capital. The name of such institutions might vary e.g. local tribunals, peoples’ courts, community courts, neighbourhood aid committees, commissions, workers’ inquiries, people’s hearings, etc (ibid.).

Despite their civil society basis these initiatives standardly take the form of an official tribunal, to varying degrees emulating the physical layout, procedures, language and symbols associated with state-based tribunals. Most peoples' tribunals include a jury (though sometimes called a 'panel'), witnesses, evidence and occasionally even a defence (Klinghoffer and Klinghoffer 2002). As Borowiak comments on the *World Tribunal on Iraq*, these initiatives are “not meant to be colourful acts of protest but rather to provide rigorous public assessments of the policies and effects of invasion and occupation” (2008, p. 161). In many cases they have led to the unearthing of vast amounts of evidence, which is not otherwise in the public domain, nor has been

received in any formal court (Duffett 1968; Klinghoffer and Klinghoffer 2002). On the other hand, and at the same time, they are used as political campaigns. Hearings are timed for political opportunism, and the tribunal itself is almost always organised as just one part of a wider political movement or campaign.

### **1.1.2. Peoples' Commissions**

A closely related form of a-legal space is the Peoples' Commission. Recent examples include the *Lewisham Peoples' Commission of Inquiry*, which formed part of the successful campaign against the downgrading of Lewisham Hospital in London (Save Lewisham Hospital 2013). Organised by a local campaign group, *Save Lewisham Hospital Campaign*, the initiative revolved around a day long public hearing timed to immediately precede the official judicial review hearing. A panel of judges, including well known human rights barrister Michael Mansfield QC, heard evidence from academics, GPs, hospital staff, patients, Lewisham Council, and other community representatives. The hearing, in a large theatre in Lewisham, was open to the public as well as being filmed and broadcast live online. On the day of the hearing the panel of judges made preliminary statements about the evidence, and in the weeks that followed compiled a more comprehensive formal report (Save Lewisham Hospital Campaign, 2013).

Cases such as this one, in which a public hearing or series of hearings forms the centre piece to the event, share much with the peoples' tribunal model and are in many ways interchangeable with it.<sup>5</sup> The basis for distinguishing between peoples'

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<sup>5</sup> Indeed, the Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Show Trials and Commission of Inquiry into the Origins of the Reichstag Fire, from the 1930s, could just

commissions and peoples' tribunals is a difference in presentational nuance. Peoples' commissions are generally presented more in terms of an *investigation*, rather than a trial. In any case, both can be understood as ideal type categories, where specific initiatives will share more or fewer of the specified characteristics.

Other peoples' commissions diverge further from the tribunal format however. The *High Pay Commission* is another recent UK based example, which was established to investigate the effects of high executive pay in the private sector in Britain (High Pay Commission 2011). The commission ran for one year, from November 2010 to November 2011, publishing several reports and a final set of recommendations for companies and the government. Whilst it was set up by centre-left think tank *Compass*, once appointed the commissioners which had been selected conducted a free investigation (Lawson 2012). The initiative was then described in publicity materials as an "independent body" (High Pay Commission 2011).

### **1.1.3. Unofficial referenda**

There have been various cases of popular non-binding referenda like the Venezuelan referendum on President Pérez. One significant example is found in the history of the Catalan independence movement. In 2009 and 2010 various unofficial 'consultations' were carried out in Catalonia on the question of independence. The best known and first took place in the small town of Arenys de Munt in the province of Barcelona, where 2,671 citizens (forty-one percent of the electorate) voted in a non-binding referendum initiated by the local council (Libertat.cat 2013). Despite its small scale,

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as easily be placed in this category of a-legal space. I have categorised them as peoples' tribunals following Kinghoffer and Klinghoffer (2002), who categorise both as early precedents of the peoples' tribunal tactic.

the referendum, in which 92% voted in favour of independence, captured the attention of the national and international media. Three hundred journalists received formal accreditation to cover the event and several TV stations filmed it. It was reported in publications across the world from Venezuela's *El Universal* to *The New York Times* (Castillo 200). One month later on December 13th 2009, the consultation was repeated in 167 other municipalities in Catalonia. 700,000 citizens were invited to vote, 200,000 - around 30 percent of the census - participated, with approximately 95% voting in favour of independence (Libertat.cat, 2013).

Another case is the *World Referendum on Climate Change*, which was debated in Bolivia in 2009 to 2010. Whilst never achieving wide-scale take up, discussions and planning for this initiative were commenced in the run up to the *World Peoples' Conference on Climate Change and the Rights of Mother Earth*, which took place in Cochabamba, Bolivia in April 2010 (PWCCC 2010). The Conference, attended by approximately 30,000 delegates, was organised by the Bolivian government after the failure of governments to reach a new binding climate agreement at the UN COP meeting in Copenhagen in 2009. As part of this event hundreds of representatives of social movements, NGOs and other interested individuals participated in online and in-person debates about the basis and logistics of a world climate referendum, which would "consult the peoples of the world" on climate change and the "capitalist economic model" (ibid.).

A somewhat different example of this phenomenon was the Scotland wide non-binding referendum via postal ballot on the repeal of Clause 28 in 2000. Clause 28 stated that local authorities; "shall not intentionally promote homosexuality or

publish material with the intention of promoting homosexuality" or "promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship" (Local Government Act 1988). In 2000 the Labour government made moves to repeal this regressive legislation. The non-binding poll was organised by the *Keep the Clause* campaign which sought to resist the repeal of clause 28. The poll was the first privately funded poll in Scotland, paid for by millionaire bus company owner Brian Soutar, who reportedly contributed one million pounds. Postal ballots were sent to every registered voter in Scotland. Over a million ballots were returned, representing around 32% of registered voters, with approximately 86% of these voting to 'keep the Clause' (BBC 2000a; BBC 2000b). The *Keep the Clause* poll differs from most other kinds of a-legal initiatives in that it was principally supported by conservatives and the religious right, as opposed to liberals and the left. Whilst most a-legal initiatives are organised by the left and can be argued to be in support of disempowered groups, there is no intrinsic connection between this type of tactic and left wing politics. It is rather a modular form of action that can be used by either right or left. I revisit this issue in chapter 2.

#### **1.1.4. Citizens' debt audits**

Citizens' debt audits represent another use of a-legal space which is growing in popularity. The best known and arguably most significant initiative of this kind took place in Ecuador in 2007, when the Ecuadorian government established the *Public Debt Audit Commission*. The commission was made up of a cross section of Ecuadorian civil society organisations, though with government support and funding, and had a remit to conduct an audit of the country's debt and how it had been accrued. When

they delivered their final report in 2008 the Commission claimed to have uncovered “illegality and illegitimacy” in Ecuador’s foreign debt records, and recommended that the government cease repayments (quoted in Faiola 2008).

The Ecuadorian *Public Debt Audit Commission* can be conceived as 'a-legal' despite its execution by the Ecuadorian government and its official status in Ecuador, because it constitutes a novel democratic instrument which is not recognised at the international level in which it operates. The recommendations of the Commission have no binding legal implications, at the international level. However, despite this, in 2008 shortly after the *Public Debt Audit Commission* delivered its final report, the Ecuadorian government followed its recommendations and defaulted on their Global Bonds debts, citing the commission's findings as the basis for the default (ibid.). In this way it can be seen to have exceeded a recognised institutional basis, based on a new claim to legal and democratic authority.

The Ecuadorian case has inspired similar initiatives around the world. *International Citizen Debt Audit Network* (ICAN) is a network of social movements and national networks from eleven European and North African countries, who are implementing Citizen Debt Audits as a means to challenge government austerity programmes (ICAN 2013). Through *ICAN*, member groups are able to exchange knowledge and experiences; “sharing the types of audits that are being implemented or promoted in each country, as well as the types of action and social mobilisation strategies that are taken up in each territory, with the common goal of forming a solid and united front against the dictatorship of debt”. Following Ecuador, Debt Audit Commissions have been established in Bolivia, Venezuela, Paraguay and Argentina (ICAN 2013).

### 1.1.5. Civil society based monitoring bodies

Civil society based monitoring projects represent another type of a-legal space. One recent example is the *Peoples' Environmental Scrutiny Committee*, subsequently renamed the *Peoples Environmental Scrutiny Team (PEST)*, which was established in 2014 as part of a wider campaign to improve environmental management within Manchester City Council. Among other demands, Manchester environmental activists had called for the creation of an Environmental Scrutiny Committee, to accompany Manchester City Council's six existing scrutiny committees (on Finance, Health, Economy, Communities, Neighbourhoods and Young People and Children). Scrutiny Committees are intended to monitor the activities of the Council Executive and officers. They meet publicly around ten times a year (PEST 2014a). In the absence of an Environmental Scrutiny Committee within the council's structures, activists established the *Peoples' Environmental Scrutiny Committee*. The goals of the initiative include: "nurturing links between concerned citizens, and getting Manchester City Council to set up its own Environmental Scrutiny Committee" (PEST, 2014b). In the meantime, PEST runs on the one hand much like an official council based committee: they have monthly public meetings, publish reports on issues related to the council's environmental management, and organise events. PEST Members have also presented reports and contributed to meetings of the six official Manchester City Council meetings. On the other hand, and in contrast to the existing official scrutiny committees, the initiative is intended to play a campaigning and community capacity building role: keeping pressure on the Council (as a key organiser explains: "it was renamed People's Environmental Scrutiny Team – PEST - for obvious acronymical reasons" (Hudson 2014)), and providing training to participants in council



procedures, Freedom of Information requests, lobbying, and other relevant skills (PEST 2014c). Finally, there is a sense in which the initiative is intended to play the role of an exemplar, as it is explained:

Without citizen action setting a good example, there is NO guarantee such a committee will come into existence. Assurances from the Council, its officers and executive members are really not worth very much (PEST 2014d).

However, a-legal monitoring projects are not always based entirely in civil society. In some instances, local governments have taken an a-legal approach, when formal mechanisms or procedures have been exhausted or are otherwise nonviable. One example is the Police Monitoring Committee and *Police Monitoring Unit* which was set up by Manchester City Council in 1985, as one of several radical new initiatives established by the Labour Left after it took control of the council in 1984.<sup>6</sup> As the *Police Monitoring Unit's* ex Information and Research officer, Tim Treuherz, explains, “the initiative was very controversial, not least because there were existing statutory arrangements for ensuring police accountability” (2013). The statutory authority was a Committee of Greater Manchester County Council, comprising councillors from each of the ten greater Manchester districts. However, it was felt by the City Council that the Committee was failing to ensure police accountability, specifically in relation to institutional racism, corruption and police violence (ibid.).

Approximately nine city councillors were appointed as members of this alternative Police Monitoring Committee, and five or six full time members of staff employed at

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<sup>6</sup> Other new initiatives included the Equal Opportunities Unit and the Neighbourhood Services Unit, intended to devolve powers to the local neighbourhood level (Treuherz 2013)

the accompanying *Police Monitoring Unit*. The Unit's main activity was the publication of a monthly bulletin *Police Watch*, which was the only council monthly publication to be delivered to every door in Manchester along with the council magazine. *Police Watch* ran stories on police racism, corruption and malpractice - issues which received little or no coverage in the mainstream media. It encouraged members of the public to report experiences to the Unit, and advertised details of forthcoming Committee meetings.

The *Police Monitoring Unit* and Committee can be considered a-legal for several reasons. Despite the fact that they were initiated by a local government, the bodies had no institutional powers to implement reforms or impose sanctions on the police. Their remit was limited to running campaigns on issues of concern about policing (Manchester City Council Police Monitoring Committee and Unit 1985). However, through various decisions, both are presented as something more than a campaign, and as having some responsibility in relation to police accountability. The *Police Monitoring Unit* could equally have been called the 'Police Monitoring Campaign', given its main activities and remit. However, the decision to form a 'unit' confers an additional sense of institutional authority. Working in collaboration with the newly formed Police Monitoring Committee these bodies constituted a challenge to the existing statutory authority for police accountability.

Similar to the *Peoples' Environmental Scrutiny Committee*, the initiative was presented as intended to provide a space for public involvement in and influence over the currently inadequate monitoring process. As the first edition of *Police Watch* magazine explained;

In the absence of any real voice or influence in the present system it is important not to let discussion die down or to relegate it to grumblings over the cornflakes... Your experiences of how you are policed and your thoughts and ideas on how it can be improved are of interest to us and the Police Monitoring Committee and the *Police Watch* bulletin can be your voice (Police Monitoring Unit 1985).

The initiative ran until 1988 when it was closed, partly as a result of changes in the political make-up of the council. In addition to various other similar police monitoring initiatives which were established around the country at this time it can be seen as contributing to a change in culture around policing, in which it became possible to question the police (Treuerherz 2013).

#### **1.1.6. An Embassy**

Whilst it is the only example of its kind, the *Aboriginal Tent Embassy* shares the key characteristics of a-legal space and demonstrates yet another form this activity can take. This unique protest, described by one scholar as “the most symbolically powerful political demonstration in Australia’s history” (Schaap 2009, p. 211) and a “serious political threat to the government of the day” (Schaap 2008, p. 3) began on the eve of Australia Day, 1972, when four aboriginal activists from the town of Redfern, Eastern Australia, set off for the Australian parliament in Canberra. Arriving in the early hours of the morning they set up placards, a beach umbrella and erected a sign declaring it the ‘Aboriginal Embassy’ (Robinson 1994).

The protest was a direct response to the Prime Minister's Australia Day speech in which he had refused the growing demand for aboriginal land rights (Robinson 1994). When the local and national media arrived, the protesters issued a statement in which they demanded the retraction of the Australia Day speech, compensation for stolen lands, and stated that the Embassy would remain until these demands were met. In the following weeks Aboriginal people from across the country arrived to join the camp, along with tourists and other supporters. During the coming months, the lawn in front of Parliament House was occupied by "a constantly changing and fluctuating population of Aboriginal people from throughout Australia encamped under the red, black and green flag of international black unity" (ibid., p. 54).

Whilst the organisers' ambassadorial pretensions, according to one account, "started as a joke" (Paul Coe, Organiser, quoted in Cowan 2001, p. 34), within days they were receiving international mail at the site and holding press conferences, and in the months that followed they received formal state visits from Soviet Union diplomats, a cadre from the IRA, and a representative from the Canadian Indian Claims Commission (Robinson 1994).

In July, seven months after it had arrived, the Tent Embassy was eventually dismantled by police. It was re-established and again removed by police in several violent demonstrations over the coming months, and was subsequently re-erected at various points throughout the 1970s and 80s (Muldoon and Schaap 2012). In 1992, on its twentieth anniversary, the Embassy protesters returned and took occupation of

the building of old Parliament House for a number of hours. It has maintained a permanent presence since this date (ibid.).<sup>7</sup>

## **1.2. The defining characteristics of a-legal space(s)**

### **1.2.1. The quasi-legal, quasi-institutional form**

The key characteristic which distinguishes these initiatives from other types of protest and campaigns is the quasi-legal or quasi-institutional format. Initiatives take the form of an official process or institution with a basis in domestic or international law. This is done, as a minimum, through the name they assign themselves, whether ‘world referendum’, ‘embassy’, ‘tribunal’, or ‘commission’. Normally this is also done through an adherence to the formal procedures of the institution or process they mimic. Peoples' tribunals are structured – to varying degrees – like a formal court room, with a panel of judges, a witness box, witnesses who give expert and victim testimony, and sometimes even the inclusion of a defence (Klinghoffer and Klinghoffer 2002). The various cases of non-binding civil society based referenda have normally involved the completion of ballot papers, which are deposited in ballot boxes, often to be publicly counted later.

However, the extent to which these initiatives conform to the procedures of a state based referendum, court room, commission or other formal institution can vary. In

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<sup>7</sup> The Aboriginal Tent Embassy continues to maintain an active presence on social media, sharing news stories and campaign information in relation to Aboriginal politics. See: <https://www.facebook.com/Aboriginal-Tent-Embassy-210730945611610/>

their review of peoples' tribunals, Reilly and Posluszny (2005) identify two distinct approaches. The first involves a close adherence to the procedures of national or international law and legal proceedings. These tribunals aim to “meet the most rigorous requirements of international legal norms with a view to building legal or quasi-legal precedents” (ibid., p. 1). A good example of this approach is the *Women's International War Crimes Tribunal* in Japan, which addressed the alleged human rights abuses inflicted on the ‘comfort women’, approximately 200,000 Asian women subjected to sexual slavery by the Japanese military during World War II. This tribunal was “conducted as a derivative of” the International Military Tribunal for the Far East (IMTFE; the Tokyo Trial) (Chinkin 2006, p. 16). The IMTFE had been established by allied forces to address Japanese war crimes, but had not considered the case of the comfort women. Through considering charges of sexual slavery, the *Women's International War Crimes Tribunal* is described as doing “what had been left undone by the IMTFE” (ibid.). As one scholar has commented of this tribunal's final report;

When one gets to the end of the judgement's thousand or more paragraphs of detailed description, analysis and evaluation, there is no doubt that one has experienced some fairly assiduous orthodox legal analysis (Byrnes 2012, p. 11).

The alternative approach - and by far the most common - is to focus less on due process and established protocol and more on ‘giving voice’ to testimony, in order to support education or other political efforts such as lobbying (Reilly and Posluszny 2006). Peoples' tribunals of this form place less emphasis on meeting the stringent requirements of international legal norms. One example is the *Courts of Women*, an initiative which has held dozens of hearings in different countries, on issues such as

gender and climate change, poverty and war, amongst others. In stark contrast to the Japan based *Women's International War Crimes Tribunal*, these hearings have allowed the inclusion of poetry and music as evidence from witnesses. A central concern has been the creation of spaces where different voices and different forms of expression are made legitimate (El Taller 2015).

The distinction between two broad approaches is perhaps most pronounced in peoples' tribunals. However, others types of a-legal space can also be loosely divided on these lines. The Catalan independence referenda, for example, took place in many instances with local council support, utilised polling cards, ballot boxes and polling station venues very similar to those that would be used had the referenda had a binding character. And votes were limited to those on the electoral register (Libertat, 2013). Other non-binding referenda or 'consultations' have taken a more casual approach, involving little more than a stand on the street where passers-by can fill in a handmade polling card, and with little concern as to whether individuals have voted more than once.

The *High Pay Commission* fits into the former category. Though established by a political organisation various steps were taken to appear as, and indeed genuinely take, the form of an independent commission. *Compass* head, Neal Lawson, explained "obviously you set up a commission because you think there is a problem but within that there was no predetermined view", and indeed one of the requirements of the *High Pay Commission's* funders was that the commission be "genuinely independent" (2012). As such, once the Commissioners had been appointed *Compass* had no influence on the process or their findings (Ibid.). Publicity materials emphasised this

was an “independent inquiry”, “non-partisan” and “independent from any political party or organisation” (High Pay Commission 2011, p. 2). And there is evidence to suggest the organisation was successful in appearing as such, as one key organiser commented:

One of the advantages for us was that people assumed that we had been set up by the government... we were keen to stress that we were independent, but then somehow this feeling that we were quite an official body almost gained ground’ (Hargreaves 2012).

The *Aboriginal Tent Embassy*, on the other hand, is an interesting example of the latter, less legalistic approach. In the form of a temporary encampment, which grew from a beach umbrella to a messy sea of tents, it clashed with, rather than attempted to meet normal expectations of a sovereign nation's embassy. Indeed, it was this juxtaposition of different signs to which some scholars have attributed its resonance. The claim to be an 'embassy' contrasted with the informal, temporary and impoverished appearance of the camp and thereby underlined the Aboriginal protesters' status of dispossession (Cowan 2001). Organisers also engaged in an active questioning and experimenting with the a-legal form. At one stage a 'Ministry for Caucasian Affairs' was established, which mirrored and challenged the Australian state structure and the (at this time) Ministry for Environment, Aborigines and the Arts.<sup>8</sup> However, the idea was subsequently dropped, deemed “too much like white bureaucracy” (Anderson, Aboriginal Tent Embassy founder, cited in Robinson, 1994, p. 52).

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<sup>8</sup> This was an Australian government ministry established by Prime Minister McMahon in May 1971, which was subsequently split into several ministries in December 1972 by the next administration. The ministry was said to reflect Prime Minister McMahon's limited interest in Aboriginal affairs (Maccallum 2009).



In summary, despite this variation, all peoples' tribunals, commissions, referenda and other a-legal initiatives, have included some components of the formal process they mimic, whether or not they simultaneously attempt to challenge or simply ignore other aspects of the form.

### **1.2.2. The unofficial basis**

Who organises these kinds of activities and is this part of the definition? An understandable assumption would be that these are initiatives of civil society. Indeed, in the majority of cases they are organised by activists, NGOs, community organisations, social movements and other entities that do not have official power or authority. Moreover, it is the fact that they are acting *as if* they have some state sanctioned authority but in fact do not which makes them stand out.

However, in some cases, state and sub-state actors have also initiated and/or participated in this form of activity. The Ecuadorian *Public Debt Audit Commission*, which was initiated and funded by the Ecuadorian government, in collaboration with Ecuadorian civil society, is one such example. And Honduran President Zelaya's planned unofficial poll, discussed in-depth in chapter 3, is another. The various Police Monitoring Units which were established in the UK in the 1980s by local councils to challenge institutional racism, corruption and violence in the British police, can equally be classed as the use of a-legal space, given their quasi-institutional format and claims to be "working for accountability" (Police Monitoring Unit 1985), despite a

purely campaign based remit, and their lack of statutory powers to implement policy reforms or impose sanctions.<sup>9</sup>

These cases suggest that a definition of a-legal activity as an activity of civil society would exclude some important examples of the phenomenon. However, there is a further reason not to limit the definition in this way. Such a definition would obscure important aspects of the struggle that takes place in these sites. Firstly, in most cases, organisers of a-legal activities seek to institutionalise what they are doing, within the state (whilst avoiding co-optation). Secondly, in some cases there is an ambiguity as to the institutional status of an activity, and it is only the result of the struggle between organisers and state actors, that determines whether the activity is deemed official and institutional, or merely a civil society based type of protest.

These points are well illustrated through the Catalan Independence referenda of 2009. Plans for the first ever referendum on Catalan independence, in the town of Arenys de Munt, emerged through the formal political process in local government when a motion to have a public ‘consultation’ was passed by the council. Whilst the referendum was never recognised at the national level, and the outcome always only to be symbolic, it can be said to have had a form of legal basis, as a kind of non-binding local government-led consultation, grounded in the local level democratic process. However, following a legal challenge by the Spanish government, the Arenys de Munt council was ordered by a Spanish court to cancel the referendum, which the judge found to “clearly invade powers expressly reserved for the State” (quoted in

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<sup>9</sup> See *Remit of the Police Monitoring Committee and Unit*, (Manchester City Council 1985), for further information.

Baiget 2009). The council had claimed that this was not a council run referendum, but that it merely provided the venue in which the process would be carried out. The judge rejected this defence, finding the council to have consented to the consultation, and thereby exceeded their powers (ibid.). As a consequence, the referendum was relocated from the Council building to a private social club. It still had, however, the implicit and sometimes explicit support of the local government. The town's mayor, for example, called the judicial decision "bad for democracy" and declared he would still be participating (quoted in Baiget 2009). Of the subsequent Catalonia wide referenda carried out in December 2009 and in 2010, some came with the support of council motions and some without this institutional connection (ibid.).

In fact, a struggle to achieve institutional recognition, and to integrate activities with formally recognised institutional procedures and bodies is characteristic of these initiatives. Organisers of the *Radical Cause* referendum in Venezuela sought to have the referendum recognised by the electoral commission, and attempted to use their political contacts to bring this about (Melo 2012). Organisers of the Bolivian-led *World Referendum on Climate Change* intended for the referendum to be carried out "officially" wherever possible. The referendum, it was stated; "should be developed by the corresponding electoral organisms, in countries supported by their governments" and only where this was not possible due to state opposition should it take place within civil society, it was argued (PWCCC 2013b). The *Permanent Peoples' Tribunal* sends all rulings to the major international bodies and many have subsequently been discussed by the UN Human Rights Commission in Geneva (Lelio and Lisli Basso Foundation 2014).

A solution is to define these initiatives not by organisers' institutional or non-institutional status but by their relative institutional authority, and their efforts to exceed this authority. What organisers of the Ecuadorian *Public Debt Audit Commission*, the Catalan Independence referendum, and other a-legal activities share is that they attempt to exceed the official legal authority and jurisdiction afforded them under existing domestic or international law. The Ecuadorian debt audit is established with the support of the national government, yet it is an attempt to challenge the international financial system in which Ecuador has limited power, and introduce a legal mechanism that is as yet unrecognised. Just as the Catalanian council of Arenys de Munt attempted to challenge the Spanish state through the initiation of an unrecognised mechanism, and as the Spanish judge put it "invade powers expressly reserved for the State" (quoted in Baiget 2009).

Therefore, whilst a-legal activities are usually based in civil society, a definition of the concept should not be limited to this arena. Instead, the concept refers to initiatives where actors have attempted to assume official legal authority and jurisdiction not presently afforded them by domestic or international law. One interesting consequence of this is that the more successful the initiative, the less it appears as 'a-legal' and the more it appears as simply 'legal'. As these cases illustrate, whether an activity is 'legal', in the sense that it has an officially recognised legal basis, is sometimes ambiguous, subjective and changeable. The utility of the a-legal category then is to capture this process, through which new practices emerge and are sometimes subsequently institutionalised.

### 1.2.3. A response to institutional or democratic failure

The final defining characteristic concerns one aspect of how organisers present their motivations and what they hope to achieve. These initiatives are framed as a response to the failures of the formal legal and democratic system, and as promoting, exemplifying or embodying some better alternative.

In most cases, the a-legal approach is taken following multiple efforts within the formal legal or political system. The *High Pay Commission* publicity materials, for example, detail the months of lobbying for a formal governmental commission which had preceded this initiative. Only when the then government failed to respond to these calls did organisers decide to set up their own commission, it is explained (High Pay Commission 2011; Lawson 2012). In this way the initiative is presented as a response to the government's failure to address the issue of pay inequality, and based on a desire to rectify this failure. The *Permanent Peoples' Tribunal* (PPT) is similarly founded on an acknowledgement of, and desire to address, the failings of formal legal mechanisms. As the mission statement of the *PPT* describes it, their aim is to; "raise awareness of all those situations in which the massive violation of fundamental human rights receives no institutional recognition or response" (Transnational Institute 2008).

The Catalan independence referenda can similarly be seen as a response to institutional failings. Following the passing of the Statute of Autonomy in 2006 there had been various delays in the implementation of the provisions of this statute. More than a third of the provisions were appealed in the Constitutional court of Spain by

the opposition party, the People's Party. In 2009 the case was still unresolved and those in support of independence had become increasingly frustrated with the situation and sought a way forward in the face of institutional deadlock. The Arenys de Munt referendum was proposed by the Popular Unity Candidates party in a Council motion as an alternative way forward (Nichols 2012).

The Aboriginal Tent Embassy was established in direct response to the government's refusal to consider the question of Aboriginal land rights. It followed months of lobbying efforts, public campaigns, and attempts on the part of campaigners to negotiate with the government on this issue (Robinson 1994). The 1972 Australia Day speech was the first time in which the government had responded publicly to these demands, and the point at which it was made clear that there would be no land rights of the form requested (Robinson 1994). Hence the Aboriginal Tent Embassy, like other a-legal initiatives, was established when formal avenues for achieving change appeared to have been exhausted.

However, the depth of the criticism levied at the formal legal or democratic system can vary. The High Pay Commission, for example, seeks to challenge "free market capitalism" (Gannon 2012) rather than capitalism itself, and hopes to promote government regulation of the private sector to enable this. *Compass* chair, Neal Lawson, observes that "the High Pay Commission was criticized from both the right and the left", with some arguing that it had "not gone far enough"; whilst pay caps were recommended, the idea of tying lowest and highest salaries within a company was considered "too far" by commissioners (Lawson 2015). And HPC chair, Deborah Hargreaves comments;

We don't want to undermine the system; we want to make the system work better. And I think that's why we have to come up with good reasoned arguments that are based on data, so that people can't just dismiss us as sort of raving lefties who want to overthrow capitalism (2012).

Other initiatives, on the other hand, articulate a more fundamental challenge. The *World Referendum on Climate Change* and the *International Tribunal on Climate Justice*, both projects of Bolivian civil society initiated in 2009, sought to "change the capitalist model of overproduction" in favour of a system that "respects Mother Earth" (PWCCC 2010).

#### **1.2.4. A-legal space and the concepts of constituent and constituted power**

The defining characteristics of a-legal space reveal a close and complex relationship to the oppositional concepts of constituted and constituent power, which is important to address before continuing. First introduced in the context of the French revolution by Emmanuel Sieyes, the theory of constituent power distinguishes between 'constituted power' - the state: its offices, institutions and procedures, and 'constituent power' - 'the people': the force who created the state and remain the ultimate source of its legitimacy (Sewell 1994). Sieyes argued that it was the people who had the power over the structure and nature of the state. The theory became, as one historian calls it, "a script for the revolution" (ibid., p. 53) and provided the theoretical basis for the creation of the National Constituent Assembly in July 1789, which drew up the first written French Constitution and promulgated the Declaration of the Rights of Man and of the Citizen in 1789. Constituent power remains an

important concept in the French constitution, as it does within liberal constitutional theory. The notion of an original ‘founding moment’ in which the constitution and the state were created by the constituent power functions as the source of legitimacy and authority for the constitutional order (Colón-Ríos 2012).

Within traditional constitutional theory and for most legal philosophers, the concept of constituent power is exhausted by the notion of a past founding moment, during which it was once active (Wall 2015). Hence it remains an important but ultimately impotent concept. However, critical legal scholars and certain strands of constitutional theory have argued for the ongoing relevance of constituent power as a creative force. Popular uprisings and protest movements are often characterised as expressions of constituent power (c.f. Negri 1999; Ciccariello-Maher 2013), which, it is argued, should be central to democratic and constitutional theory (ibid.; Kalyvas 2000; Colón-Ríos 2012; Dalmau 2008).

Considered through the theoretical framework of constituent and constituted power, the nature of a-legal space as a form of political action is intriguing. This form of action has a close and somewhat paradoxical relationship to these oppositional concepts. On the one hand, the action involves the emulation of institutions of constituted power. Indeed, the concept of constituted power is critical for articulating the connection between peoples’ tribunals, unofficial referenda, citizens’ debt audits and so on. Other key descriptors such as ‘quasi-legal’ and ‘quasi-institutional’, on their own, fail to fully capture what is at stake. Quasi-legal is too narrow: these activities are not always strictly ‘legal’ in form, as they are in the case of peoples’ tribunals. Quasi-institutional too broad: it is not just any kind of institution that is mimicked but



an institution of the state. In short, a-legal initiatives mimic the form of extant institutions of constituted power. On the other hand, this is done without any official basis in the law of the state, or at least exceeding any official basis; whilst making a claim to democratic or legal authority not recognized within the existing system; and purportedly as a response to institutional failure and an attempt to re-order aspects of the institutional order. In short: they are an expression of constituent power.

To be clear: the concept of a-legal space is not reducible to that of constituent power. Rather, the use of a-legal space should be understood as one contemporary manifestation of efforts to exercise constituent power. What is unique about this particular mode for the expression of constituent power is that whilst attempting to change the constituted order, and indeed in order to do so, actors consciously and carefully mimic aspects of the constituted order. Hence their authority as the constituent power is, paradoxically, dependent somewhat on the authority of constituted power. The relationship between the oppositional concepts of constituted and constituent power and their complex and paradoxical relationship to a-legal space are themes I return to in subsequent chapters.

### 1.3. Existing theorisation of a-legal space

How then should these activities be understood and theorised? What is their meaning for organisers and what role may they play in processes of social or political change? The various activities here classed as a-legal have received limited scholarly attention. The most researched type of a-legal space is the peoples' tribunal, on which there is a small but growing literature set (see for e.g. Klinghoffer & Klinghoffer, 2002; Borowiak, 2008; Chinkin, 2006; Nayar, 2006; Nayar 2003; Nayar, 2001; Terrell, 2005; Beigbeder, 1999; Merry 1995; Byrnes 2012; Byrnes & Simm 2013; Otto 2017), of which Klinghoffer and Klinghoffer (2002) provide the most in-depth study to date, in their book *International Citizens' Tribunals: mobilising public opinion for human rights*.

A recurrent account within this literature characterizes peoples' tribunals as a kind of corrective safety net. According to Klinghoffer and Klinghoffer (2002, p. 5), peoples' tribunals:

can . . . serve as a corrective mechanism through which public intellectuals mobilize world public opinion against powerful countries shielded from sanctions under international law. If the absence of effective and permanent legal structures is the problem, then [people's] tribunals may offer an appropriate solution.

The problem, they note, with existing international legal institutions such as the International Criminal Court is that states with UN Security Council veto power may avoid charges. In these cases, they suggest that people's tribunals may offer a solution (ibid.). Hence these informal bodies might be viewed as like an extra layer of

international legal infrastructure. This position is broadly supported by Borowiak (2008, p. 161) who states that “citizens’ tribunals inhabit a space shaped by the exceptional condition of institutional failure” which have “become part of the repertoire of non-governmental practices promoting international accountability where law and official bodies fall short” (ibid., p. 186). In a similar vein, peoples’ tribunals have been characterized as ““fallback” forums’ (Terrell 2005, p. 8), and playing a potential “auxiliary role” where formal mechanisms fall short (Beigbeder 1999, p. 138).

However, there are problems with this analysis. Firstly, in the vast majority of cases, peoples’ tribunals are not followed up by similar legal action within the formal system. The governments of the USA and UK, for example, are yet to face charges of war crimes for the invasions of Vietnam and Iraq, despite both being the subject of large scale international peoples’ tribunals. Even the 2005 Tokyo based *Women’s International War Crimes Tribunal*, which so carefully adhered to legal process and explicitly sought to continue the work left undone by the International Military Tribunal for the Far East (Chinkin 2006, p. 335) cannot easily be claimed to have functioned as a “corrective mechanism” as Klinghoffer and Klinghoffer suggest (2002, p. 5). Despite meeting the most rigorous requirements of international legal norms, the tribunal has elicited limited formal response from the Japanese government, who are yet to admit legal responsibility or offer a formal apology to the ex-comfort women (Chinkin 2006). If people’s tribunals are to be seen as a kind of corrective safety net, then surely justice within the formal system must be a key measure of their efficacy? Yet, if they are so rarely achieve this, why do thousands of activists

around the world, with increasing regularity, continue to spend years organising these events?

The second problem with this analysis is its failure to address the issue of why these cases could not be dealt with through the formal legal system in the first place. In most cases, peoples' tribunals are established only after formal mechanisms have been exhausted or barriers to their use are perceived as insurmountable. Chinkin (2006), for example, charts the many efforts made to access justice for the comfort women through national and international legal and political institutions in the decade preceding the *Women's International War Crimes Tribunal*. For these individuals it is not an "exceptional condition of institutional failure", as Borowiak suggests (2008, p. 161), but a system in which they are systematically marginalised and excluded from political and legal recognition.

There are scholars, however, who have suggested a different way in which these initiatives should be understood. Drawing on analyses of the *World Tribunal on Iraq* and the *Permanent Peoples' Tribunal*, Jayan Nayar (2001, p. 3), suggests that peoples' tribunals should be understood as efforts to "reclaim law". They are instances of "peoples' law-doings", which could contribute to the creation of an alternative "peoples' legality" (ibid.). In contrast to liberal scholars who have emphasised the importance of an apolitical bipartisan approach (c.f. Klinghoffer and Klinghoffer 2002), Nayar depicts these initiatives as principally engaged in discursive struggle. The *Permanent Peoples' Tribunal*, for example, is described as "a self-consciously political creation for the explicit purpose of challenging the constructions of

dominant law and thereby seeking to reclaim for the purposes of suffering humanity the voice of judgement” (2001, p. 3).

At the heart of this project to construct a ‘peoples’ legality’, is the idea of “creating a different authority for judgement” (2006, p. 320). Nayar explains;

The idea of people’s law, as an opposition to Empire’s law, is something more than an articulation of protest. It is not occupied with urging Empire to reform. It is not intended to seek an invitation to speak with the powers who seek to implement Empire’s projects. Rather, it is about creating a different authority for judgement and action altogether, based on other ‘word-worlds’ of law that are authored by peoples in action (ibid.).

The suggestion is that peoples’ tribunals are engaged in discursive struggle: to assert both the authority to pass judgement and the validity of their alternative judgement. Sally Engle Merry takes a similar position, when she argues that peoples’ tribunals can “contribute to the reconstitution of the sociocultural world in...emancipatory ways” (1995, p. 16). In her 1994 Presidential Address at the annual meeting of the Law and Society Association, Sally Engle Merry responded to Joel Handler’s (1992) earlier critique of the postmodern turn within law and society scholarship. Merry argues that Handler “looked too narrowly for ways that law contributes to social justice and transformative politics” (1995, p. 12). The wider lens she advocates includes an appreciation of the “the constitutive nature of law”, by which she means “the way legal processes construct social and cultural life” (ibid.). Significantly, Merry draws on the *Peoples’ International Tribunal of Hawai’i* to exemplify this point and demonstrate the way law constructs the social and cultural world. She argues that this peoples’ tribunal, in which the government of the United States was tried for the

invasion and occupation of Hawai'i, for resource appropriation and for the cultural destruction of the Hawaiian people, contributed to the redefinition of Hawaiian people. "Viewed as irresponsible and 'childlike' in the 19th century, Hawaiians in the 1990s were increasingly recognized for their rich cultural tradition and demands for greater political power" and a year after the tribunal there was a "growing recognition of Native Hawaiian claims" (ibid., p. 24). Organisers of the *Peoples' International Tribunal of Hawai'i* have, Merry claims, "accepted the symbolic power of law" and use "the appropriation and redeployment of law as a basis for imagining a new social order" (1995, p. 79).

Building on the work of Nayar (2006; 2003; 2001) and Merry (1995), I suggest that peoples' tribunals, commissions, referenda and other a-legal initiatives should be understood as sites in which actors attempt to advance an alternative order. They are not adjuncts to the existing legal or political system, but attempts to exemplify an alternative to it. Through prefiguring an alternative order they struggle to imagine, legitimise and ultimately institutionalise it. In the rest of this section I seek to show that this is a helpful way to understand each of the different types of activity which have been characterised as using a-legal space(s).

I start with the peoples' tribunal format, where this argument is perhaps most contentious. Peoples' tribunals seek to demonstrate the suffering and injustice which has arisen from a prevailing state of affairs. And they seek to show how a different application of the law, to that so far tried within the formal legal system, can rectify this situation and is the correct application of the law. However, the extent to which their use of law diverges from hegemonic legal concepts and arguments varies.

Importantly, in many instances, it might well be argued that peoples' tribunals don't seek to contest or change the existing legal order, but rather to see it *upheld*. Instances such as the *Russell Tribunals* on Vietnam and Palestine have involved a careful adherence to internationally recognised and accepted legal norms and treaties. The intention has been to prove charges of war crimes and genocide, in each case, within the terms of universally recognised international law.

For two reasons, however, I argue that exploring peoples' tribunals as a form of constitutional struggle is still appropriate. Firstly, whilst only some peoples' tribunals invoke a counter-hegemonic legal order, and others stick rigidly to accepted international legal norms, concepts and procedures, all peoples' tribunals hear legal claims which could not be heard within the formal legal system. That the United States faced charges of war crimes and genocide for its actions in Vietnam in 1967, for example, was inconceivable. Hence the *Russell Tribunal* can be seen as a challenge to the political order, if not the legal order. Or to put it another way, it challenged the *de facto* legal order, if not the *de jure* legal order. And it did this in part through highlighting the divergence between the two.

An alternative response is to agree that peoples' tribunals are not always about contesting or re-imagining the legal order. Hundreds of peoples' tribunals have taken place around the world since the 1967 Russell Tribunal, and they have reflected a variety of motivations and different forms of legal consciousness; some more conservative than others. However, in some of the most significant examples of the phenomenon this is precisely how they have been understood by organisers. And

moreover, it is to this end that they have most commonly been employed in the last two or three decades.

As a member of the *Permanent Peoples' Tribunal* reflected, regarding the nature of the *PPT* when contrasted with the earlier *Russell Tribunals*:

While the two Russell tribunals were simply tribunals of opinion, occasional expressions of a fraction of the Western intelligentsia, by conferring on the Tribunal a permanent character and by providing it with an instrument of reference, the Universal Declaration of the Rights of Peoples, the Leilio Basso Foundation aims at contributing to the creation of a transnational humanitarian order (Member of the PPT, anonymous, cited in Klinghoffer and Klinghoffer 2002, p. 165).

As its founder, Leilio Basso, explained, the PPT addressed the need “to fight the origins of the diverse forms of oppression which are necessary to the survival of the capitalist system” (cited in *ibid.*).<sup>1</sup>

The *PPT Mexican chapter* recently concluded its four-year investigation of “Free Trade, violence, impunity and the rights of the peoples”. The conclusions of the panel of judges reviewing the alleged deterioration in the education system are particularly interesting. The judges found evidence of growing inequality, violations of all kinds of rights, and the commercialization and privatisation of education. They concluded that “the government created the constitutional conditions that enabled this process to flourish through carefully crafted legislation, passed and implemented at all levels”

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1 In a similar vein, legal scholar Richard Falk suggests that the PPT can “relate positively to the energy of decolonization” (cited in Klinghoffer & Klinghoffer, 2002, p. 165). Indeed, peoples' tribunal scholars Klinghoffer & Klinghoffer (2002, p. 165) have gone so far as to remark that PPT members “tend to accept the bullet more than the ballot as a means of exercising self-determination.”



(Coll 2015). Hence the ruling can be interpreted as an attempt to contest the now institutionalised neoliberal order in Mexico.

Klinghoffer and Klinghoffer (2002, p. 179) observe that;

The last decade of the twentieth century witnessed the development of tribunals focusing on the reputed perils of “global capitalism.” The concerns are similar to those raised by demonstrators in Seattle, Washington, and Prague—namely, that the combination of globalization and capitalism is being spread by an exploitative “system” to the detriment of “the people.”

Hence they highlight the need to contextualise any attempt to make sense of the peoples' tribunal tactic. It is a tactic that has been used for over eighty years, and with increasing frequency, by different kinds of organisations, in many parts of the world and to address a diverse range of issues. As such, divergent applications are inevitable. Equally, however, their observation supports the argument that, since the 1990s, one recurrent application has been in wider struggles against neoliberalism and the legal and political order which supports it.

Contemporary peoples' tribunal organisers have often explained their use of the peoples' tribunal tactic as a response to injustice which is both normalised and institutionalised. Organisers of the recent London-based peoples' tribunal on 'precarity', as one example, observe that:

People's tribunals, like the one proposed here, can be applied in work-related situations where systemic injustice, normalized to the point of intractability, lies beyond the reach of existing labour and employment legislation and policy (Precarious Workers Brigade, 2011).

Similarly, organisers of the Philadelphia based *Peoples' Tribunal Against Police Brutality and Misconduct*, explain that they:

believe that a tribunal of this type is necessary due to the systemic nature of police brutality in Philadelphia and the U.S. The state has given police the legal license to commit acts of murder and brutality with impunity (Askia Coalition Against Police Brutality 2011).

Peoples' tribunals have addressed a dizzying range of different issues, from the rights of mental health patients to foreign wars to 'precarity' and police brutality. Perhaps the common theme is the perception of institutionalised, systemic injustice. The peoples' tribunal tactic hopes to both contest the institutionalised order within which such injustice occurs, and exemplify an alternative.

Turning to non-binding referenda: one might question the extent to which these initiatives really embody and enact a different legal order. Wasn't the *Radical Cause* referendum in Venezuela, for example, simply an attempt to undermine an unpopular president by a rival political party? An in-depth discussion of this case is reserved for chapter 4. However, as I hope to show in this chapter, interviews with organisers and participants suggest the action was about more than bringing down a particular president for many of those involved. President Pérez was, in the words of one organiser, "a stopper, that had to be removed" (Almeida Pérez 2012). And the referendum was intended to challenge the existing system of pacted two-party

representative democracy, and the limited political agency it afforded the majority of citizens.

In fact, despite the variety of issues addressed through non-binding popular and citizen-led referenda, I argue that they commonly represent an attempt to contest the constituted order. The *World Referendum on Climate Change*, which was initiated by Bolivian civil society in 2010, is a good example of an initiative which sought to challenge the legal and political order at the international level. The proposed referendum questions illustrate this well, the first reading:

Are you in favour of changing the capitalist model of overproduction and overconsumption and re-establishing harmony with the environment, recognising and respecting the rights of Mother Earth? (PWCCC 2010)

The Scottish '*Keep the Clause*' campaign's referendum against the repeal of Clause 28 is an interesting case. In this instance the a-legal tactic was employed to *resist* changes to the constituted order, which had been initiated by government. However, broadly speaking the case still fits the hypothesis. Organisers, without institutional power, turned to the use of a-legal space, in an effort to promote a particular legal order which was distinct from the government's proposed legal changes.

Debt audits have supported public education and consciousness raising efforts on the one hand and constituted an important legal tool on the other, as Ecuador's successful bonds default demonstrates. However, there is precedent for also understanding

these activities as about something more than this. Prominent debt campaigner and former director of UK NGO *Jubilee Debt Campaign*, Nick Dearden has discussed the role they may play in building a “new economic vision” (2011). Reporting from a recent conference on austerity in Greece, Dearden noted that the debt audit was seen as a tool which might help indebted European countries avoid “the three decades of stunted development experienced by Latin American countries”. However, he added:

But the activists gathered this weekend believed that a debt audit can be the start of something even more fundamental, a new way of thinking about economics. As [the Greek MP] Sakorafa put it, an audit is the start of regaining values and vision to show ‘beyond speculating market games, there are more valuable concepts; there are people, there is history, there is culture, there is decency’ (Dearden 2011).

Such comments support an interpretation of debt audits as engaged in constitutional struggle, in a broad sense. They are struggling to challenge the existing economic order, and the arrangement of financial institutions and procedures which support it, and to begin to articulate what an alternative might look like.

This is a necessarily limited discussion of just some instances of the a-legal space tactic. However, I argue that this characterisation can be applied to a-legal initiatives in general. The very fact that actors resort to this non-binding extra-institutional space suggests the issue could not be addressed to their satisfaction within the formal system. One way to explain this is that their demands are based on a normative order which is fundamentally different to that of the extant legal and political order.

As a final point: non-binding referenda, peoples' tribunals, commissions, audits, and other a-legal initiatives are established in quite different circumstances, take very different forms, and play out in different ways from one another. As such, the intention is not to reductively lump these initiatives together with the claim that they are all doing exactly the same thing. Rather, I hope to have shown that they can each be seen as part of the same broad phenomenon, and hence demonstrate different ways in which struggle over transformative constitutional change can be enacted. A better understanding of what features these different forms of a-legal space share and where the differences lie is central to understanding the tactic, and is discussed in more depth in subsequent chapters.

## **Chapter 2: A conceptual framework for exploring the use of a-legal space**

In this chapter I elaborate a conceptual framework through which to understand and explore the use of a-legal space as a political strategy. I start with an exposition of Chilean theorist Marta Harnecker's account of a-legal space, where she originally coined the term, inspired by the Venezuelan *Radical Cause* party's referendum on President Carlos Andrés Pérez in 1992 (2007; 2008). Harnecker provides a starting point, but leaves various questions unanswered and the concept of a-legal space in need of theoretical development. In this chapter I propose how her account might be developed. I divide this task into two parts. In section 2.1 I consider the ontological status of a-legal space, and whether we can sustain the notion of a-legal space as a distinct legal category of action. I draw on Hans Lindahl's (2013) different theoretical account of the a-legal to argue that we can. In section 2.2 I consider a-legal space from a functional perspective. I draw on several different theories and concepts to explain how this approach might be an effective political strategy.

### **2.1 The concept of a-legal space**

#### **2.1.1 Marta Harnecker's account of a-legal space**

Harnecker's discussion of a-legal space is short: less than two pages are devoted to it. However, she makes several substantive claims, which provide a starting point for theorising the use of a-legal space. Firstly, the *Radical Cause* party's cheeky referendum on the presidency of Pérez is held to be something more than a

noteworthy historical quirk. It is framed as a particular political-legal strategy, distinguished by its alternative legal status. “No law provided for this type of consultation, but neither did any law prohibit it” (2007, p. 111), suggesting that:

besides the area of the *legal arena* and its opposite – the illegal arena – there is a whole other arena that... could be called the a-legal, that arena which is neither legal nor illegal (ibid., p. 138).

This depiction of a-legal space as an alternative political-legal strategy can be best understood when situated in its historical context. For decades, political strategy in Latin America was understood as a choice between 'reform' and 'revolution'. Whilst revolution necessitated the armed struggle, it promised the overthrow of the capitalist state, taking control of the means of production, and the opportunity to restructure state and society. The alternative, safer and for some more feasible option was to participate in the existing democratic system, and seek social improvements “within the parameters of capitalist property relations” (Cameron 2009, p. 339), and existing constitutional arrangements. The a-legal approach, as characterised by Harnecker, does not fit into either category. No laws are broken, yet neither do participants accept the prevailing rules of the electoral system or formal politics more generally.

The second claim concerns the potential utility of a-legal space. Whilst not often taken advantage of, these spaces hold significant potential argues Harnecker. Specifically, a-legal spaces “can be taken advantage of with great creativity, in order to raise consciousness, mobilize people and have them participate in a way that builds the anti-system social force” (2007, p. 112). In the case of the *Radical Cause* referendum

on Pérez, it is argued that the referendum “helped to create a political situation in favour of the president’s resignation” (2007, p. 111). Finally, Harnecker points to the ubiquity of a-legal spaces, which she suggests are “countless” (ibid.). Just two other specific examples are cited, both organised by the Zapatista Civil Movement in Mexico in the 1990s. One is the National Consultation for Peace and Democracy, in which 300,000 people participated in 1995. The public were invited to vote on various issues including whether the organisation should unite with others and form a common political front, or whether it should remain independent. The other is the 1999 National Consultation for the Recognition of Indian Peoples and the end of the War of Extermination, in which close to three million individuals participated (ibid.). Hence all of the examples of a-legal space given by Harnecker include popular consultations or referenda, organised by a political movement or party, without a basis in the formal law of the state. She does not suggest other forms that this activity might take, but equally she does not limit the concept to referenda. To sum up Harnecker’s proposal: the use of a-legal space is a tactic or strategy which avoids the traditional legal/illegal dichotomy; there are “countless” opportunities for action of this kind (2007, p. 112); and the tactic holds great potential to mobilise people, raise consciousness, and otherwise influence the political conditions for change.

Whilst intriguing, her argument leaves various questioned unanswered and the concept of a-legal space in need of theoretical development. Why should this space or activity be useful for social movements? And by what mechanism might it bring about changes in popular consciousness, mobilisation and participation? I consider these questions pertaining to the functional value of a-legal space in the next section. Now I turn to consider whether the idea of a-legal space as a distinct legal category can be



sustained. As it stands, there is a gap in Harnecker's account of a-legal space as an alternative legal category which is in need of further development.

A-legal space transcends the legal/illegal dichotomy for Harnecker because as with the referendum "no law provided for [it]... but neither did any law prohibit it (2007, p. 111). The problem with this argument is that legal provision and legal prohibition is not a real dichotomy into which all activity must fit. The *Radical Cause* referendum is simultaneously legal in the sense that it breaks no laws, and not legal in the sense that it has no basis in a legally recognised, sanctified and institutionalised process. Similarly, most other instances of a-legal space, including peoples' tribunals, debt audits or peoples' commissions (as just some examples) are legal to the extent that they are lawful and not legal to the extent that they have no formal basis in the law of the state. However, in this they are not distinct from many other forms of contentious political action and social practice more generally. Another objection is that Harnecker does not explicitly mention the quasi-institutional form of a-legal space, which is strange given that this is surely the key feature which distinguishes these activities from other forms of protest and informal politics. Therefore, despite its appeal, Harnecker's account is in need of development.

### **2.1.2 Hans Lindahl's theory of a-legality**

Hans Lindahl's conceptualisation of a-legality can provide just this development. Lindahl presents his novel theory of legal order and its disruption through strange behaviours and situations which he denominates 'a-legal', in his monograph *Fault Lines of Globalization: Legal Order and the Politics of A-legality* (2013). Lindahl's

account of a-legality has important commonalities with Harnecker's idea, beyond a (to some extent) coincidental use of the term 'a-legal'. Most significantly, he posits a distinct legal category of activity which in some sense transcends the legal/illegal binary. And, whilst there are differences between the activities Lindahl describes and the initiatives which are the object of this study, his theory can be used to fill a theoretical gap in the account of a-legal space developed by Harnecker. In the present section, I outline the central components to Lindahl's theory, before showing how it can be used in a theory of a-legal space as a political strategy.

Lindahl's a-legality is best introduced through examples. *Fault Lines of Globalization* opens with an anecdote. Recalling an experience he had whilst dining in a restaurant, Lindahl describes a "vagrant" who came in off the street and haughtily demanded he be served a meal. Much to the surprise of Lindahl and his fellow diners the waiter, not wanting to cause a scene, decided it was better to oblige and sat the man down at a table. When the waiter brought out the food the man smiled and asked the waiter if he would like to join him. The "stunned" waiter "awkwardly declined" and quickly returned to the kitchen (ibid., p. 1). For Lindahl, this peculiar incident captures something of what is meant by situations and behaviours which are 'a-legal'. "However fleetingly", Lindahl observes, "the vagrant's gesture disrupted the flow of an order that had been taken more or less for granted by those who participated in it" (ibid., p. 1). Through rejecting the regulatory force of the existing legal order - and its rules for how to behave in a restaurant - the actions of the vagrant disrupted the legal order, for those within it. This disruption is described as having "two faces" (ibid.). On the one hand, the vagrant's action prompted a new *awareness* of the extant legal order. Diners in the restaurant and the waiter alike were temporarily made aware of

their participation in a particular legal order – in which a restaurant is a certain kind of ‘ought-place’, where those with sufficient resources can eat, others serve the food, and others are left outside. On the other hand, the action also “intimated” the possibility of an alternative possible order (ibid., p. 2). Through the man’s suggestion that he be served regardless of funds, and his friendly dinner invitation to the waiter, another order was invoked, where different rules and different subject positions obtain.

This ‘a-legal’ behaviour, for Lindahl, resists assimilation with legal or illegal categories of action. The man’s behaviour breaks various rules for how one is to behave in the context. Yet crucially he does not behave as if he is breaking the rules, but rather as if regulated by some other kind of legal order. This behaviour is, according to Lindahl, *unordered* within the terms of the extant legal order and hence reveals to onlookers other possible ways of behaving not accounted for within this legal order. Had the man ordered a meal and then attempted to run off without paying the scenario would be less interesting and provocative. Equally so, had he meekly approached the kitchen and requested any food they were throwing out. Unlike these two alternative scenarios his behaviour does not easily fit within recognised categories of illegal or legal behaviour. Instead, his calm confident demeanour and unusual dinner invitation to the waiter contribute to a sense that something else is going on.

In another example, Lindahl describes a political group carrying out an ‘autoréduction’ (as it is known in French) in a French supermarket. The group fill their baskets with food, including expensive foie gras, then line up at each of the

checkouts in the supermarket. Upon being served they explain to the cashier that they will not be paying for the food but would like to take it to distribute amongst the unemployed. They request that the manager is called to authorise this, and politely refuse to move in the meantime, blocking any further sales from taking place. Yet another example discussed comes from the Brazilian *Landless Workers' Movement* (*Movimento dos Trabalhadores rurais sem terra*; MST). Citing as justification the hugely unequal distribution of land in Brazil where 1.6% of landowners control around half of arable land, the *MST* engage in land occupations and struggles through the courts to gain legal title for occupied lands (Lindahl 2013). Hence, common to Lindahl's examples is an act of rule-breaking behaviour, which is not acknowledged as such. Actors resist the regulatory force of the dominant legal order, and behave as if governed by some other legal order. And the effect of this behaviour is a disruption of the extant legal order, prompting a new awareness of this order and of the possibility for alternatives.

Lindahl's account of a-legality, its relation to legal order and its capacity to disrupt a legal order depends on the invocation of three new conceptual categories. Any legal order, it is argued, has its *boundaries*, *limits* and *fault lines*. Whilst not normally encountered in theories of legal order, for Lindahl these categories are central to understanding the nature of legal order, indeed they are constitutive of legal order. Whilst 'boundaries' refer to the line between the legal and the illegal within a given legal order, 'limits' refer to the line between what is legally *ordered* and what is *unordered*. The realm of the unordered encapsulates behaviour and situations not defined as legal or illegal, within a given legal order. The third new category, 'fault lines', is more specific and refers to the line between legally ordered behaviour and

behaviour or situations which are not only unordered, but *could not be ordered* by this particular legal order, because they presuppose a fundamentally different normative order altogether.

Whilst boundaries, limits and fault lines are constitutive of legal order, they are not always visible to those whose behaviour is governed by a given legal order. Lindahl's point is that much of the time we act with unconscious compliance, thinking and behaving in a way which is determined by the legal orders we are located within, yet we remain unaware of these frameworks which so structure our ways of being. In fact, it is only when these lines are breached that they become truly present for those whose behaviour they govern. Hence it takes illegal behaviour to reveal the *boundaries* of a legal order. As Lindahl puts it:

illegality has a 'positive' significance in that it renders legal order and behaviour *present* in a specific way... Illegality reveals that legal boundaries govern behaviour and also, conversely, that legal boundaries depend on behaviour (ibid., p. 27).

However, it takes a different kind of behaviour to reveal the *limits* or the *fault lines* of a legal order: not illegal behaviour but a-legal behaviour. Hence the value of a-legal behaviour and situations is their potential to reveal the limits and fault lines of a given legal order, to those within it, or in other words, to reveal its contingency.

Crucially then, for Lindahl, a-legality is a relational concept. The man in the restaurant behaved a-legally, in the terms of the dominant legal order regulating behaviour in this context. Hence, particular behaviours and situations are a-legal with respect to a given legal order. As Lindahl explains:

It makes no sense to pose the question about a-legality as though there are specific kinds of behaviour that are a-legal *as such*, independently of any given legal order (ibid., p. 159).

Behaviour and situations are deemed a-legal when they resist assimilation with legal or illegal categories of behaviour within a particular legal order, through behaving as if regulated by another legal order. This account offers one way to make sense of the suggestion that unofficial referenda, peoples' tribunals and commissions, civil society debt audits and so on constitute a-legal spaces. Similar to the man in the restaurant, the participants in these initiatives behave as if in accordance with another legal order. Hence the quasi-institutional format, which is strangely unremarked upon in Harnecker's description of the *Radical Cause* referendum, is central. Through acting out an institutional process which is based on a different legal or political order, in which different norms and values prevail, organisers invoke this alternative order and reject the existing one. Perhaps one might question the extent to which these initiatives really embody and enact a different legal order. Indeed, in many ways they enact processes which are very similar to the existing legal and institutional order. The vagrant diner, the autoréduction protesters and the MST occupations are not so obviously similar, and more transgressive it would seem. This is an issue I will address in the course of the thesis.

To sum up: for Harnecker, the *Radical Cause* referendum was interesting because it was not legally sanctioned, but nor did it break the law. It exemplified “a whole other arena... which is neither legal nor illegal” (2007, p. 138). The problem with this account is that legally sanctioned and institutionalised behaviour and illegal

behaviour is not a dichotomy into which actions must fit, and she has not distinguished this activity from many other forms of contentious political action. It seemed that something was missing from her account. In suggesting that a-legality is relational, involving a rejection of the extant legal order and 'intimation' of an alternative, Lindahl offers a way forward.

### 2.1.3 Weak and strong a-legality

There is further reason to draw on Lindahl's theory of a-legality to explore these initiatives. In distinguishing between different variants of a-legality, Lindahl offers one way to make sense of different approaches to the use of a-legal space, which is crucial to a deeper understanding of the phenomenon. As discussed in chapter 1, a-legal initiatives vary in the level of systemic critique in which they engage. Whilst the UK's *High Pay Commission*, for example, is described as "not anti-capitalist" and intended to "make the system work better" for business and society (Hargreaves 2012), other initiatives articulate a more fundamental challenge and demands incommensurate with the existing order. Organisers of the *Aboriginal Tent Embassy*, for example, reject the Australian government's discourse of 'reconciliation', assert that sovereignty was never ceded, and demand a treaty with the Australian state (Schaap and Muldoon, 2012). Such demands simply cannot be incorporated within the existing Australian legal and political order. Lindahl's theory of a-legality reflects a similar distinction. A-legality, he suggests, comes in a 'weak' and a 'strong' form, distinguished by whether the behaviour *could be* ordered by the extant legal order, or is something more than the "not-yet-(il)legal" (ibid., p. 174). Brazil's Landless Movement, the *MST*, is given as one example of weak a-legality. To be clear: this is not

a value judgement, but reflects the fact that their behaviour and demands are *orderable* within the extant order. The *MST*'s occupations are, of course legally contentious and the organisation has been taken to court on countless occasions. Nonetheless, the existing Brazilian constitution enshrines the right to occupy unused land, and the *MST* explicitly appeal to the constitution in seeking to justify their actions. In contrast, the May '68 occupation of the Sorbonne and the subsequent wildcat strikes across France are given as one example of strong a-legality. Workers engaged in “radical questioning” and “sought to overthrow the state and directly take over the economy”, Lindahl explains (ibid., p. 169).<sup>1</sup> Strong a-legality such as this “arrests legal intentionality in a more radical way: behaviour appears as (il)legal but has a normative point that definitively eludes both terms of this disjunction” (ibid., p. 168 – 169).

Lindahl's weak/strong categorisation of a-legality maps neatly onto the initiatives which are the subject of this study. This provides support for the applicability of Lindahl's theory. Also, however, it provides tools to better understand the use of a-legal space as a political-legal strategy. For Lindahl, weak and strong variants of a-legality are involved in a fundamentally different claim-making process. A full exposition of the weak/strong distinction, and its implications for how we understand the claim-making process in which these activities are engaged, depends on Lindahl's novel account of legal order. Lindahl promotes a “first-person plural” concept of legal order” (ibid., p. 4). Law, he suggests, should be understood as a type of collective action taken by individuals who come together to act as a group: “legal

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1 Whilst in contrast, the statements and actions of the unions and French Communist party exemplify weak a-legality, argues Lindahl; both had “vested interests in the continuation of the extant legal collective” (Lindahl 2013, p. 169).



order as played out by a 'we' in which a manifold of individuals act jointly" (ibid.). A full discussion of the significance, strengths and possible problems with this conception of legal order is beyond the scope of this study. What is important, however, is how this approach relates to his theory of a-legality as that which reveals the limits and fault lines in a legal order. In short, weak a-legality is an appeal to the existing legal collective to shift the limits of the legal order, whilst strong a-legality involves a more radical challenge. As "something more and other than the not-yet-(il)legal" (ibid., p. 157), it involves behaviour or situations which intimate an incommensurate legal order, in which the normative point of the collective action is entirely different. Hence it is not an appeal to the existing legal collective to shift the boundaries of the legal order. Rather it involves an appeal to a different, not yet existent, legal collective orientated around different normative values.

The weak/strong categorisation of a-legality suggests that a-legal initiatives might involve very different kinds of claims for very different audiences. It has implications for their likelihood of success, and indeed for what success would even look like. This is an issue I return to in chapter 4 and the discussion of the *Radical Cause* referendum on Pérez. For now, it is sufficient to appreciate that the framework provides tools to explore what specific a-legal initiatives are trying to achieve and to whom their demands are directed.

#### **2.1.4. Is a-legal space the best way to understand these activities?**

There are a couple of potential objections to the use of 'a-legal space' as a conceptual tool to understand peoples' tribunals, civil society referenda, debt audits and the

other initiatives which are the subject of this study, which it is necessary to consider. Firstly, might it not be better to opt for a positive description such as 'peoples' law initiatives' or 'social movement legal initiatives', instead of 'a-legal space' or 'a-legal initiatives'? These conceptual categories are more descriptive, offer greater clarity and are less ambiguous. And moreover, there is precedent for understanding peoples' tribunals in this way. Nayar (2006; 2001) has advocated the development of 'peoples' law', as an alternative to the existing international legal order which has largely been transformed into 'Empire's Law' (2006): law for which the primary purpose is to normalise and legitimate the structural violence of empire. Peoples' law is developed by the grassroots, in "communities of suffering", and is grounded in an alternative set of norms, values and meanings (2006). Peoples' tribunals should be seen as practising and developing this alternative kind of law. Therefore, extending the idea of 'peoples' law-doings' to include debt audits, popular referenda, and other popular quasi-institutional initiatives for social change could build on the peoples' law project initiated by Nayar.

However, for several reasons the concept of a-legal space offers greater analytical purchase as a tool to explore the phenomena which are the subject of this study. Firstly, these activities are not always based entirely in civil society or social movements. As highlighted in chapter 1, in some instances, state and sub-state actors have adopted an a-legal approach. And so to define the phenomenon by its civil society or social movement basis would be to exclude important examples. Secondly, the category of 'a-legal space' facilitates a focus on the tactic and strategy, rather than attempting to generalise about who employs it and to what ends. This means that interesting cases like the Ecuadorian *Public Debt Audit Commission* which are initiated

by states are not excluded. But also, we can avoid any assumption about the type of political project in which this tactic is employed. Peoples' law has substantive criteria: it is in the interests of 'the people' or the common good; it enjoys popular grass-roots support; and it contests the tyranny of states or capital, for example. A-legal space, by contrast, is politically and ethically neutral and can logically be employed by all sorts of political projects. If it transpires that a-legal space is commonly employed by a particular kind of actor, in a particular kind of situation or with particular kinds of goals, then this is a substantive finding which contributes to our understanding of a phenomenon, rather than the tautological implication of the conceptual category we started with.

In the event, it is striking that in almost all instances the use of a-legal space is employed to support projects on the left of the political spectrum. One unusual counter-example is the Scotland-based non-binding referendum on the repeal of Clause 28 in 2000.<sup>2</sup> Scottish citizens were enabled to express their opposition to the repeal of this regressive legislation in the nationwide postal ballot, in which 32% of registered voters took part (BBC 2000a; BBC 2000b). Principally supported by conservatives and the religious right, this case stands out from other examples of the phenomenon. Why this might be and what was different in this instance are questions to be explored in more depth.

A different objection might be made from a legal pluralist perspective. Legal pluralists challenge the equation of law with state law, and hold that there are multiple often incommensurate legal orders operating within any society (c.f. Merry 1988). From a

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<sup>2</sup> Discussed in more depth in chapter 1.

pluralist perspective these initiatives, one might argue, are not *a-legal* but simply *legal*. And moreover, the a-legal category depends on an outdated monist conception of law. However, I suggest that this is not the best way to understand these initiatives and would be to miss an important component of this strategy. Organisers seek to achieve change within the legal and political order which is constituted by the state. And these initiatives are intended to help achieve this. They mimic institutions of the state in order to challenge them and demonstrate another possible model. In defining these initiatives as a-legal rather than legal the intention is not to valorise state law, nor to suggest that indigenous law or other legal systems not based in the state are not law. It is to recognise the centrality of state law and institutions of the state to the a-legal space strategy.

#### **2.1.5. The limitations to Lindahl's conceptual framework for the present study**

Despite the similarities, there are various notable differences between the behaviours and situations Lindahl denominates as a-legal and the unofficial referenda, peoples' tribunals, commissions, and other a-legal initiatives here under investigation. Firstly, a-legal initiatives are less legally ambiguous; they are, in general, lawful. Lindahl's examples, on the other hand, are legally provocative and contentious, and it is the contentious, transgressive nature of the behaviour which lies at the heart of Lindahl's definition of a-legality. Secondly, a-legal initiatives are planned politically motivated actions, whilst Lindahl's category is much wider encompassing all sorts of behaviours and situations. Finally, and perhaps as a result of the former, Lindahl's account is not focused on how those behaving a-legally attempt to explain what they are doing and persuade others to join them. Efforts to increase awareness, political consciousness,

participation and mobilisation in the wider population are a key component to the initiatives which are the focus of this study. In the following sections I explore these differences, and what they tell us about a-legal initiatives and their relationship to Lindahl's a-legality.

### 2.1.6. Rule breaking

Broadly speaking, peoples' tribunals, unofficial referenda, civil society debt audits and other a-legal initiatives are *lawful*. Authorities may often try to limit and control their activities (imposing draconian limitations on venue choice, preventing key organisers obtaining foreign visas, and generally monitoring their activities)<sup>3</sup> and in several cases states have pursued legal challenges through the courts.<sup>4</sup> However, the onus has been on the state to construct the case that the initiative has in some way broken the law. In Lindahl's examples of a-legality, on the other hand, rule-breaking behaviour is both obvious and of central importance. Indeed, it is only through questioning and challenging existing legal boundaries between the legal and illegal that the limits of a legal order are revealed, and the possibility for other legal orders is made apparent. So, in both Lindahl's a-legality and the a-legal initiatives explored in this study, agents behave as if in accordance with some other legal order, and thereby invoke this other order. However, the latter do not question the extant legal boundaries in quite the

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<sup>3</sup> As just two examples, the Russell Tribunal on Vietnam was denied permission to take place in France and other European countries. It eventually took place in Sweden but was banished to a remote town rather than a major city (Duffett 1968); and a Colombian organiser of the International Tribunal on Climate Justice in Bolivia was prevented by Colombian security services from leaving Colombia to attend the event (Fundación Solón 2009b).

<sup>4</sup> Specific examples include the *Aboriginal Tent Embassy*, the first Catalan independence referendum in Arenys de Munt, Catalonia, and the Honduran President Zelaya's proposed a-legal referendum on convocation of a constituent assembly in 2009. In each of these cases organisers faced legal challenges, and court rulings found the latter two to be unconstitutional and ordered the initiatives to be cancelled. These cases and the issue of legality are discussed in more depth in chapter 3, sub-section 3.3.3.: 'the struggle to define (il)legality and the two 'axes of legality'.

same way. On this basis I would argue that a-legal initiatives do something somewhat different to the scenarios described by Lindahl, whilst at the same time sharing many commonalities. They can be seen as a variant, or a sub-category of the broader phenomenon of a-legality as it is described by Lindahl.

One question to consider will be how important the rule breaking component is to the hypothesised phenomenological and psychological effect at the heart of Lindahl's account. Do these actions which don't break the rules in quite the same way – which are on the whole lawful – hold the same disruptive potential? If not, do they still count as a-legality? And is this still a useful form of action? I will return to these questions in chapter 4 where I will discuss the nature of the a-legality in which these initiatives are engaged in more depth.

A final consideration is that these initiatives are often accompanied by and/or intended to support more explicit rule and law-breaking behaviour. To name just a few examples: the *Russell Tribunal on the Vietnam War* hoped to provoke a mass movement of civil disobedience against the war (Duffett 1968). Organisers of the *Radical Cause* referendum, in some accounts, intended to help create the conditions for a coup (Almeida Pérez 2012).<sup>5</sup> *Aboriginal Tent Embassy* organisers returned to illegally occupy the old parliament building on the twenty-year anniversary of the Embassy in 1992 (Schaap 2008). Perhaps part of the value of these initiatives, then, is in helping to legitimate these other more legally contentious actions and the wider project of which they are a part.

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<sup>5</sup> However, this is contested, as I discuss in more depth in chapter 4.

### 2.1.7. Activism

The second key difference is that, for Lindahl, a-legal behaviour and situations are not limited to political activism, nor need they be motivated by a conscious intention or desire to disrupt the legal order. We cannot know the intentions and thinking of the homeless man in Lindahl's restaurant anecdote: whether he sought to challenge the rules in a restaurant and wider legal order from which he is excluded, or just fancied his chances at a free meal. But for Lindahl's account of a-legal behaviour this doesn't matter. The behaviour is defined as a-legal because:

erupting into a legal order from the domain of the unordered, ...[it] transgresses the spatial, temporal, subjective, and material boundaries that establish whether behaviour is legal or illegal (Lindahl, 2013, p. 4)

And in this way it:

disrupted the flow of an order that had been taken more or less for granted by those who participated in it... it called attention to the restaurant as part of a concrete order in which boundaries establish that certain persons are to behave in certain ways in certain places and at certain times... [and] intimated another way of ordering who stands and who sits, who orders and who eats, when one is entitled to enter and leave, and so forth (ibid.).

Hence, behaviour is defined as a-legal because of some external feature(s) of that behaviour which suggest a transgression of "the... boundaries that establish whether behaviour is legal or illegal" (ibid.), and the presumed effect of this on others. Other

examples of a-legal behaviour for Lindahl include environmentally destructive activity, before such behaviour was regulated.

A-legal initiatives, by contrast, are politically motivated and consciously seek to promote their alternative legal (and social, political, cultural) order. Moreover, they are explicit in their invocation of another order. They don't just "intimate" another order, as Lindahl suggests (*ibid.*), but spell it out, attempting to imagine and articulate the details. How then should the relationship between these initiatives and Lindahl's a-legality be understood? I suggest that these initiatives should be understood and explored as self-conscious and politically motivated instances of a-legal behaviour. As suggested above, they are a sub-category of the broader phenomenon of a-legality, and this is one of the specific characteristics of this sub-category. The significance of this difference is another issue which is explored in more depth in subsequent case study chapters.

#### **2.1.8. Seeing a-legality**

Relatedly, Lindahl does not provide us with all the theoretical tools necessary to explore and critique these initiatives which so explicitly promote another possible order. Lindahl argues that a-legal behaviours and situations disrupt the extant legal order: "calling attention" to it and "intimating another way of ordering" (*ibid.*, p.1–2). But for whom, one may ask? When the French protesters carried out the *autoréduction*, most shoppers were "irate" and few sympathetic to what the protesters were doing, it is noted. For some, commenting on a blog page about the incident, it was "SIMPLY THEFT" (anon quoted in *ibid.*, p.36) and "pure and simple



theft" (anon quoted in *ibid.*, p. 37). Indeed, Lindahl notes the strong desire we have to order and make sense of unusual behaviour and situations. Quoting Helmut Plessner's description of how people react to 'boundary situations', he captures something of how a-legality may be experienced in extreme cases:

Unanswerable situations, in which man cannot orient himself, to which he can find no relation, whose condition he cannot discover, which he cannot understand and cannot grasp: with which, therefore, he can do nothing, are ... intolerable. He will try at any price to change them, to transform them into situations 'answerable' in some way or other, or to escape them (1970, quoted in *ibid.*, p.37).

This desire to reduce experience to familiar categories presents a challenge to those seeking to disrupt the legal order through a-legal behaviours. The tendency will be for onlookers to interpret strange rule-flouting behaviour as 'simply illegal' and thereby bypass the process of critical reflection about the extant legal order which a-legality promises to stimulate. Despite what Lindahl argues, the negative, dismissive comments of shoppers witnessing the *autoréduction* suggest that this is much what happened on that occasion too.

Of course, one might make a different argument. The verbal reactions of shoppers to the *autoréduction* could belie a more ambiguous consciousness. In fact, assertions that the incident was "SIMPLY THEFT" carry the implicit suggestion it might be seen as something else or more: a defensive dismissal of some other unspoken suggestion. (It would be unnecessary and peculiar to describe a house burglary as 'simply theft'!) However, whilst these shoppers might have been aware of some alternative

construction of the event, they are avowedly denying it and rigidly resisting engaging with it.

As highlighted, a-legal referenda, tribunals and other initiatives which are the subject of this study do something somewhat different to Lindahl's a-legal scenarios and behaviours. They can be seen as a sub-category or variant of Lindahl's a-legality. In most cases, (though importantly not all)<sup>6</sup>, these initiatives are further from "the pole of illegality" (Lindahl 2013, p. 159), and as such are less likely to be dismissed as 'pure criminality!' or similar. The analogous risk here, however, is that onlookers and the wider public dismiss the project as 'not real', 'pretend', 'not really law' or equivalent. As Byrnes (2012, p.4) illustrates, this indeed characterises a common response to peoples' tribunals:

often seen as a curiosity that shows commendable imagination and energy on the part of organisers but as lacking legitimacy and any practical relevance to the real world of law, rights and politics. A quaint subject for academic study perhaps, but little more.

The disruptive potential of these initiatives is lost if they are dismissed on either count: as 'pure criminality!' on the one hand, or 'not really law', 'lacking legitimacy', 'pretend' or 'a joke' on the other hand. Therefore, part of the challenge for those initiatives which explicitly seek to embody and promote an alternative kind of order is in persuading onlookers to engage with what they are doing. They must persuade participants and onlookers to 'see' the a-legality: to see the behaviour as more than simply illegal or conversely not legitimate or serious exercises, and to engage with the

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<sup>6</sup> Instances where the use of a-legal space(s) has been constructed as illegal by the State or other opponents are discussed in chapter 3.

discursive disruption this brings. Lindahl touches upon this point when he describes the autoréduction organisers' efforts to "interpellate" the other shoppers, "engaging them in a discussion about the point of their action" (ibid., p. 35), but this is not developed. Understanding a-legal initiatives requires exploring the way in which they attempt to persuade (or 'interpellate') participants, onlookers and wider audiences. And a theory of a-legal space as a political strategy requires an account of why, when and how people might be persuaded to engage with what these initiatives are doing. Therefore, in section 2.2 I move beyond both Harnecker and Lindahl and attempt to theorise this process and strategy. Firstly, however, I consider one aspect of this strategy hitherto left to one side: the spatial dimension.

#### **2.1.9. The spatial dimension: 'A-legal space' or 'a-legal initiatives'?**

Until now I have referred to 'a-legal initiatives' and 'a-legal space' somewhat interchangeably. In Harnecker's account the phenomenon is understood in terms of 'space'. Lindahl, on the other hand, has a different unit of analysis, instead referring to a-legal 'behaviours' and 'situations'. Hence there is a need for clarification. Here I argue that there are good empirical and theoretical reasons to retain the spatial dimension to the concept. Firstly, the empirical reason: organisers of these initiatives often describe what they are doing in terms of space. I give just some examples, to illustrate this trend. Peoples' tribunal organisers and scholars alike often emphasise the intention to create spaces in which the voices of victims of injustice can be heard. The *Courts of Women* have held more than forty peoples' tribunals, in Asia, Africa, Central America, the Arab World and the USA, on violence against women. They explain their motivation in the following way:

The Courts of Women are an attempt to define a new space for women, to define a new politics. They are public hearings in which the voices of the women are listened to – as victims, survivors, resisters... The Courts of Women are a new political space: the 'Court' is used in a symbolic way. In the Courts, the voices of the victims/survivors are listened to. Women bring their personal testimonies of violence to the Court. They are 'sacred' spaces where women, speaking in a language of suffering, name the crimes, seeking redress, even reparation (El Taller 2015).

The *Precarious Workers Brigade*, a London-based activist group who organised a peoples' tribunal on 'precarity' in 2011, articulate a similar position:

While some of the aspects of precarity are covered by existing law and are therefore illegal, the vast majority are not. Therefore, the condition of precarity seems to lend itself to the form of a people's tribunal that can provide a public space where voices of the implicated can be witnessed, for example, by listening to the stories of precarious workers in their own words, gestures, sounds and images (Precarious Workers Brigade, 2011).

Peoples' tribunal scholar, Jayan Nayar (2001) presents a similar perspective in his reflections on the 1967 *Russell Tribunal* on the Vietnam War:

The Russell Tribunal was created to provide that space for voices of suffering, a space denied by theatres of dominant legality. Throughout its proceedings, it was challenged as to its 'legitimacy' and its 'objectivity'. Throughout, it had to create a space for truths of suffering, to assert its historic mission to voice the truth, to force judgement, to prevent the crime of silence.

Referenda too have sometimes been framed in terms of the creation or reclamation of public space. The *Seventh Ballot* was an a-legal referendum on the convocation of a constituent assembly in Colombia in which several million people participated (discussed in-depth in chapter 3). As one key organiser explains:

It was also an exercise to recuperate public space that was being increasingly occupied by violence, organised crime, and special interests. This could only be done from different trenches to those of traditional politics (Carrillo 2010).

Perhaps least surprisingly, analyses of the *Aboriginal Tent Embassy* which occupied a physical space outside of the Australian Parliament House for six months in 1972 (and at sporadic periods since) have similarly focused on the Embassy's reclamation, subversion and creation of public space. As Cowan (2001, p.35) observed, the Embassy is “a practical and potent 'occupation' of Australian space: physical, social and political.” And as Muldoon and Schaap (2012, p. 540) agree: “the Embassy... constitutes an alternative public space to that authorized by the state. It brings into being a subaltern counterpublic.”

There is also theoretical support for conceiving of these initiatives in terms of the space(s) they use or create. Within various academic disciplines over the past decade the study of 'social space' has become a major subject of enquiry (Hetherington 2010). As Hetherington (ibid.) points out, most of this new theorising has explored how space is used to resist the dominant social order. A plethora of new, old and resurrected concepts have been used to theorise how actors resist and challenge the dominant social order through creation of a separate space within which different cultural and behavioural codes prevail. Within cultural studies and cultural

geography, for example, many studies have drawn on the Foucauldian concept of *heterotopia* (see for e.g. Teyssot, 1994; Connor, 1989; Soja, 1995; Delaney, 1992; Lyon, 1994; Bennett, 1995; Genocchio, 1995; Hetherington, 1993; 1997). This somewhat ambiguous concept was understood by Foucault to refer to radically different sites in which normal behaviours are suspended, and which are destined to compensate and purify other spaces. The concept has been applied to psychiatric hospitals, retirement homes and prisons (by Foucault himself (1967)); Further Education colleges (Blair 2009); and to the UK-based protest camp *Climate Camp* (Saunders and Price 2009), to name just a few examples.

Similar debates in sociology and cultural geography have drawn on the anthropological notion of *liminality*, used to describe rites of passage rituals and a middle point where an individual is understood to have left one life stage and is yet to be initiated into the next (van Gennep 1960; Turner, 1969). Within liminal space “the normative structure of society is temporarily suspended or overturned”, notes Hetherington (2010, p. 32). According to anthropologist Turner (1969) these rituals, which are an important part of life in small-scale societies, function to help a society both understand and renew itself.<sup>7</sup> The *Temporary Autonomous Zone* (TAZ) is yet another conceptual category of this kind. Coined by anarchist writer Hakim Bey, the TAZ is described as “a guerilla operation which liberates an area (of land, of time, of imagination) and then dissolves itself to reform elsewhere/ else-when” (1996, p.101) and has been used to describe the revolutionary Communes of Paris, Lyons and Marseilles; American countercultural communes of the 1960s; and social events such as festivals and dinner parties. Other key and closely related concepts used to

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7 ‘Liminoid space’ is the term given to analogous rituals when taking place in large-scale societies, where their significance is less (Hetherington 2010).

articulate the broad phenomenon of an alternative kind of space include margins, paradoxical space (Hetherington 2010) and Lefebvre's (1991) theory of *representational space*.

The various different concepts employed within the broader sociology of space literature are not synonymous. Temporary Autonomous Zones, heterotopia, margins, liminal spaces and so on, have emerged in different disciplinary contexts to address somewhat different questions, and hence vary in focus and nuance. However, there are several significant common themes. Firstly, they are primarily conceived in terms of resistance to and divergence from the dominant social order. Within these spaces it is possible to incubate different behaviours which constitute a challenge to the dominant social order. And these spaces, even if they exist only temporarily, have an impact on the dominant social order. Therefore, there is a strong theoretical precedent for exploring resistance to the dominant social, legal or political order through the use or creation of an alternative kind of space.

The arguments of Kevin Hetherington (1997) in what remains the most theoretically developed account of heterotopia to date are particularly significant for a theory of a-legal space(s). Hetherington suggests that a key weakness in accounts of alternative space – from heterotopia to representational space – is the misconception that such spaces are characterised by a suspension of rules. Scholars have focused on their potential to avoid and subvert dominant ways of thinking and behaving, often resulting in a somewhat romanticised conception of these spaces as orderless. In fact, they are equally subject to processes of ordering, just a different form of ordering. Secondly, he stresses that ordering is an active process, not a static phenomenon.

Hence it is something to which we all contribute. The value of heterotopic space is in enabling subjects to participate in an alternative form of ordering. Finally, these spaces are not disconnected from the wider social context but closely connected, and hence have an impact on the wider context. Hetherington argues that heterotopic spaces have been essential to wider-scale discursive and social change. He develops this theory through reference to the Palais Royale in eighteenth-century Paris which, he argues, played a crucial role in the emergence of new ideas and ways of thinking which preceded and enabled the French revolution. Hetherington's (1997) arguments, supported by the wider literature on the use of space as a form of resistance, suggest the value of maintaining a spatial dimension to the concept of a-legality. Having made the case for retaining the concept of a-legal space as an ontologically distinct category of action, I turn now to consider its functional value.



## 2.2. The use of a-legal space as a discursive strategy

The use of this kind of space must be understood as a type of discursive strategy. It has no *direct* legal or material consequences. No one is imprisoned, fined or otherwise sanctioned, following a peoples' tribunal. Venezuela's President Carlos Andrés Pérez would not have to step down, no matter the outcome of the *Radical Cause* referendum. Catalonia faced the same legal and political obstacles to secession, following the spate of non-binding independence referenda which took place across the region in 2009. And unlike with many other protest tactics, normal life continues uninterrupted: no roads are blockaded, city centres occupied, or businesses shut down. As a form of dissent, peoples' tribunals, popular non-binding referenda, debt audits, and other forms of a-legal space function at a purely discursive level. Hence this kind of tactic must be understood as an attempt to bring about a discursive change which will in some way advance a broader project. The following sections are an attempt to theorise this discursive strategy.

I take the theory of political grammar as elaborated by Daniel Hausknost (2011) and Aletta Norval (2006) as the theoretical framework through which to understand processes of discursive change. This framework has several strengths as a tool to explore the use of a-legal space. Most importantly, it provides a model for the relationship between discourse and agency, and an account of how discursive change happens. Hence in the first section I outline the key components to the theory of political grammar and its utility to explore discursive change through the use of a-legal space.

Next I consider the defining characteristics of this tactic – the adoption of a quasi-institutional form, without any formal basis, or exceeding an institutional basis – and their significance from a discursive perspective. Drawing on the large body of literature which has emphasised the hegemonic effects of law, I argue that these activities emulate the legal form in an attempt to confer the same authority, legitimacy and hegemonic influence associated with the law. However, this is only one of the two ways they attempt to claim legitimacy. Whilst on the one hand appealing to the authority of *constituted* power, these initiatives also appeal to the authority of *constituent* power. Within the literature which emphasises law's hegemonic power, commonly known as '*the constitutive approach to law*', there is support for an argument that both constituted power and constituent power have hegemonic effects. Whilst discursive change is the product of many different factors and sources, it seems that within certain kinds of societies expressions of both *constituted* and *constituent power* are particularly influential in the production of meaning. This is significant because, I argue, these activities can be seen as an attempt to harness the meaning-making potential associated with constituted and constituent power. In the final sections I consider two other related ways in which these initiatives may work as a tool for discursive change: through the creation of democratic subjectivities and the fostering of 'receptivity'.

### **2.2.1. Political grammar**

Harnecker makes bold claims about the potential for a-legal spaces to be used to raise consciousness, participation and otherwise influence the “political situation” (2007, p. 11). What is missing from her discussion is an account of how and why such effects

should be expected. As a starting point for addressing these questions, what is required is a theory of the construction and transformation of social meaning. Daniel Hausknost's (2011) theory of political grammar change is one effort at such a theory, which is potentially interesting from the perspective of a-legal initiatives. Intending to address a gap in the literature, where radical scholars have neglected the "'mechanics' of change and agency within the dominant liberal democratic order" (2011, p. 21),<sup>1</sup> Hausknost develops an account of how possibilities for change are delimited and shaped within a liberal democratic order (or indeed any political system) based on the notion of *political grammar*.

Hausknost builds on the earlier work of Norval (2006), in which she applies the Wittgensteinian concept of 'grammar' to the political realm. As Norval explains, "for Wittgenstein, grammar sets the bounds of sense" (Norval 2006, p. 231); it structures the way we perceive and understand the world, and enables us to communicate meaningfully with those who share our grammar. Political grammar, therefore, sets the bounds of sense within our political world. Hence, as an analytical construct it can help explain how and why we make sense of the world in the way we do. Hausknost develops the idea of political grammar through elaboration of a theoretical model for how precisely it 'sets the bounds of sense'. Political grammar is understood as that which "organises and stratifies the 'political imaginary'" within a society (ibid., p.101). Ideas, statements, and demands are organised into categories of relative intelligibility and possibility, as a function of a society's political grammar. Any specific political statement, idea, or demand, understood here as an 'element' is

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1 Scholars from Hardt and Negri (2000; 2004), to Holloway (2002; 2010), to Laclau and Mouffe (1985) have, he alleges, failed to theorise the precise process by which change happens (Hausknost 2011).

located somewhere along a continuum from 'possible', to 'semi-possible', to 'intelligible but impossible', to simply 'unintelligible'.

The theory of political grammar is, of course, not original in attempting to theorise the invisible structures which shape and delimit social meaning. In several ways the theory has much in common with discourse theory. However, as Hausknost explains, political grammar is not intended to replace or challenge discourse theory. Rather, it is intended to account for why certain kinds of discourses flourish whilst others flounder in a given context. Hence, it can be seen as an additional theoretical layer, which can augment a discourse theoretical framework.

The utility of this framework for a study of a-legal space lies in its detailed account of how discursive change happens, and how it explains the source of discursive change. According to this account, a society's political grammar changes as a result of 'tipping events'. The notion of 'tipping events' was proposed by Robert Wood (2006) to describe the 1998 Master Settlement Agreement (MSA) with Big Tobacco, in which tobacco firms agreed to pay 206 billion dollars to US states to cover Medicaid expenses for tobacco-related illnesses. The MSA was a significant win for campaigners, "symbolised a profound shift in the battle with Big Tobacco" and is said to have opened the door to federal and state-level regulation (ibid., p. 420). To this extent it can be understood as a 'focusing event': an already familiar concept in the policy studies literature which describes events which are "important drivers of major policy change" (ibid., p.419). However, as Wood pointed out, the MSA had important differences with the events normally characterised as focusing events; and this is what makes it interesting from the perspective of discursive change. Typically

“large-scale, dramatic event(s)” (ibid.) such as natural disasters or a terrorist attack, focusing events work to catapult a little known issue onto the public agenda and thereby act as a catalyst for policy change. The MSA does not fit this bill. By the late 1990s the dangers of tobacco were well known to the public, and campaigners had tried to challenge the industry through political and legal channels since decades earlier. Hence the event did not significantly impact on public awareness or education levels, nor draw media attention to a little-known issue. Yet it served to shift the policy terrain and influence policy actions in the months and years that followed, much like a focusing event. For Wood (2006) the MSA exemplifies the need for clarification in policy studies literature, and for identification of 'tipping events' as different kinds of focusing event.

In Hausknost's (2011) account of political grammar change, tipping events serve to shift the discursive terrain, 'unblocking' elements which are impossible or only semi-possible, whilst closing off other elements. The turn to events to account for grammatical change is necessary, given the nature of grammar. Political grammar describes the way in which experience is ordered and made sense of. As a system for ordering reality and assigning meaning it cannot be falsified.<sup>2</sup> Hence “it is only through the power of events, occurrences outside the bounds of grammar”, that grammar can be changed (ibid., p. 17). Certain events play this role, somehow forcing a grammatical “mutation”, so that “the 'bounds of sense' are shifted” (ibid.).

There are a couple of reasons that this is the right framework through which to explore the use of a-legal space: firstly, the detailed and explicit account of how

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<sup>2</sup> Hence, Hausknost acknowledges political grammar can be conceived as both the process for ordering reality and the product of this process (2011).

change happens; secondly, the pivotal role attributed to 'tipping events' to account for ruptural change. In most cases, the use of a-legal space revolves around a key event or series of events. Whilst some initiatives such as large scale peoples' tribunals may go on for several years, in general they are not intended as permanent ongoing campaigns, and they are centred on key events. Secondly, in many and potentially all cases, the change these initiatives seek to bring about is necessarily of a ruptural nature. They are based upon and hope to advance a fundamentally different conception of reality. There is no incremental route from the hegemonic order to the alternative order that is proposed, because the two are incommensurate, so the change must be of a ruptural nature. Hence a theory which allows for and models the potential for change through rupturing events is more useful than one in which change is understood as gradual. This is not to suggest that ruptural and incremental processes aren't both part of a more complex picture of discursive transformation. They might be, but it is the potential for change through rupturing events which is of interest here.

Various questions remain outstanding, with significant implications for the a-legal space strategy. Do tipping events take place at the micro-level, for example within certain communities or sub-cultures? Or does the theory apply only to national or macro-level discursive change? A-legal initiatives in many cases, though not all, operate at a local level, receiving limited national or international media coverage, and directly involving only several hundred participants. If the phenomenon applies to the micro-level, or even if not, can such events ever be engineered? A-legal initiatives could be understood as trying to do this. Can we use the theoretical concepts and arguments within Hausknost's theory of political grammar change to

help assess these initiatives' potential as tools to disrupt the hegemonic order? These questions will be explored in the investigations of specific case studies which follow in chapters 3 to 5.

### **2.2.2. The hegemonic function of constituted power**

If these initiatives are understood as attempts to contrive 'tipping events', even if only on a micro-level, it is necessary to think through how they might do this. Part of how they do this, I suggest, is through appearing as an expression of constituted power. A large body of literature has emphasised the constitutive effects of law; arguably these effects can be attributed to constituted power more generally. Moreover, events associated with constituted power such as referenda and court cases have been a recurring theme in the small literature set devoted to the phenomenon of tipping events. Drawing on these two bodies of research, I suggest that there is a structural connection between events which are associated with constituted power and tipping events, which a-legal space holds the potential to exploit.

The relationship between law and social meaning is the subject of a large, diverse, and wide-ranging body of literature. Scholars since Durkheim have explored the way in which a society's laws are a product and reflection of its culture and in turn how law contributes to the emergence, transformation, and continuity of cultural norms. A central theme within this literature concerns the hegemonic or 'constitutive' nature of law. Laws, specific legal rulings, institutions, procedures, and legal discourse more generally are held to have a particularly powerful role in the construction, preservation and transformation of hegemony. Studies have highlighted the role of

law in the construction of identity, and how legal definitions shape cultural definitions of race, gender, sexual orientation or class, amongst other subjectivities.<sup>3</sup> As Saguy and Stuart (2008) observe, this research shows how categories of identity can gain legitimacy once they are institutionalised in law, and sometimes indeed *only* once they are institutionalised in law. Other research has looked at the role of law in the construction of collective memory, and how the law influences which events are forgotten and which are remembered (see for e.g. Markovits 2001).

Particularly important within this wider body of literature is scholarship referred to alternately as 'legal consciousness' work and the 'constitutive approach to law'. This approach emerged in the USA in the 1980s, fuelled by dissatisfaction with the then dominant instrumentalist conception of law. The instrumentalist approach emphasised the potential of law as an instrument to achieve social change through legislation on racial equality, wealth redistribution, and access to education, among other areas. It was at its peak during the sixties and seventies, at a time of landmark rulings on integration and racial equality such as *Brown v Board of Education*, when the US Supreme Court declared state laws establishing racially segregated public schools to be unconstitutional (Mautner 2010). However, by the 1980s some scholars sought a deeper conceptualisation of law and its role in the construction and transformation of social life. Influenced by the cultural studies movement in Britain in the 1960s and 70s and drawing on the Gramscian concept of hegemony, the constitutive approach understands social reality as contingent and constructed. Scholars sought to explore how societal narratives about the law worked to sustain

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<sup>3</sup> See for example; Sohoni (2007); Golub(2005); Pascoe (1996) on race; Witt (2000) on gender; Canaday (2003) on sexual orientation, Steinberg (2003) on class.



(or undermine) dominant power structures. As Susan Silbey (2005, p.335), one of the founders of this approach, put it; “the study of legal consciousness developed in law and society research as an explicit effort to explore the submerged iceberg, to trace this hegemonic power of law”.

The ‘submerged iceberg’ refers to the then little-understood phenomenon of legal hegemony: the power of law to sustain support for its ideology and values, even in spite of the inequality and suffering it so often produces. As Silbey put it (ibid., p.323): “Why do people acquiesce to a legal system that, despite its promises of equal treatment, systematically reproduces inequality?” (2005, p.323). There have been various attempts to explain the hegemonic power of law. In their classic text, *The Common Place of Law*, Ewick and Silbey (1998) attributed law’s continued hegemony to the co-existence of contradictory forms of legal consciousness, which together leave it invulnerable to attack:

At any moment, the law is both a reified transcendent realm, and yet a game . . . Challenges to legality for being only a game, or a gimmick, can be repulsed by invoking legality’s transcendent reified character. Similarly, dismissals of law for being irrelevant to daily life can be answered by invoking its game-like purposes. Through these forms of consciousness (and the opposition between them), legality can be an uncontested and unrecognized power that sustains everyday life (ibid., p. 231).

In a different kind of explanation, Carol Smart (1989; 1990; 1995) has drawn on Foucault’s analysis of scientific discourse, suggesting that law functions in much the same way. With its own method, language, testing ground and system of results, “claims to scientificity and hence truth... position(s) law on a hierarchy of

knowledges” (1995, p. 72) It is, she notes, a feature of modernity that discourses which can make claims to ‘truth’ in this way, “rather than belief, superstition, opinion and so on”, are considered “high up in the hierarchy of knowledges” (ibid.). Another account points to the significance of law's instrumental material effects, as support for its hegemonic status. As Bourdieu observed, “the law is the quintessential form of ‘active’ discourse, able by its own operation to produce its effects” (1987, p. 839). Unlike other ways of interpreting, explaining and ordering reality, legal discourse is supported by force. It has material instrumental effects as well as constitutive, and the former serve to enhance the latter.

Of significance for the present study is the suggestion that law occupies a uniquely influential position in the construction of hegemony. My suggestion is that through imitating legal symbols, language and procedures, a-legal initiatives attempt, and have the potential, to harness these hegemonic effects. One objection will be that these initiatives are not always strictly ‘legal’ in form. Indeed, unofficial referenda, the *Aboriginal Tent Embassy*, or local-level monitoring projects like the UK’s *Police Monitoring Unit*, do not make use of legal discourse like peoples’ tribunals do. However, what they do share is an imitation of institutions of constituted power. So they do not always imitate legal institutions, in a narrow sense, but they imitate institutions which are defined by their basis in the law of the state. Arguably, institutions of the state enjoy at least some of the hegemonic power that the constitutive theory of law attributes to law. And a-legal initiatives have the potential to harness this power.

This literature suggests that events, statements, and discourses which are associated with constituted power should be explored for their potential to create tipping events. Turning now to the tipping event literature, there is further support for this claim. Significantly, two of the three cases of tipping events, which have been discussed in this new literature set, take the form of an expression of constituted power.<sup>4</sup> As described above, Wood (2006) argues that the Master Settlement Agreement - the US Supreme Court ruling against Big Tobacco - functioned as a tipping event in public discourse and policy around smoking. Indeed, this influential legal ruling was what motivated his development of the concept. In his contribution to the literature, Hausknost (2011) also cites an expression of constituted power. He describes the case of an unexpected referendum result in Austria to illustrate the tipping event phenomenon. The mere fact that both scholars focus on events which are associated with constituted power is noteworthy and grounds for exploration.

Moreover, Hausknost's (2011) depiction of the referendum result as a tipping event offers further insight into the possible connection between tipping events and constituted power. This alleged tipping event and Hausknost's analysis are significant, and so merit recounting in some detail. It is explained that in the Austrian context, until the late 1970s, the idea of banning nuclear power was inconceivable. However, in 1978 when faced with the decision to commission a new nuclear power station the government decided to call a referendum on the issue. Importantly, the government was pro-nuclear, as were much of the opposition party, the trade unions, and the majority of the Austrian public. The government was confident that the

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<sup>4</sup> The exception is the publication of Rachel Carson's book '*Silent Spring*', which was published in 1962 and documented the environmental effects of pesticide use. Wood (2006) suggests *Silent Spring* functioned as a tipping event much like the MSA with big tobacco.

proposal would be approved by the public, and the decision to hold a referendum was a political one: it was felt that a referendum would garner political capital for the government. However, as the referendum date approached, the pro-nuclear lead reduced. Fearing a no vote, the pro-nuclear Austrian chancellor announced he might resign should this be the outcome. However, it is argued by Müller (1998 cited in *ibid.*) that this had the unintended consequence of pushing a number of pro-nuclear opposition supporters to vote 'no' for party political reasons. The final results of the referendum were a rejection of nuclear power by 50.47% to 49.53%. Just a couple of thousand votes had tipped the outcome and Hausknost suggests that this was largely the result of the Chancellor's failed tactical move. However, what is interesting is how this "haphazard result nevertheless started to inscribe itself deeply into the political grammar of the country" (Hausknost 2011, p.123). The electorate "did not seem to regret the decision", he notes. A year later only 42% were in favour of a new referendum and by 2008, 80% of Austrians were opposed to nuclear energy. In short: the anti-nuclear camp had won the hegemonic struggle and it had "become common-sense in Austria to be anti-nuclear" (*ibid.*).

Significantly, this discursive turn was not already on its way, nor could it have been predicted prior to the 1978 referendum. According to Hausknost (2011), the referendum result itself had a causal impact. He explains:

The rupture itself was inflicted by the unlikely outcome of the referendum that constituted the tipping event. The authority of the referendum as a democratic instrument seemed to have eradicated the 'impossible' aspect of the element and the electorate seemed to have accepted its own decision as the new 'normality' – hence, the rupture triggered a mutation of grammar (*ibid.*, p.124)

The referendum result, it seems, had a force of its own regardless of the strength or the limitations of the anti-nuclear discourse which it propelled into the domain of common sense. The common depiction of expressions of constituted power as tipping events by both Wood (2006) and Hausknost (2011), combined with Hausknost's revealing analysis of the process, suggest a structural connection between tipping events and constituted power. Hausknost does not make this suggestion and in fact is keen to stress the variety in potential tipping events:

The 'events' that make a semi-possible element create a rupture in grammar can be of very different kinds and provide ample space for contingency. In the case of the Austrian discourse on nuclear energy one might say that a careless move of the Austrian chancellor has changed the political grammar on this issue once and for all (ibid., p.122)

This, however, seems to miss a trick. Whilst the Austrian chancellor's misjudged move was part of the story, setting other events in motion, it was not what ruptured the political grammar. It was the referendum result itself which did this. As Hausknost (ibid., p.124) puts it, it was "the authority of the referendum as a democratic instrument" which had the power to shift the political grammar in this instance.

Potentially, the authority associated with democratic institutions of constituted power underlies a potential to result in wide-scale change in societies' political grammars. Building on this we can better understand the potential for a-legal space as a tool to bring about discursive change, through creating tipping events. Moreover, as I will show in the following section, this is only one of the two ways in which a-

legal initiatives claim a democratic authority which has the potential to underlie tipping events.

### **2.2.3. The hegemonic function of constituent power**

However, there are certain instances which cannot be accounted for within the constitutive theory of law's existing framework. Calavita (2001) has shown that on some occasions, law not only lacks its assumed hegemonic effect: "it backfires as a hegemonic force" (ibid., p.106) and "contribute(s) to the deconstruction of the sociocultural meanings it embraces" (ibid., p.108). Her argument draws on an unpopular Italian appeal court ruling, and the events which followed it. In 1999, Italy's highest court of appeal, the Corte di Cassazione, overturned a rape conviction on the basis that the victim had been wearing blue jeans and as the Justices explained "it is impossible to take off jeans... without the active cooperation of the person wearing them" (quoted in Calavita 2001, p. 89). The ruling provoked outrage within civil society, the political establishment, the media, and the general public. Described by one journalist as "an authentic political earthquake" (de Florio quoted in Calavita 2001, p.93), the story was front page news in nearly all newspapers for several days; politicians from all parties came out against the ruling; the Speaker of the House of Representatives decried it as "shameful" and a "disgrace" (quoted in Calavita, 2001, p.94); the Prime Minister expressed "solidarity" with those who were outraged (ibid.); and various mass protests were organised across Italy.

The event presents a problem for the constitutive theory of law. According to the constitutive literature, law can "cement prevailing understandings, or anticipate

emerging ones" (ibid.). In either case it is 'constitutive': it creates and develops ideology. Whilst the literature recognises that some laws and legal rulings are less culturally impactful than others, this event suggests something hitherto not considered. The Cassazione ruling, argues Calavita (ibid., p. 91) had a "*de-constitutive*" effect:

By referencing an ideological worldview - relating to assumptions about gender, consent, and rape - that has been largely superseded (at least by an important segment of the dominant culture), the Corte di Cassazione has actually hastened the demise of that ideology. Far from shoring up the legitimacy of its ideological vision, this legal decision has exposed it to ridicule - an emblem of the foolishness of the normative order of yesteryear (ibid., p. 106).

Calavita's argument, then, is that the appeal court's ruling was so at odds with the dominant discourses within Italian society that it actually functioned to hasten the demise of the sexist patriarchal ideology on which it was based. Importantly, she sees reason to believe that this is not an anomalous case, but rather, such "*de-constitutive moments*" are not uncommon.<sup>5</sup> Another example proposed is the 1992 Rodney King case in which four white police officers in Los Angeles were acquitted of assaulting an unarmed black man, despite the video-tape evidence of officers beating King. The ruling triggered weeks of rioting across LA and was "a lightning rod for debates about the pernicious efforts [sic] of racism more generally" (ibid., p.110). Whilst Calavita does not discuss other cases it is not difficult to think of more examples. In the UK context, one might be the controversial Poll Tax legislation which became law in

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<sup>5</sup> She explains: "There is reason to believe, given the decentralized and "disordered" (Therborn 1980:77) nature of ideology and the quotidian, that they are not uncommon - at least not so uncommon as to make them theoretically uninteresting or insignificant" (Calavita 2001, p. 109).

1990. The Poll Tax legislation triggered demonstrations and rioting across Britain, including one of the biggest demonstrations in Britain's history, and is often depicted as a key factor in the downfall of Prime Minister Margaret Thatcher who resigned less than a year later (King and Crewe 2013; Graham 2010; Alderman and Carter 1991).

Calavita's aim is not to undermine the constitutive theory of law: she is a proponent of the approach herself. Instead she stresses the need for a complexified account of law's constitutive power, which recognises its sometimes *de-constitutive* potential. I want to argue, firstly, that there is a missing link in Calavita's account of law's 'de-constitutive power' (2001.). And that secondly, when considered in this light, it offers an important contribution to a conceptual framework for exploring the use of a-legal space. The missing link in Calavita's account is the presence of a popular backlash against the legal ruling. In each of the cases she draws on, it is not the controversial legal ruling itself which accounts for the subsequent discursive change, but rather the mass of protests, riots, and/or public criticism. No doubt countless other rape case verdicts in Italy, prior to and since the Corte di Cassazione ruling, have reflected the same dated misogynist ideology. However, for whatever complex combination of factors these cases have not generated the same public outcry as the 1999 "blue jeans" ruling. These rulings would not be seen as de-constitutive moments, but evidence of a certain ideology's continued influence. It is therefore the public backlash, not the ruling itself, which creates the de-constitutive moment.

One option is to bring in the concepts of constituent and constituted power to help make sense of Calavita's account of the de-constitutive power of law. The protests and wider public backlash triggered by the Italian appeal court ruling as well as by the



Rodney King case can well be framed as expressions of constituent power. By contrast, legal rulings are an expression of constituted power. As was argued above, actions, statements, and institutions of constituted power might be said to have the same hegemonic influence as proponents of the constitutive approach attributed to law. Perhaps what Calavita (2001) has shown is that on some occasions the successful expression of *constituent power* has the same impact on cultural meanings and discourse as an expression of *constituted power*.

Calavita's (2001) contribution to the constitutive theory of law literature, and what it might mean, is of quite some significance to a study of a-legal space. The oppositional concepts of constituted and constituent power are central to an account of this strategy for social change. The quasi-legal form is what distinguishes these activities from other forms of protest and resistance. Yet, as has been argued, they are not always quasi-*legal* in the narrow sense, but rather quasi-institutional: they imitate institutions of constituted power. Thus, on the one hand, they appear as simulations of the institutions of constituted power, yet at the same time they can well be conceived as expressions of constituent power. They contest aspects of the constituted order and the normative order on which it rests, and attempt to produce new legal norms, and (to varying degrees) appeal to a new "ethical community" (Schaap and Muldoon 2012).<sup>6</sup> Also, as I will show in the following chapter, in those rare instances where the use of a-legal space is attributed significant impact,<sup>7</sup> successfully establishing an association with both constituted power and constituent power has been a notable feature.

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6 As Schaap and Muldoon comment: "Constituent power does not only produce legal norms but also ethical community" (2012, p. 538)

7 'Rare' not because they are ineffective, but because of the difficulty in attributing cause and effect with this kind of action.

#### 2.2.4. The formation of democratic subjectivities through a-legal space

I have proposed one way we might understand the potential of these initiatives to bring about change. Drawing on Hausknost's (2011) account of political grammar change, I have suggested that through generating an association with both constituted and constituent power they create potentially ruptural events with the possibility to shift the "bounds of sense" (Wittgenstein 2010). I turn now to a different account of the processes by which political grammars change, which allows for a closer exploration of the individual subjective experience of a-legality.

Asking how it is that "democratic norms and values come to grip subject-citizens" and hence "how it is that we become democrats", Norval (2006, p.230) explores the formation of democratic subjectivity and its connection to political grammar change. The question of how citizens come to identify as democrats - as actors in a democracy with agency - has been largely neglected within democratic theory (ibid.). Even within deliberative democratic theory in which preference transformation is central, there is "scant attention" given to the process of political subjectivity change (ibid., p. 239).<sup>8</sup> Norval seeks to address this gap in the literature. Drawing on several additional concepts taken from the later Wittgenstein, she theorises the process by which political grammar changes, through the formation of democratic subjectivities.

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<sup>8</sup> Within the deliberative democracy canon this absence, she suggests, might be a result of the excessive focus on process and procedures which will facilitate consensus, at the expense of an interest in individual subjectivities and subject construction. Poststructuralist accounts, by contrast, are concerned with the process of subject and subjectivity construction, yet there has been limited consideration of what may be special about *democratic* subjectivities, with "the construction of democratic subject positions (is) often relegated to the domain of mere contextual political articulation" (2006, p.230).

Coming from the perspective of poststructuralist radical democratic theory, Norval is interested in the articulation and formation of identities.<sup>9</sup> And in accordance with this framework, she rejects the notion of a rational agent, whose beliefs, actions and preferences are the product of a rational and objective assessment of the facts. Rather, individuals' beliefs, preferences and actions are the product of their identification with different discourses. Here, then, the focus is on the processes by which agents come to identify with a democratic discourse and the democratic subjectivities it enables. Central to this process, she argues, are key experiential moments. By way of illustration she describes her experience of the first democratic elections in South Africa, in 1994. As citizens queued for hours waiting their turn to vote, she suggests they underwent a formative experience which prompted the assumption of a new identity as democrats:

Both black and white, living and working in what were the highly unequal conditions of the "white" suburbs, engaged in conversation and shared an experience of enormous significance - as equal participants. This participation signalled the public assumption of democratic subjectivity. Many decades of resistance practices, both in grassroots politics and in union activities laid the groundwork for this. However, this day contributed something new and important... Occupying the position of democratic subject brought a forceful new sense of subjectivity as equals into play, one that depended upon a public enactment at a particular point in time. Crucial to this enactment was a bodily participation, quite beyond the mere fact of the invisible ink marking being stamped on every voter's hand (2006, p. 230).

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<sup>9</sup> For radical democrats, democratic practice is not about "defending the rights of pre-constituted identities, but rather in constituting those identities themselves in a precarious and always vulnerable field" (Mouffe 2000, p.148).

The claim, therefore, is twofold. Firstly, that democratic subjectivities are assumed through experience (rather than new information or logical argument). Secondly, that at least one component to the formation of democratic subjectivities is not gradual: a shift occurs in particular key moments. It is this shift which is theorised. Drawing on the Wittgensteinian concepts of 'aspect-seeing' and 'aspect-change' or 'aspect-dawning', Norval argues that voters in South Africa's first democratic elections underwent an *aspect-change*, as they assumed a new identity as democrats.

Wittgenstein's notion of 'aspect-seeing' refers to the "the way in which we 'see' pictures and people" (ibid., p.234), in other words, the aspect that is focused on and used to make sense of a picture.<sup>10</sup> Aspect-seeing is made up of two distinct processes; continuous aspect-perception and aspect-change or aspect-dawning. Continuous aspect-perception refers to the way in which an object is perceived when it is immediate and spontaneous, without ambiguity or searching for words. The corollary in politics, Norval observes, is a hegemonic situation where there is one way in which the world is understood, and no sense of an alternative. Aspect-change or dawning, on the other hand, describes the process by which we come to see something in a different way. For Wittgenstein, the process is analogous to the experience of viewing a 'rabbit-duck picture': the simple illustrations which appear equally as a rabbit or a duck depending on the way one looks at it. The experience of an aspect-change is much like suddenly seeing the rabbit-duck as a duck after we had thought it was a rabbit. Norval argues that this is how the process of democratic subjectivity formation should be understood: as a sudden shift in perception, through which the

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10 This idea is much like the concept of 'frames', as discussed by Snow & Benford (1988), and Mark Steinberg's (1999) more critical take on frames – dialogic thinking.

existing conceptual elements are rearranged. Importantly, external reality remains the same but it is perceived in a suddenly different way.

Now, whilst Wittgenstein does not distinguish between the concepts of aspect-change and aspect-dawning, and they are often taken as synonymous, Norval argues that there is a difference in emphasis in his use of the terms. Aspect-dawning she suggests refers to seeing a completely new aspect whilst aspect-change involves the reactivation of an aspect that has been seen before. In the context of democratic subjectivity formation, aspect-dawning refers to the process by which individuals first identify as democrats. Whilst aspect-change captures the process by which this identification is renewed at later points in life. The key point is that both processes involve a rearrangement of elements rather than the addition of new information. New connections are drawn or reignited, out of information that was already available. The first elections in South Africa constituted an aspect-dawning, “in the full sense of the term. As against expectations right up until the election itself, the political grammar of apartheid was replaced by identification as democrats” (2006, p.248).

Now, Norval's conceptualisation of this process might appear too sudden. Discourses about democracy and the vote were central to the anti-apartheid struggle (Howarth 2000), so these concepts were not new to most South Africans. Her argument, however, is that the *experience* of this day contributed something *new* to the popular consciousness. Discourses of democracy had existed in the public sphere for years, and this was essential, but the bodily experience of participation was integral to the active assumption of democratic subjectivity. Participation in the first democratic elections in a country is of course an extra-ordinary experience, and likely an

exceptionally affecting one. Norval's argues, however, that the example is indicative of the way in which individuals in any society become democrats and renew an identity as democrats: through key moments in which an experience triggers an aspect-change or dawning.

The connection with political grammar perhaps needs clarification. Political grammar is conceived as a structural framework which shapes and delimits the way we perceive the world. In other words, it determines the *aspects* which are seen. Hence, an aspect-change or aspect-dawning reflects and corresponds to a change in political grammar. The assumption of democratic subjectivity, then, is one way in which political grammar changes.<sup>11</sup> Hausknost provided an account of political grammar change through 'tipping events' which was helpful for understanding the process at the level of whole societies or smaller communities. Norval, on the other hand, provides a way to look at the same process but from the perspective of the individual or collective subjective experience of political grammar change. This is helpful, given the need to explore the subjective experience of a-legal space and what factors might inhibit or enable the 'seeing of a-legality'.

So is there reason to think the experience of a-legal space(s) could have the potential to prompt an aspect-change? Is there potential for these initiatives to provide the

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11 One area for further reflection is how exactly political grammar and democratic subjectivity formation influence and delimit the other. If political grammar refers to "those horizons delimiting what is possible in any given context" (Norval 2006, p.231), whilst democratic subjectivity refers to our sense of agency as democrats, it is clear that the two are intimately connected but they are not one and the same. Indeed, the political grammar will likely shape the nature of democratic subjectivities available, defining what it should and can mean to have democratic agency. In a liberal representative democratic system, for example, democratic agency is largely conceived in terms of the ability to vote in free elections, free speech, the right to protest etc. In a different kind of democratic system, where a different kind of political grammar shapes societal consciousness, democratic agency may be conceived as much more than voting. And equally, certain forms of democratic consciousness will widen those horizons shaping what is deemed possible.

conditions necessary for such a shift in how individuals perceive the world and their role within it? Drawing on Norval's (2006) account of this process, key questions to direct at specific cases will include the nature of the experience for organisers, participants, audience members and other onlookers. Arguably, however, these spaces often create opportunities for democratic engagement with the potential to trigger such an effect. This is indeed somewhat how Boehringer (2014, p.3-4) has seen the potential value in Local Peoples' Tribunals:

By convening LPTs [Local Peoples' Tribunals] and dealing with their own issues, local communities can begin the process of transformation of consciousness and culture so necessary for the process of self-emancipation... LPTs provide opportunities for people at the local level to take the lead in normative actions defending their communities and their environment, and in opposing those institutions of the state and corporations which threaten their lives and welfare, their right to be fully human... In the process of taking these matters into their own hands, people involved in such autonomous actions, unbridled by state institutions could have a transformative experience.

He adds that these initiatives provide an opportunity to “develop our capacity to act with and for each other” and “break the ideological and experiential chains which bind us mentally, psychologically, culturally” (ibid., p.4). He is speaking specifically about local peoples' tribunals, which afford greater opportunity for popular participation than some forms of a-legal space, including for example most large- scale international peoples' tribunals in which the role for the wider public is as largely passive audience members. However, nonetheless, his argument suggests the value of exploring the experience of a-legal space for participants, organisers, and the wider public alike, and for assessing the transformative

potential of this experience, and specifically its potential to facilitate the formation of new democratic subjectivities. I return to this idea in the case study chapters.

### 2.2.5. Fostering receptivity

In this final section I explore one further area of literature which is helpful for theorising the use and potential of a-legal space(s). Specifically, this literature is helpful for addressing the question of what factors might inhibit or enable the 'seeing of a-legality'. The notion of 'receptivity' has in recent years caught the attention of scholars broadly located within the radical democracy paradigm (Kompridis 2011a; Kompridis 2011b; Kompridis 2011c; Beausoleil 2014).<sup>12</sup> Whilst there is no single conceptualisation of receptivity within this literature (Kompridis 2011a), what these studies share is a concern with peoples' willingness and aptitude to listen and respond to new voices and claims. As Emily Beausoleil (2014, p.19) puts it, helpfully, "with so much work on the issue of voice", this is "the inverse question of how people come to listen".

Receptivity is not a traditional concern for political theory. As Kompridis (2011a) notes, for most political theorists this is an "ethical" issue, "whose introduction into politics would surely have a depoliticizing effect" (2011b, p. 203). Depoliticizing, one presumes, because it is associated with individual personality traits, such as being attentive or a good listener. However, recent scholarship suggests we understand it differently, and as more than a reflection of individuals' concerns to be nice. Public

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12 Key contributions to this literature include Nikolas Kompridis' *Critique and Disclosure: Critical Theory between Past and Future* (2011a) and a "Special Issue" of the Journal *Ethics and Global Politics*, entitled "A Politics of Receptivity" (2011), in which a series of articles suggest receptivity should be "at the very centre of a transformed democratic politics" (Kompridis 2011b, p.203).



receptivity to difference in general and the kinds of discourses to which they are more or less receptive is an important factor in discursive struggle and crucially, it is argued, a product, in part, of the social, political and economic context. In other words, this literature suggests a structural account of receptivity to augment the more familiar agential one.

This research is important for an account of a-legal space(s) because it suggests, firstly, that receptivity is a phenomenon that can and should be studied. Hence it provides a framework through which to approach the problem which was identified in the previous chapter: potential public resistance to engaging with these initiatives. Secondly, research in this area suggests that receptivity is a phenomenon that can be actively fostered (or inhibited). Scholars have sought to show that public receptivity to new ideas and ways of being can indeed be influenced and actively fostered, through particular kinds of interventions. Drawing on recent research in neuroscience and into the notion of 'affect', Beausoleil (2014, p. 21), for example, explores how “the conditions of listening in politics... might be effectively harnessed to produce receptivity and responsiveness”. She advocates the use of “performative practices” such as theatre and dance, with their use of “affective and embodied strategies to garner attention”. More specifically, she argues that “the forms of encounter most effective in cultivating receptivity and revisability are those that move us via *affective intensity* within pointedly *mediated contexts*”(ibid., p.22, emphasis in original). Beausoleil argues that it is through this “balance of strategies” that performative practices “work to cultivate receptivity and dissemble those limits to thought, action and relation that preclude more complex ways of seeing” (ibid.).

Arguably the transformative potential of certain performative practices applies similarly to the experience of a-legal space(s), at least in some instances. Peoples' tribunals and commissions often include detailed accounts of personal traumas and specific injustices, including witness testimony and graphic evidence. For audience members and participants alike this may be emotionally affecting. The account of organisers of the London based *Peoples' Tribunal on Precarity*, supports the suggestion that participation can be an emotionally affecting experience:

We did not anticipate the strength of the emotional aspects of the tribunal – the anger, relief, anxiety, fear. It can be difficult to talk about such issues and even more difficult to listen. It is particularly empowering to speak and listen collectively (Precarious Workers Brigade 2011).

These initiatives are also *mediated*, in a way that many other forms of protest are not: there are visible organisers, who structure and lead the event, and participants often play the role of audience members. Beausoleil (2014) emphasises the importance of mediation, which can create a degree of distance helpful to create space for reflectivity.

Additionally, there is room to explore how the combination of spatial and legal components in these initiatives might actively foster receptivity. In most instances, initiatives occupy a particular physical space for a temporary period of time, within which organisers and other participants engage in a physically immersive and participatory experience. As discussed in the previous chapter, participants go through the motions of acting out a democratic or legal event, which reflects the kind of system they believe should be institutionalised. Participants in a referendum fill

out a ballot paper and post it in the ballot box, and others help run the polling stations; participants in a tribunal stand in the witness box, sit on the jury or listen in the audience. To varying degrees, organisers, participants and (sometimes) other members of the public are physically implicated in these initiatives.

What is interesting to consider is how the combination of these performative and embodied components, in addition to the quasi-legal, quasi-institutional format might create the conditions for receptivity to difference. Ben Seel's (1997) account of the *Pollok Free State* offers interesting anecdotal support for such a hypothesis. In 1994, the Pollok protest camp against the building of the new M77 motorway near Glasgow declared itself a 'free state', issuing passports to local residents and releasing a 'declaration of independence'. For Seel (ibid., p.109) the camp is an example of "counter-hegemonic resistance via the Temporary Autonomous Zone": organisers sought not only to resist the new motorway, but to "facilitate(ing) learning about the hegemonic political economy, consumer culture and liberal polity in order to help build a radical green movement" (ibid., p.108). His research shows that while the specific campaign to resist the new M77 motorway was unsuccessful, the experience of the camp radicalised participants, including both core group members and visitors from the wider community, who became increasingly involved in a wider resistance movement. The pertinent question for the present study, then, is to what extent the particular combination of performative, embodied and quasi-legal components impacted on the experience for organisers, participants and other visitors. Of course, this is difficult to measure, given that the process of radicalisation described by Seel might equally be a result of prolonged social movement engagement. However, there is some evidence to suggest that the use of a-legal space fostered a different kind of

receptivity, even with unlikely audiences. Jake, one of the core group members describes his experience at the camp:

That's the whole concept of the Pollok Free State – people make their own decisions about the way they want to live their lives; to a certain extent it's worked. It's been a bit of a gimmick, like declaring independence and giving out passports and stuff like that, but it's very much a definite space here... everybody has observed that, even the police. We've had the police out here telling us what to do and we've jokingly said, 'you can't tell us what to do, it's a Free State, it's a separate country'. But it's not a Free State so much as a geographical location, but a state of mind and it's very interesting to see how people observe that. Even people who have got the physical violent power know not to. That's weird, I mean it's good (Jake quoted in Seel, 1997, p.5).

Jake's comments suggest the experience of a-legal space may, on occasion, foster greater receptivity to new ideas and wider discourses, from audiences who might normally be unsympathetic. Beausoleil's (2014, p.21) discussion of how to "harness... the conditions for listening" helps provide some guidance as to what communicative and experiential elements to look out for within specific initiatives.

Coming from a different theoretical perspective, Campbell, Cornish and Gibbs (2010) have sought to address a gap in the social psychology literature, exploring how social movements create environments in which the demands of the poor and marginalised are heard. They coin the term 'receptive social environments' to describe contexts in which "the rich are willing to take these voices seriously" (ibid., p. 962). Interestingly, they cite the Brazilian Landless Workers' Movement, and in particular its efforts to

“emphasise its legal correctness” and constitutionality (ibid., p.14) as a successful example of creating a receptive social environment.

### **2.3. Conclusion**

The aim of this chapter was to outline a conceptual framework through which to understand and explore the use of a-legal space as a political strategy. Harnecker (2007; 2008) provides a starting point, but leaves various gaps in an account of this phenomenon which I have sought to fill in. Through understanding a-legal initiatives as a sub-category of the strange and disruptive behaviour that Hans Lindahl (2013) denominates as ‘a-legal’ we can sustain the idea of an ontologically distinct legal category of action. Such initiatives are strategic, self-conscious and politically-motivated examples of a-legal behaviour, where actors explicitly seek to disrupt the legal order and ‘intimate’ an alternative. They resist assimilation with the legal or the illegal, in the terms of the extant legal order, because they question and reject aspects this order.

In the second part of the chapter I considered the mechanism by which this strategy might function to bring about political or social change. Drawing on Hausknost’s (2011) account of political grammar change through tipping events, I explored the potential of a-legal space as a tool to consciously contrive these ruptural events which shift the political grammar and open up new political possibilities. I suggested that there is a structural connection between events which are associated with either constituted or constituent power and tipping events. Potentially, the democratic authority associated with referenda, court rulings, elections, but also (though less

commonly) wide-scale rioting or mass protests, has the potential to underlie the creation of tipping events. A-legal initiatives are distinguished by their association with both constituted power and constituent power, and in this way they have at least the potential to contrive tipping events. Finally, I have considered the role of these spaces in the creation of new democratic subjectivities, and in fostering receptivity to different ways of thinking. The embodied and performative features of a-legal spaces suggest their potential in both areas. This combination of concepts and theories is intended as a preliminary conceptual framework which will be tested and developed in the subsequent case study chapters.

### **Chapter 3: The use of a-legal space in Latin America**

The last two and a half decades have seen quite spectacular social and political transformations across Latin America. These have included the explosion of new social movements and the election of left and centre-left governments in countries across the region, and the turn to a new kind of constitutionalism on the part of governments and social movements alike. In this chapter, I situate the phenomenon of a-legal space as a strategy in the context of contemporary Latin America. Whilst a-legal initiatives can be identified around the world, there has been a particular preponderance of these tactics in Latin America over the last twenty-five years, and I argue that this both reflects and is a part of these wider social and political transformations. Looking at the use of a-legal space in this context can help us understand the phenomenon better. In turn, looking at the use of a-legal space can contribute to broader debates in contemporary Latin American politics.

In section 3.1, I provide an overview of the recent developments in Latin American politics, and explain their relationship to the a-legal space phenomenon. In section 3.2, I turn to a discussion of the first two case studies. These are two a-legal referenda which were attempted in Honduras and Colombia, both in the context of struggles to convene a constituent assembly to re-write the national constitution. These cases suggest that the concept of a-legal space can fill a gap in scholarly accounts of how constitutional change sometimes comes about. Facing the closure of the formal system, in both instances actors have turned to the use of a-legal space in an attempt to create an opening for constitutional change. In section 3.3, I make the bigger claim that other instances of a-legal space, such as citizens' debt audits, peoples' tribunals

and other unofficial referenda should be understood much like the Colombian and Honduran referenda: they are attempts to change the constituted order through creating a space for the manifestation of constituent power. These case studies are also useful for exploring other aspects to the nature of a-legal space as a tactic, which I discuss here. Finally, in section 3.4, I show how understanding a-legal spaces as part of the constitutional process can contribute to existing literature on new Latin American constitutionalism.

### **3.1. Recent developments in Latin American politics**

Significant social, political and economic transformations have marked the last two and a half decades in Latin America. Several interrelated developments are of particular significance. These include the emergence of powerful new social movements as influential actors in many Latin American countries; the election of left and centre-left governments across the continent, partly (and to varying degrees) as a result of these new social movements' collective action and support; and the turn to a new kind of constitutionalism by left governments in power. I discuss each of these developments, and their significance for a study of a-legal space, in turn.

#### **3.1.1. New Social Movements in Latin America**

Throughout the 1980s and 1990s, across Latin America, right-wing and social democratic governments alike adopted neoliberal macro-economic policies based on the 'Washington Consensus', under pressure from the World Bank and International Monetary Fund (IMF) (Gwynne and Key 2000; Harris 2000). The reduction of state



spending and privatisation of state industries in many instances led to dramatic increases in unemployment and poverty levels, which was compounded by a reduction in poverty alleviation and other state programmes (Harris 2000).<sup>1</sup> The emergence of new collective movements and action in this period is often understood as a response to the social and economic effects of neoliberalism (Silva 2009; Dinerstein and Ferrero 2012; Prevost, Vanden and Campos 2012; Ciccariello-Maher 2013; Green 2003; Prashad and Ballvé 2006).

Latin America has a long history of popular resistance from which the explosion of social movements in the 1990s can be traced. However, these new movements also shared several characteristics which mark a break with the past and have led to their classification by scholars as 'new social movements'. Firstly, unlike earlier workers' movements and unions of the twentieth century they are not connected to established political parties and have generally kept their distance from these actors. Secondly, instead of the armed tactics common in earlier decades they have adopted an ever-widening repertoire of non-violent direct action, including road blockades and closures, and occupations of land, buildings and public spaces, as well as marches.<sup>2</sup> Thirdly, they are comprised of previously marginalised groups such as indigenous people and peasants, women, Afro-descendants, as well as the traditionally mobilised urban working class. Like the new social movements which preceded them in the Global North, they have articulated new claims which were ignored by political parties and traditional labour movements, such as indigenous and

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1 In Argentina, for example, unemployment increased from six percent in 1991 to 18.5 percent in 1995 (Dinerstein and Ferrero 2012).

2 Road blockades for example have been employed to great effect by the Argentinian Piqueteros movement and indigenous movements in Bolivia and Ecuador. In Bolivia and Ecuador the strategy of blocking every road into and out of a capital city, forcing the city to a grinding halt, has twice been connected with resignation of governments (Prevost, Vanden, and Campos 2012).

peasant rights, women's rights, gay and lesbian rights and environmental concerns, in addition to more familiar demands for employment and land. Also new, and of central importance to their increased influence, has been the formation of broad coalitions, made up of different groups not previously aligned, such as the Bolivian indigenous and peasant coalition movements (Prevost, Vanden and Campos 2012).

Another less tangible shift might be conceived as a change in paradigm for how movements think about social change. As Prevost, Vanden, and Campos (2012, p.6) observe:

For decades the concept of social change was linked to armed revolution in Latin America and a commitment to construct socialism with the Cuban experience as a guide... The language and tactics of contemporary movements have gone in a different direction.

This is reflected in the turn away from the traditional political parties, as well as from armed tactics aimed at a revolution through force. Equally it is reflected in how movements articulate their goals. As Prevost, Vanden and Campos (ibid.) highlight, movements have moved from an “explicit commitment to radical socialism”, to “broad themes of social and economic justice”: “emblematic of the approach is the commonly-heard declaration 'another world is possible'”. Movements have sought to build alternatives to capitalism, not captured in the socialist model of Cuba or elsewhere, but rather embodied by concepts such as 'buen vivir' ('living well') which encompasses the indigenous values and practice of living in harmony with nature (Escobar 2010).

One facet to this new paradigm is “a shift from pure opposition to neoliberalism to the creation of new forms of social and political interaction” (Dinerstein and Ferrero 2012). This is reflected in the practice of horizontal decision-making and participatory democracy, which has characterised movements across the continent. In some instances, movements have filled the gap left by the end of state provision of social services. The Unemployed Workers Organisations of Argentina, for example, have established projects to meet community needs in areas including housing, education, and health care, amongst others. Leveraging state funds through a strategic use of protest and road closures, they have been able to pay registered 'unemployed workers' to work on the community projects (Dinerstein 2010). However, despite their dependence on state funds, these organisations have (to varying degrees) maintained a radical autonomy from the state. Work is defined as “a true human attribute that must be used for the production of useful goods and services for the community rather than profit making” (Union of Unemployed Workers cited in Dinerstein 2010, p. 361); in other words, they have developed and maintained a counter-hegemonic definition of work.

Autonomous practice, exemplified in the Unemployed Workers Organisations of Argentina, as well as the Zapatistas of Mexico, but present to varying degrees in movements throughout the continent, has also been a defining feature of new movements which have emerged since the 1990s (Dinerstein and Deneulin 2012; Dinerstein 2014). Indeed, some have argued for the invocation of a new conceptual category: 'hope movements' (Dinerstein and Deneulin 2012; Dinerstein 2014). The familiar category of 'social movement', it is argued, fails to fully capture the new kind of collective action in which these organisations are involved, as they attempt

to “explore alternative relations and sociabilities beyond them” (Dinerstein and Deneulin 2012; Dinerstein 2014, p. 1).

What is significant for the present study is that this transformation of the informal political sphere in Latin America has correlated, broadly speaking, with the appearance and increased usage of a-legal spaces. The explosion of new social movements (and hope movements), characterised by their pursuit of 'another world' and their efforts to explore and prefigure aspects of this other world, makes fertile ground for a study of a-legal space. The use of a-legal space should be seen as movements' attempts to imagine and articulate the laws and institutional structures which might support these “alternative relations and sociabilities beyond them” (ibid.).

### **3.1.2. The New Left in power and new Latin American Constitutionalism**

Alongside these changes at the level of grass-roots politics and civil society, have come equally dramatic developments in formal politics. Starting with the election of Hugo Chávez in Venezuela in 1998, a wave of progressive left and centre-left governments have taken power across the region. The so-called 'pink tide' or 'left turn' has included the election of left governments in Chile, Brazil, Argentina, Uruguay, Ecuador, Bolivia, Paraguay, El Salvador, and Guatemala since the start of the 2000s.<sup>3</sup> In 2005, it was reported that three-quarters of South America's population of

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3 Socialist candidate Ricardo Lagos was elected in Chile in 2000, followed by his successor Michelle Bachelet in 2006; Brazil's Luiz Inácio Da Silva ('Lula') of the Workers' Party in 2002; and socialist Tabaré Vázquez of Uruguay in 2002. In 2002 Lúcio Gutiérrez, was elected on a left wing platform in Ecuador, and subsequently replaced by centre left candidate Rafael Correa in 2006. Néstor Kirchner was elected in Argentina in 2003, and Cristina Kirchner in 2007. In 2005, Bolivia elected the social movement candidate and first indigenous president, Evo Morales. In 2008, Fernando Lugo was

350 million people are now ruled by “left-leaning presidents”, all of whom had been elected since 1998 (Painter 2008). As one might expect, Latin America's 'left turn' has generated much scholarly debate, both positive and alarmed. Various strongly contested attempts have been made to categorise the contemporary Latin American left in power, and distinguish between different models of government. In most analyses, however, the governments of Venezuela, Bolivia and Ecuador are placed in a common category (Ellner 2012).<sup>4</sup> These governments share various characteristics in terms of policies, discourse and strategy, which it is generally argued distinguish them from other governments in the region, and both socialist and social-democratic governments of the past (*ibid.*). Key common characteristics include anti-neoliberal government rhetoric; significant investment in social programmes and redistribution; nationalisation of key industries; and the use of charismatic leadership styles, to name a few (Ellner 2012; Ellner 2013). A fuller discussion of the New Left governments in power is beyond the scope of the present discussion, however, one

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elected president of Paraguay on a left-wing platform and became the first president from outside of the traditional oligarchy. In Central America, Daniel Ortega of the Sandinista National Liberation Front was elected in 2006; centre left Alvaro Colom was elected in Guatemala, breaking fifteen years of right wing governance; and Mauricio Funes of the Faribuno Martí National Liberation Front was elected in El Salvador in 2009, ending twenty years of right- wing governments (Prevost, Vanden and Campos 2012).

- 4 One particularly influential framework suggests that “there is not one Latin American left today; there are two”, distinguishing between the 'bad' populist left of Venezuela, Ecuador and Bolivia, and the 'good' social democratic left exemplified in countries such as Chile, Uruguay and Brazil (Castañeda 2006, p. 29). Subsequent scholarship which has adopted the good left/ bad left framework has sometimes differed in its interpretation of the 'good' left, but the 'bad' left is consistently understood to refer to the governments of Venezuela, Bolivia and Ecuador. Proponents of this framework point to the centralisation of power, 'undemocratic' constitutional changes, and 'populist' leadership styles in the so-called bad left. In contrast, others have championed the governments of Venezuela, Bolivia and Ecuador as a “new left” with a promise of “21<sup>st</sup> Century Socialism” (Harnecker 2010, p. 35 - 50); others, similarly, have celebrated the experiments in popular control and participatory democracy within the so-called bad left (Smilde and Hellinger 2011). Its continued influence notwithstanding, the good left/ bad left framework has been widely criticised for its reductive nature and normative bias (Cameron and Sharpe 2010; Ciccariello-Maher 2013; French 2009; Buxton 2010). Critics argue that differences in left governments' policies are best understood through reference to cultural, political and historical variation. And, moreover, Castañeda's (2006) framework serves a disciplinary function, intended to discipline left governments in the interests of Washington (Cameron and Sharpe 2010; French 2009). Despite these fierce disagreements, the so-called 'bad left' countries of Venezuela, Bolivia and Ecuador are commonly placed in the same category by analysts of all political persuasions (Ellner 2012).

aspect is of particular significance. Central to the governmental strategy of Venezuela, Bolivia and Ecuador has been an embrace of a new kind of constitutionalism grounded in the 'constituent power' of the people, centred on the creation of a constituent assembly to re-write the constitution and the institutionalisation of mechanisms for direct and participatory democracy.

Promises to 're-found' the nation through a new constitution were central to the electoral campaigns of Hugo Chávez in Venezuela, Evo Morales in Bolivia and Rafael Correa in Ecuador and, according to some, key to their electoral success (Collins 2008).<sup>5</sup> The phenomenon reflects a broader mood for constitutional change across Latin America, where in a 'fourth wave of constitutional reform' almost every country has re-written or significantly altered their constitution since the 1990s (Van Cott 2000; Schilling-Vacaflor 2011). In instances where constitutional change has been averted, a new constitution has become a central objective of resistance movements (Mendoza 2012).<sup>6</sup> However, the new constitutions of Venezuela, Bolivia and Ecuador, and the process by which these constitutions were adopted, have several significant features which distinguish them from other countries in the region, and other periods of constitutional reform. In each case, new constitutions have been written by a constituent assembly: a special body, separate from the normal organs of the state, formed with the special purpose of developing a new constitution. These constituent

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5 Describing Correa's presidential campaign, Collins (2008) notes "The clarion call of his campaign was to throw the old, corrupt political elite out and remake the whole system...This message resonated with a public hungry for change, and he won an impressive 56.7 per cent of the popular vote..."

6 This is the case in the examples of Honduras and Chile. Writing about the Honduran resistance movement which has emerged since the coup against President Zelaya in 2009, Honduran scholar Breny Mendoza (2012) observes; "To date, writing a new constitution is the sole strategy and is what defines or constructs the political philosophy of the movement". (The Honduran case is discussed in more detail in the following section). Similarly, in Chile, one of only two Latin American countries to still use the constitution enacted under the period of authoritarian rule, a significant movement for the creation of a constituent assembly to develop a new constitution has developed (Otramirada 2014).

assemblies have been created following approval in a national referendum; assembly members have been elected and included representatives of social movements and civil society groups, as well as politicians. The contents of the new constitutions have been developed and deliberated by the Constituent Assembly over an extended period and subsequently presented to the public for ratification in national referenda. Substantive commonalities in the three constitutions include an emphasis on popular democratic participation, realised through the institutionalisation of participatory democracy within the structures of the state. Indeed, a move from representative democracy to a more integrated democratic model is made explicit within all three constitutions.<sup>7</sup> Other commonalities include greater state control of the economy, enhanced human and social rights (Schilling-Vacaflor, 2011) and recognition of and some basis in indigenous cosmology (particularly within the Bolivian and Ecuadorian constitutions).

For some theorists, this approach diverges from the traditional constitutional model in important ways so as to amount to a new form of constitutionalism, described variously as 'new Latin American constitutionalism' (Viciano Pastor and Martinez Dalmau 2010; Fernández 2009); 'new Andean constitutionalism' (Fernández 2009; Wall, forthcoming); and 'transformative neo-constitutionalism' (de Sousa Santos

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7 The Bolivian Constitution states that the country has adopted a "participatory democratic, representative and communal form of government" (Constitution of Bolivia 2009, Chapter 3, Article 11). Similarly, the Venezuelan Constitution asserts: "The government of the Bolivarian Republic of Venezuela and of the political organs comprising the same, is and shall always be democratic, participatory, elective, decentralized, alternative, responsible and pluralist, with revocable mandates (Constitution of Venezuela, Title I, Article 6, cited in <http://venezuelanalysis.com/constitution/title/1>). And the Ecuadorian State is "organized as a republic and is governed using a decentralized approach. Sovereignty lies with the people, whose will is the basis of all authority, and it is exercised through public bodies using direct participatory forms of government as provided for by the Constitution" (Constitution of Ecuador 2008, Chapter 1, Article 1, available at: <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>).

2010; Ávila Santamaría 2011)).<sup>8 9</sup> New Latin American constitutionalism has been the focus of a large and growing body of scholarly literature. There are two types of response to the phenomenon which are significant to the present study. The first explores its significance as a development in left political strategy. The second explores its significance from the perspective of democratic and constitutional theory. I consider each in turn.

This constitutional turn on the part of left governments in Latin America is considered “somewhat surprising” by some commentators (Cameron and Sharpe 2010, p.119). The approach is contrasted with the dominant strategy of the Latin American left since the 1960s in which actors sought to gain control of the state through extra-legal violent means. However, by the 1990s it had long been clear that the armed struggle had failed. New Latin American constitutionalism is framed as a response to the quandary in which the left found itself, and as an alternative to the reform/revolution dichotomy, which characterised earlier thinking. Whereas reformists sought to achieve social advances within the limitations of liberal representative democracy and capitalism, new Latin American constitutionalism is framed as an attempt to transcend these limits from inside the existing legal and democratic order.

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8 For consistency, I will use the term 'new Latin American constitutionalism' to refer to the form of constitutionalism adopted in Venezuela, Bolivia, and Ecuador.

9 The constitutional model adopted in these countries is sometimes also referred to as 'neo-constitutionalism' (e.g. Mendoza 2012). However, others have argued convincingly that the approach developed in Venezuela, Bolivia and Ecuador should be distinguished from the broader category of neo-constitutionalism. For Boaventura de Sousa Santos (2010) and Ramiro Ávila Santamaría (2011), what is taking place in these countries involves a step beyond the neo-constitutionalist project. It is like neo-constitutionalism but with additional 'transformative' components. As Ávila Santamaría (2011, p. 16) explains: “Neo-constitutionalism brings together the most innovative elements of contemporary constitutionalism that have been developing in Europe since the middle of the 20<sup>th</sup> Century and that mark an important distinction with judicial positivism and formalism. ‘Transformative’ intends to demonstrate the advances of our own Andean constitutionalism that are totally novel to the contemporary frame.”



This is done through an appeal to the democratic component within constitutional theory: 'constituent power'. Whilst central, the function of constituent power within contemporary liberal constitutions has been relegated to a symbolic one. The constituent power is held to have been active at some past 'founding moment', in which the constitution and state were founded. But after this point, the *constituted power* replaces the constituent power; the constituent power's role is over apart from serving as a source of legitimacy for the ongoing constitutional regime (Colón-Ríos 2012). In new Latin American constitutionalism, the concept of constituent power has been resurrected, with the intention of enabling radical structural change through democratic politics. Appealing to the ultimate authority of constituent power - 'the people' - governments have been able to legitimate the creation of constituent assemblies, approved in referenda; these have the power to completely restructure the state, through the dissolution and creation of institutions and foundational laws. Cameron (2009, p.340) illustrates the framing of this strategy as an alternative to the reform/revolution dichotomy, in his description of its emergence in the Venezuelan context:

Languishing in jail after his failed 1992 coup attempt, Hugo Chávez contemplated taking his struggle for power onto enemy territory, and to seek office by means of election. But, for Chávez, this could not mean submitting to Venezuela's moribund democratic system. So he struck on the idea of constituent power as a form of revolutionary power and, in an extended interview, he explained the distinction: 'In France in 1789 constituent power exploded. This is the power to constitute a people against what is constituted, that simple ... But this transformative power, as against the established, constituted power, has to be very great.'

So, whilst other currents in radical thought have eschewed the pursuit of state power altogether, attempting to “change the world without taking power” (Holloway 2002), new Latin American constitutionalism represents an alternative way forward. As Cameron (2009, p.340) puts it: it is a “strategy of taking power through changing the constitution”. This interpretation of new Latin American constitutionalism is significant for the present study because it is much how Harnecker (2007) has depicted the potential of a-legal space. For Harnecker, the use of a-legal space is a political-legal strategy which transcends the reform/ revolution dichotomy of the past and in this way avoids the limitations of both the legal route, of formal parliamentary politics, and the illegal route, of armed revolution. The difference of course is that the initiatives which make use of a-legal space lack, by definition, the formal power to make laws; I return to this point in the next sub-section.

The other significant response in the literature comes from the perspective of constitutional and democratic theory. For some, new Latin American constitutionalism amounts to more than a clever strategy for those seeking transformative change: it holds the key to a democratic constitutional theory. In the revised constitutional theory he calls ‘weak constitutionalism’, Joel Colón-Ríos (2012, p.152) highlights the democratic deficit within traditional liberal constitutionalism, in which:

after a constitution is in place, constitutionalism's main function (that of limiting political power) runs counter to the idea of creating opportunities for ordinary citizens to make episodic appearances and engage in important constitutional transformations.

Colón-Ríos advocates a constitutional model which provides mechanisms within the constitution which can “provide an opening, a means of egress, for constituent power to manifest from time to time” (ibid., p.103). Through institutionalising spaces for the manifestation of constituent power, we can allow for “episodes in which the citizenry exercises its democratic right to (re)create the constitutional regime under which it lives” (ibid., p.152). The paradigm example of such a mechanism, argues Colón-Ríos (2012), is the ‘constituent assembly from below’ and the real-world examples of this type of constitutionalism in action are the new constitutional regimes in Venezuela, Bolivia and Ecuador. Of course, in most contemporary constitutional regimes there is no ‘opening’ or ‘means of egress’ within the constituted order, for the expression of constituent power. A-legal activities are, as I will argue in subsequent sections, an attempt to create one.

### **3.2. The use of a-legal spaces in struggles for a constituent assembly**

The use of a-legal space has been an important tactic for actors pushing for a constituent assembly to write a new national constitution, on at least two occasions. In both Colombia and Honduras the tactic was employed at critical moments in the countries’ struggles for constitutional change, albeit by very different agents, and with a very different outcome.

### 3.2.1. The Colombian '*seventh ballot*'

In 1991 Colombia became the first in a series of Latin American countries to convene a constituent assembly, following approval in a national referendum, with the remit of writing a new national constitution. The move is credited with initiating the wave of constitutional reform which took place across the continent over the following decade and creating a precedent for the new Latin American constitutionalism which characterised left governments' policies in Venezuela, Bolivia and Ecuador (Gómez Leyton 2009). Unlike in these countries, however, the impetus for a constituent assembly was not the transformative programme of a new left wing government. A student movement, centred around a group of law students at the University of Rosario in Bogotá, is largely credited with leading the campaign for a constituent assembly and carrying out the actions which made this possible.<sup>10</sup>

The proposal for a new constitution first emerged in Colombia in the early 1980s in a context of intense political crisis and following decades of escalating violence between paramilitaries, guerrillas, the military, and the drug cartels (Fox, Gallón-Giraldo and Stetson 2010; Instituto de Estudios para el Desarrollo y La Paz 2011).<sup>11</sup> The idea gained support within various sectors, for whom it was seen as a route to peace, human rights protections and political stability (García 2011). In 1987 representatives of key trade unions, NGOs and some political leaders formed the

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10 For a detailed discussion of the student movement for a constituent assembly in Colombia see Torres Forero's (2006) *De las aulas a las urnas: La Universidad del Rosario, la Séptima Papeleta y la Constituyente de 1991*.

11 Between 1984 and the creation of the Constituent Assembly in 1991, 120 judges and magistrates, the justice minister and the attorney general were murdered by the drug cartels, for investigating drug cartel violence (Van Cott 2000). As Van Cott (2000, p.48) argues: "The purpose of these attacks was to paralyze the justice system and to intimidate the public and public officials into outlawing the extradition of Colombian nationals (Buenahora 1995: 33 - 34; Bushnell 1993: 264; Kline 1999: 46 0 47)".

National Commission for a constituent assembly (Fox, Gallón-Giraldo and Stetson 2010; Instituto de Estudios para el Desarrollo y La Paz 2011). Major newspapers came out in support of the constituent assembly process (Torres Forero 2006). Various unsuccessful attempts were made during this period by successive governments to reform the constitution, and thereby address the mounting sense of institutional crisis.<sup>12</sup> In 1988, significantly, liberal President Virgilio Barco proposed a referendum to reform the constitution's amendment process and allow for a future referendum on the convocation of a constituent assembly. Barco's proposal – as with previous efforts at reform – was overturned by the Colombian Supreme Court, who argued that such a referendum was unconstitutional. As with most liberal constitutions, the Colombian Constitution of 1886 had no provision for the convocation of a constituent assembly to enact reform. All reform was to take place through the constitution's amendment procedure, and to be enacted by Congress.

The turning point in the Colombian struggle for a constituent assembly came through the student movement. The assassination of Liberal party presidential candidate, Senator Gálan, in 1989, was the catalyst for the emergence of a mass student movement in favour of constitutional reform. Gálan, who had been popular amongst the young, “embodied popular aspirations for democratic reform” (Van Cott 2000, p. 53). His death served to galvanise and energise the movement for a constitutional assembly. The students employed a varied tactical repertoire over the coming months, including a mass march,<sup>13</sup> petitions, and public meetings. Central, however,

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12 Constitutional reforms were attempted by the governments of Liberal presidents López Michelsen, Turbay Ayala and Virgilio Barco, in 1977, 78 and 88 respectively, and Conservative president Betancur in 1984 – 85. In all cases proposals for reform were overturned by the Colombian Supreme Court.

13 On August 25<sup>th</sup> 1989 the 'March of Silence' took place through the centre of Bogotá. An estimated 25,000 protesters, mainly students, marched in complete silence, in protest at the assassination of

were various efforts at demonstrating the level of popular support for a constituent assembly, without, as one account explains, “the necessary infrastructure to carry out a mass referendum” (Torres Forero 2006, p. 41). In late 1989 their '*Plebiscite for a plebiscite*' capitalised on media support by taking out a subsidised advert in the highest circulation national newspaper<sup>14</sup> in the form of a petition, calling on the president to hold a plebiscite on various issues, including the creation of a constituent assembly. Readers were asked to complete the petition and return it to the student group, who would then deliver the petitions en masse to the president. As one account of the event explains, the idea was that “many signatures, thousands and thousands, would configure an actual plebiscite” (ibid.).

The *plebiscite for a plebiscite* was the students' first attempt to simulate a form of referendum in the absence of the necessary infrastructure to carry out a mass referendum. Their next attempt took advantage of the state's infrastructure, and is generally depicted as the turning point in their campaign and the root of the 1991 Colombian Constitution. In early 1990 it was proposed that an un-authorised additional ballot paper be included in the forthcoming elections for Congress and other public posts in March 1990. The '*seventh ballot*' ('séptima papeleta'), as the initiative became known, would accompany the six official ballots, and enable citizens to vote on the convocation of a constituent assembly.<sup>15</sup> The plan was to exploit the existing electoral process. At this time, paper ballot papers were produced by candidates' campaign teams. Voters selected the ballot paper with the name of their

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Senator Gálán and other deaths through violence, and in favour of constitutional change (Fundación Séptima Papeleta 1989).

14 The newspaper – 'el Tiempo' – paid for fifty percent of the advert cost out of “patriotic duty” (cited in Torres Forero 2006, p. 43).

15 The idea of the Seventh Ballot is credited to Professor Fernando Carillo, a lawyer and economist based at the University of the Andes at the time, who was involved with the student movement for a constituent assembly (Torres Forero, 2006).

preferred candidate, which they inserted into an envelope which was then deposited into the ballot box. Citizens in support of a constituent assembly, it was planned, could insert the additional unauthorised *seventh ballot* along with their other ballot papers.

Initial discussions for the *seventh ballot* initiative centred on the potential legality, as well as the logistics, of such an action. Would the ballot papers be counted? Counted, but perhaps recorded only as void? Would this unauthorised ballot paper invalidate a voter's other ballots? Accordingly, representatives from the student movement had a series of meetings with experts in electoral law and officials from the electoral commission. Significantly, it was established that votes for an unknown person in an election did indeed have to be counted, and retained in a separate container according to the existing electoral code. On this basis it was decided that the text of the seventh ballot paper would commence: "I vote for Colombia", in order to meet this criterion and be counted (Torres Forero 2006). Various options were then explored for how the unauthorised ballot papers would be introduced to the polling booths (ibid.). Eventually, the ballots were printed in both the major national newspapers, which had come out in support of the initiative; voters were invited to cut them out and bring them secretly to the polling station (Fox, Gallón-Giraldo and Stetson 2010).<sup>16</sup> In addition, representatives from the student movement organised

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16 There were various different versions of the Seventh ballot in circulation, the full text of one read: *I vote for Colombia. Yes to a Constituent Assembly whose membership directly represent the people of Colombia with the objective of reforming the National Constitution. In exercise of the sovereignty recognised in Article 2 of the National Constitution, the electoral power will count this vote.* Original text: "Voto por Colombia. Sí a una Asamblea Constituyente cuya integración represente directamente al pueblo colombiano con el fin de reformar la Constitución Nacional. En ejercicio de la soberanía reconocida en el artículo 2° de la Constitución Nacional, el poder electoral escrutará este voto" (cited in Novoa García, 2011)

themselves to be present at as many polling stations as possible to ensure that the seventh ballots were indeed counted (Torres Forero 2006).

Figures for participation in the *seventh ballot* vary significantly, but all sources place the number in the millions.<sup>17</sup> In addition to the ballots cut out of the newspapers, hundreds of thousands of homemade versions were also counted (Van Cott 2000). Following the massive levels of support in the *seventh ballot* the then President Virgilio Barco issued a Decree under state-of-emergency powers, enabling a formal and binding consultation to take place on the possibility of a constituent assembly, during the forthcoming presidential elections in May 1990. More than 88% of the electorate who participated voted in favour of the proposal (Colón-Ríos 2012; Fox, Gallón-Giraldo and Stetson 2010), and so the following December elections took place for the membership of the constituent assembly. Members included representatives of social movements and ex-guerrilla groups as well as the main political parties (ibid.).

The 1991 Colombian Constitution and the constituent assembly process by which it was adopted is looked to as a precedent for the progressive constitutions of Venezuela, Bolivia and Ecuador, both for its substantive emphasis on deepening democracy through participation as well as its constituent assembly origins. And as Colón-Ríos (2012, p.94) notes, the adopted constitution “has been widely celebrated” and includes many civil, social and economic rights, and mechanisms for upholding them, to the extent that:

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17 2 million (Novoa García 2011; Van Cott 2000), 5 million (Fox, Gallón-Giraldo and Stetson, 2010), 13 million (Torres Forero 2006).



[the constitution] has become a fundamental tool for the left, giving place to the curious situation that the left tends to defend the established constitutional regime from the opposition, and the right to challenge it from government (ibid., p.101).

In his description of the event, Fernando Carrillo, the university professor who is credited with originally proposing the idea of the *seventh ballot*, claims that they had “created a supra-constitutional political fact, without precedent” (Carrillo 2010). Indeed, statements and decisions of the president, the Supreme Court, as well as the press, could be interpreted to support this claim. The national newspaper *El Espectador* described the episode as a “shake- up in the political structures” (cited in Novoa García 2011). President Barco used the *seventh ballot* as his explicit justification for a Presidential Decree that a referendum on the convocation of a constituent assembly take place during the May elections (Van Cott 2000). The constitutionality of the Presidential Decree was subject to review by the Supreme Court who, in contrast to earlier rulings on constitutional reform throughout the 1970s and 1980s, upheld the president's decision. They argued that if the people decide to reform the constitution then they must not be prevented from doing so, and they cited the *seventh ballot* as evidence of the Colombian peoples' will (Fox, Gallón-Giraldo and Stetson 2010).

The Supreme Court's appeal to the theory of constituent power is not without precedent in Latin American jurisprudence. Indeed, as Colón-Riós (2011) shows, it is common for Latin American courts to make detailed reference to the theory of constituent power and appeal to a notion of constituent power as having ultimate authority over existing constitutional structures. What is interesting in this case is how the *seventh ballot* was interpreted by the court as evidence of the constituent

will, where earlier demonstrations, petitions and other forms of protest for constitutional change apparently were not. The event functioned as justification for the Supreme Court and the president to act in a different way than before. This enabled, or forced (depending on how one assesses the will of each) an action that went beyond existing constitutional procedures and norms, in calling a national consultation on the convocation of a constituent assembly.

### **3.2.2. The Honduran '*fourth ballot box*'**

In June 2009 President Manuel Zelaya of Honduras was removed from office in a civil-military coup, initiated by members of his own party in alliance with the army and Honduran business elite, and with the support of Congress (Cunha Filho, Coelho and Flores 2013; Llanos and Marsteintredet 2010). Tensions between the President and other members of his party and Congress had been growing for some time.<sup>18</sup> However, it is generally agreed that the immediate trigger for the coup was the president's decision to proceed with a non-binding 'national poll' on whether there should be a referendum on the convocation of a constituent assembly to write a new constitution (Cunha Filho, Coelho and Flores 2013; Llanos and Marsteintredet 2010; Benjamin, 2009; Thale, 2009).

Manuel Zelaya commenced his presidency of Honduras in January 2006. He was elected for the Liberal party, one of Honduras' two hegemonic political parties, both located on the right of the political spectrum. He had run a right-of-centre campaign,

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<sup>18</sup> Particularly significant was the government's decision to increase the the minimum wage by 60% by presidential decree (following failed negotiations with business) in January 2009, which prompted outrage in the business sector and a Supreme Court review (Cunha Filho, Coelho and Flores, 2013).

largely ideologically indistinguishable from that of the other front runner, (Porfirio 'Pepe' Lobo, for the National party) (Cunha Filho, Coelho and Flores 2013). Son of a traditional landowning family, Zelaya came from the Honduran elite and in his campaign and at the outset of his presidency he drew on his network of contacts, utilising the traditional system of patronage which characterised Honduran politics (ibid.). He was not expected to change Honduran politics in any significant way (ibid.; Klesner 2006).

However, over the next couple of years Zelaya came to exemplify a process known as 'policy-switching'. This term is normally applied to the many examples of Latin American governments who have been elected on progressive left platforms, promising redistribution and poverty alleviation programmes, only to adopt neoliberal structural adjustment policies upon entering government. However, the government of Zelaya has been studied as a unique example of a right-to-left policy switch (Cunha Filho, Coelho and Flores, 2013). Key symbolic and material decisions which exemplify the switch include Honduras' participation in the 28<sup>th</sup> anniversary of the Sandinista Revolution in Nicaragua in July 2007; joining Petrocaribe, the Venezuelan regional energy agreement in December 2007; and, most controversially, joining the ALBA bloc, the regional alliance of left-wing countries, led by Venezuela, and established as an alternative to the US-backed Free Trade Agreement of the Americas (Masud 2013).

Perhaps influenced by his ALBA partners, in November 2008 Zelaya proposed the convocation of a constituent assembly to re-write the national constitution. Just prior to Zelaya's inauguration, the Citizens' Participation Law was passed, with the stated

objective of deepening Honduran democracy and citizens' participation. However, implementation of the law took place through the traditional political structures and therefore failed to transcend the old patronage networks and enable real citizen influence (Cunha Filho, Coelho & Flores, 2013). A constituent assembly, it was suggested, could "transform the country's participatory structures and institutionalise mechanisms of direct democracy" (ibid.).

The initial plan was to draft a bill ordering a binding referendum on the convocation of a Constituent Assembly, to take place alongside the November 2009 general elections. However, by this stage Zelaya no longer had sufficient support in Congress to ensure a legislative majority. As an alternative, on March 23<sup>rd</sup> 2009 Zelaya issued a statement calling for a 'broad popular consultation' to take place by Presidential Decree in June, on whether there should be a referendum on the formation of a Constituent Assembly (Llanos and Marsteintredet 2010). In a turn reminiscent of the Colombian case, the non-binding consultation was dubbed the '*fourth ballot box*' ('la cuarta urna'), as the proposal was for a fourth ballot, on the convocation of a constituent assembly, to accompany the planned presidential, congressional and mayoral elections which were to take place in November.

However, the Decree was overturned by the Attorney General who ruled it unconstitutional. Undeterred, Zelaya issued a second Decree two months later on May 26<sup>th</sup> 2009, this time announcing a 'national poll' to take place on June 28<sup>th</sup> and conducted by the National Statistics Institute, to ascertain support for a future binding referendum on a constituent assembly. The shift from 'popular consultation' to 'national poll' was so that the exercise could be presented within the legal

framework of the existing Citizens' Participation Law, and avoid contradicting the Constitution, according to which only Congress can approve national referenda. In other ways it was essentially the same proposal (Llanos and Marsteintredet 2010). However, it was then ruled that the new proposal for a national poll was covered by the earlier ruling by the Court of Contentious Administration, who placed an injunction and ordered the army to confiscate electoral materials for the poll. This ruling was subsequently upheld by the Supreme Court who ruled the poll illegal (Llanos and Marsteintredet 2010).

Both the National party and Zelaya's own Liberal party came out against the *fourth ballot box* referendum. One group, (including members of the Liberal party), accused Zelaya of intending to use the referendum to remain in power.<sup>19</sup> In a further effort to stop the poll, on June 23<sup>rd</sup> – just four days before it was scheduled to take place – Congress passed a law preventing any kind of referendum or plebiscite to take place 180 days before or after the November general elections (ibid.).

On Wednesday June 24<sup>th</sup> Zelaya ordered the army to distribute the ballots for the poll to the polling stations and provide logistical and security support for the event, as is standardly the role of the army during Honduran elections. However, the Commander of the Armed Forces, General Romeo Vasquez Velasquez, refused, citing the Supreme Court ruling and arguing that he could not break the law. Zelaya dismissed the Commander, leading to the resignations of the Defence Minister and the heads of the

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<sup>19</sup> An allegation which has stuck despite the fact that, as Colón-Ríos (2012) points out, Zelaya's presidential term would have concluded before any new constitution could come into force. Of course, it is possible that Zelaya had hopes to return to power at a later date and hoped to influence the constituent assembly process in some way, so as to facilitate this. But this would be a far less direct process than is implied in much of the national and international media coverage and even some scholarly accounts of the episode (e.g. Taylor-Robinson and Ura 2012; Cassell 2009).

army, navy and air force, in protest (CNN 2009). Thursday June 25<sup>th</sup> the Supreme Court ruled that the dismissal of the Commander of the Armed Forces was unconstitutional, and issued an order for his reinstatement, (which, as Cunha Filho, Coelho and Flores (2013) point out, exceeded the Supreme Court's own constitutional powers). The National Congress convened an emergency session, and the president of the Congress, Roberto Micheletti, announced the assembly's "unconditional support for the armed forces for respecting the constitution" (cited in CNN 2009). The Supreme Electoral Tribunal equally declared that the poll was illegal, and a spokesperson announced their support for the military's action (ibid.).

On the same day, Zelaya accompanied by several hundred supporters led a protest to the military base where supporters reportedly collected the thousands of ballot papers out of storage, whilst singing the national anthem (CNN, 2009). In a statement Zelaya is reported to have announced:

Sunday's referendum will not be stopped...We have the right to vote and the right to organize. The military should rectify their position in favour of the people and ignore the extortion of the elite (Zelaya cited in CNN 2009)

The poll had been declared illegal by the Supreme Court, the Supreme Electoral Tribunal, the National Congress, and the armed forces had shown their support for this ruling. On Friday June 26<sup>th</sup>, two days before the poll, Zelaya contested the alleged illegality of the poll. He argued that the poll was justified within the Citizens Participations Law, according to which citizens "can ask the powers of the state to be consulted" (Zelaya cited in CNN 2009). Moreover, he added:

The poll has no binding character. That is, its results – yes or no – do not obligate the state to do anything. It's a public opinion poll. It's a poll that does not create new rights, does not create a new law (ibid.)

The same day, a secret judicial order for the President's arrest was issued by the Supreme Court, for alleged crimes against the form of government, treason, abuse of authority and usurpation of functions (Cassell 2009). At dawn on June 28<sup>th</sup>, the morning of the scheduled poll, Zelaya was kidnapped by the army and flown out of the country. Later that day, Congress confirmed his resignation and the head of Congress, Roberto Micheletti, was named his successor in an interim government (Llanos and Marsteintredet 2010).

Various factors contributed to the failure of Zelaya's plan to use the *fourth ballot box* as a tool to enable fundamental constitutional change. As described, he lacked support within the organs of the state. The Supreme Court, National Congress, Supreme Electoral Tribunal and the army formed a united block against his plans. Equally, he lacked support within his own party. However, he also lacked strong connections or support within Honduran civil society and social movements. Cunha Filho, Coelho and Flores (2013) note that he was widely distrusted amongst the main social movement leaders, and wide-scale mobilization in support of Zelaya did not happen until after the coup had been carried out. Moreover, Honduran civil society and social movements are less influential than in other areas in the region. Despite the emergence of new civil society organisations in the early 2000s (which it is suggested was important to help enable Zelaya's leftward switch), civil society and social movements remain “diffuse and relatively weak... lacking the capacity to make

any legitimate challenge to the status quo” (ibid., p.536).<sup>20</sup> In this context, without active support from either the constituted or constituent powers, Zelaya's challenge to the established order resulted in his removal.

Despite the weak social movement support for Zelaya whilst still in power, following the coup mass demonstrations and protests in support of his return took place every day for over six months (Mendoza 2012). As one analyst observed:

the eruption of the resistance movement of the people of Honduras into the political field did raise some eyebrows and question marks. The scenes of fearless impoverished people, women and men alike of all ages and races, confronting tanks and soldiers for almost 200 days in a row and still doing it today came as a surprise not only to political analysts but to Hondurans themselves (ibid.).

A coalition of civil society organisations has since formed the *National Front of Popular Resistance*, which is the main umbrella organisation for the resistance movement in Honduras. The central demand, and strategy for social change, is the creation of a constituent assembly (Mendoza 2012).<sup>21</sup>

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<sup>20</sup> For a fuller discussion of this point see Castellanos (2006). Honduras: Gobernabilidad democrática y sistema político. *Nueva Sociedad*, Special Issue.

<sup>21</sup> See Appendix F for an account of the profound cultural and social significance of the National Front of Popular Resistance and the struggle for a constituent assembly by well-known Honduran playwright, Rafael Murillo Selva.



### 3.3. Implications for a theory of a-legal space

In this section I explore the implications of these cases for a broader theory of a-legal space as a political strategy. I make various arguments. Firstly, these cases are indicative, I suggest, of how the use of a-legal space should be conceived: as part of a wider constitutional struggle, and more specifically as attempts to create an opening for the manifestation of constituent power. Other lessons concern the centrality of struggles to define (il)legality and (il)legitimacy when this tactic is employed; the potential for achieving impact through a-legal space; the location of a-legal space and the use of a-legal space by actors with constituted power.

#### 3.3.1 Creating ‘an opening, a means of egress, for constituent power to manifest’

It is striking that a-legal referenda have played such a critical role in the struggle for a constituent assembly in both Colombia and Honduras. This suggests that the concept of a-legal space can fill a gap in scholarly accounts of how constitutional change sometimes comes about. This space was used, I suggest, with the intention to *force* an opening in the constituted order, in the absence of institutionalised mechanisms. Moreover, understanding the role played by a-legal referenda in these particular struggles for constitutional change is indicative of how all a-legal initiatives might be conceived. I elaborate on these claims in turn.

In his account of ‘weak constitutionalism’, Colón-Ríos (2012, p.103) emphasises the importance that “an opening, a means of egress, for constituent power to manifest” be built into the constitutional order. Such a mechanism can provide the possibility for ordinary citizens to bring about fundamental constitutional change. The *seventh*

*ballot* and the *fourth ballot box* can be understood as attempts to create such an opening, in the absence of an institutionalised mechanism. In both instances actors turned to the use of a-legal space in response to the closure of the formal system. The *seventh ballot* followed repeated attempts by successive governments to reform the constitution throughout the 1970s and 1980s in response to growing civil society pressure. As with most liberal constitutions, the only recognised mechanism for constitutional change in the Colombian constitution of 1886 was the restrictive amendment procedure, (and reform was to be enacted by Congress and not the executive). Meanwhile, popular demand for fundamental constitutional change grew. As Novoa García (2011) illustrates, the devastating violence and organised crime which continued with impunity had become connected in the public consciousness with a failure of the existing institutional framework and order:

From the second half of the 80s, narco-terrorism and other forms of organised violence led the country to a genuine institutional crisis which could not be managed through the instruments of the constitution of 86... In these conditions, what was at risk was institutionality itself – impotent to stop the wave of violence (Novoa García 2011).<sup>22</sup>

It was in this context: social unrest; popular support for change; and the apparent closure of the formal system, that the Colombian student group turned to the idea of an unofficial ballot. Likewise, whilst initiated by the president, the Honduran *fourth ballot box* poll can also be viewed as a response to closure of the formal system. As in Colombia prior to 1991, in Honduras only Congress has the authority to amend the constitution; there is no provision for the creation of a constituent assembly and the

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<sup>22</sup> Novoa García is Director of the Centre of Constitutional Studies (PLURAL). He was president of the Special Legislative Commission created by the Colombian Constituent Assembly which deliberated between July and December 1991 (Novoa García 2011).

president is prohibited from calling a national referendum. Zelaya had intended to draft a bill calling for his extra-ordinary referendum, but by 2009 he no longer had sufficient legislative support in Congress (Llanos and Marsteintredet 2010). Hence, when it appeared that there was no way forward through the formal channels, Zelaya turned to the use of a-legal space.

The difference, of course, is that these initiatives do not make law. Unlike Colón-Ríos' (2012, p. 3) vision of an "opening, a means of egress, for constituent power to manifest", these a-legal referenda had no binding legal consequences. So how can they be seen to have created an opening for constitutional change? Whilst lacking any formal legal implications, these referenda promised to create a space for the emergence of a new factor: constituent power. Through allowing for a public manifestation of the 'constituent will' they promised to shift the political and legal debate and thereby create an opening for subsequent constitutional change. And, as I will show in the next sub-section, in the case of the *seventh ballot* this strategy was successful.

Moreover, this is much how other instances of a-legal activity including other non-binding referenda, civil society debt audits, and peoples' tribunals amongst other forms, could be understood. At a general level, they reflect the broader turn to a new constitutionalism within the Latin American left and the corresponding shift in legal consciousness. More specifically, they can be understood as attempts to create an opening for the manifestation of constituent power as a route to change the constituted order. Like the *seventh ballot* and the *fourth ballot box*, they are initiated in the face of institutional closure: when formal legal and political channels have been

exhausted. And like these initiatives, they create a space in which political demands can be constructed as the 'constituent will'. Where they are successful in this construction, they can function to shift the range of political and legal possibilities available.

This characterisation of the non-binding referenda, peoples' tribunals, citizens' debt audits, and other a-legal initiatives which have emerged across Latin America in increasing frequency throughout the past two decades is useful. Importantly, it enables us to build on the work of constitutional law scholars such as Colón-Ríos (2012) who have emphasised the merits of new Latin American constitutionalism. In most countries of the world there is of course no constitutional provision for the emergence of constituent power to fundamentally transform the constitutional order. Also, outside Latin America's ALBA block, most governments are unsympathetic to such an idea. So where does this leave those fighting for fundamental constitutional change? Exploring the use of a-legal space contributes to an understanding of what strategies have been employed by actors seeking constitutional transformation, in the absence of institutional mechanisms through which to do so.

Now, one objection to this interpretation will be that peoples' tribunals and referenda, and audits and commissions are quite different types of activities. Indeed, these initiatives are used in quite different circumstances to address different issues, and play out in different ways. However, my intention is not to suggest that they are all the same, but that they can all be understood as the reflection of a common approach and strategy. This is where actors attempt to shift the possibilities for political and legal change through creating a space for the manifestation of

constituent power. How this plays out in different forms of a-legal space will be one question to explore in subsequent chapters. What might be involved in creating a space for the manifestation of constituent power can, I suggest, be understood quite broadly. Some a-legal initiatives place much emphasis on facilitating the direct engagement and interaction of participants in a particular action. Others focus on creating the theoretical bedrock for a counter-hegemonic discourse, for example peoples' tribunals or debt audits which focus on collation of mountains of complex, technical data, which will stand up to rigorous legal analysis.<sup>23</sup> Both are consistent with a depiction of creating a space for the manifestation of constituent power, as I will seek to show in the subsequent case study chapters.

### 3.3.2. Impact

Both the Colombian *seventh ballot* and the Honduran *fourth ballot box* referenda would appear to have had an outstanding impact. Unlike many a-legal initiatives - which reach relatively small audiences and take place on the margins of the political mainstream - these initiatives captured the interest of the country, and are connected with dramatic events that came in their wake. Gaining an understanding of if, how and why these initiatives were effective may offer important insights into the potential of the a-legal space tactic in general. So in this sub-section I explore these questions. I start out by considering the evidence of impact in each case, with a particular focus on the Colombian *seventh ballot*. As the *fourth ballot box* was eventually prevented from taking place, any discussion of its potential impact is necessarily constrained. However, I also consider what the implications of this case

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<sup>23</sup> Hence creating a space for the manifestation of constituent power might be seen as analogous to the development of a counter-hegemonic block. This is indeed the claim made by Kalyvas (2000) in his account of 'hegemonic sovereignty'.

might be for a general theory of a-legal space. I then look at how scholars have explained the (apparent) impact of the *seventh ballot*. Whilst offering some insights, these accounts leave various questions unanswered. I suggest instead that the impact of the *seventh ballot*, and the *fourth ballot box*, can be well explained through the theory of a-legal space which was developed in chapter 2. I illustrate the applicability of this theory through a discussion of the cases, and conclude by a discussion of the consequences for a general theory of a-legal space.

There is significant evidence to suggest that the *seventh ballot* was a powerful event, which played a part in altering the course of history. As a starting point: millions of Colombians participated in the *seventh ballot*, secretly inserting the unauthorised additional ballot paper into the ballot box.<sup>24</sup> Following the event, President Barco opened the way for convocation of a constituent assembly to re-write the constitution, and the Supreme Court upheld his decision. And the *seventh ballot* was used to justify both of these extra-ordinary acts. Two months after the *seventh ballot*, President Barco issued the crucial Decree 927 in which he ordered that:

Whilst the disturbance of public disorder continues and the country remains in a State of Siege, the electoral organisation will proceed to adopt all measures to count the votes that are submitted on the date of the presidential elections in 1990, around the possibility of forming a Constituent Assembly (Republic of Colombia, 1990).

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<sup>24</sup> Different sources suggest different levels of participation in the *seventh ballot*, but all put the number in the millions: 2 million (Novoa García 2011; Van Cott, 2000), 5 million (Fox, Gallón-Giraldo and Stetson, 2010), 13 million (Torres Forero 2006).

The legal argument presented in support of Decree 927 makes several claims to legitimate this extra-ordinary presidential action. These include the escalating violence which had contributed to a situation of “permanent public disorder” (ibid.) and the inadequacy of existing institutional structures to overcome this situation. In addition, in a fascinating move, Barco explicitly cites the *seventh ballot*, noting:

That on March 11<sup>th</sup> 1990 a considerable number of citizens, on their own initiative, facing the imminent need to allow institutional strengthening... demonstrated their will that the Political Constitution be reformed promptly by a Constituent Assembly... (Decree 927, 1990).

Moreover, it is argued that “to frustrate this popular movement in favour of institutional change” would be to weaken the existing institutional structures (ibid.).

The Decree concludes:

That for all the above, the National Government, interpreting the will of Colombians and complying with its constitutional obligation to preserve public order and search for all the means necessary to achieve the re-establishment of this, must proceed to enact a norm of legal character that enables the National Civil Registry to count the votes that are produced in relation to the possibility to call a Constituent Assembly, by popular initiative (ibid.).

The somewhat strange formulation of the Decree, in which emphasis is placed on counting “votes that are produced” rather than calling a referendum, can be explained by the fact that the president was constitutionally unable to call a referendum or plebiscite on any issue. In order to limit presidential power, the

Constitution prevented the initiation of a referendum by the president. Instead, Barco draws on the *seventh ballot* as evidence of “the will of Colombians” and depicts Decree 927 as a matter of “*interpreting*” this will (ibid., emphasis added). Whilst in practice the Decree amounted to ordering a plebiscite or referendum on the convocation of a constituent assembly, it denies that the president is initiating this exercise. Instead it is “by popular initiative” that votes on a constituent assembly have been and will be cast, and the government’s role is limited “to enact(ing) a norm of legal character that enables the National Civil Registry to count the votes” (ibid.). In other words, Barco argues that he is not initiating a referendum process: he is deferring to the authority of the people. And it is the *seventh ballot* that enables him to make this argument. In contrast to earlier rulings on constitutional reform, the Supreme Court accepted Barco’s arguments and upheld the Decree. In their ruling, much like Barco, the judges explained that the *seventh ballot* was evidence of the “Colombian will” (Colombian Supreme Court 1990).

In Honduras, President Zelaya’s planned non-binding poll on the creation of a constituent assembly had equally dramatic, though unintended consequences. Most accounts depict the *fourth ballot box* poll as the trigger for the 2009 coup which removed Zelaya from power (Cunha Filho, Coelho and Flores 2013; Llanos and Marsteintredet 2010; Benjamin, 2009; Thale, 2009). Moreover, the efforts of Congress and other sectors of the establishment to try to prevent the *fourth ballot box* taking place suggest that this poll was something more than a pretext for the coup. The various public declarations of the poll’s illegality from the Army, the Supreme Court, the Supreme Electoral Tribunal and the two dominant political



parties (including Zelaya's own), and the desperate last-minute preventative bill drafted by Congress four days before the poll was to take place,<sup>25</sup> all attest to the perceived significance of the *fourth ballot box* poll. We cannot know the level of participation that this initiative would have engaged. However, the massive resistance movement which has sprung up since the coup, orientated around the singular demand for a constituent assembly (Mendoza, 2012) suggests the poll would have had popular support.

So, why did these non-binding referenda prompt such dramatic reactions? Why was the *fourth ballot box* perceived as so serious a threat? And how did the *seventh ballot* elicit this response from the president and the courts, when previous petitions, marches, and governmental efforts had failed to do so? More generally, what features of these initiatives might account for the powerful reaction they provoked and the chain of events which followed them?

Scholarly accounts of the *seventh ballot* offer some important insights, but leave various questions unanswered and ultimately provide an unsatisfactory account of how and why the event might have functioned to bring about significant constitutional change. Accounts of the *seventh ballot* and the constitutional process it triggered often focus on the level of participation in this event. Scholars describe how mass popular participation '*led to*' the president's decision to initiate a formal consultation on a constituent assembly. Fox, Gallón-Giraldo, and Stetson (2010, p.470, emphasis added), for example, note:

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25 The bill prohibited any kind of plebiscite or referendum from taking place within 180 days of a national election (Cunha Filho, Coelho and Flores 2013; Llanos and Marsteintredet 2010).

The overwhelming number of affirmative votes - five million - cast in the séptima papeleta [the seventh ballot] *led the then-president Virgilio Barco to issue a Decree*, under state-of-emergency powers, to pose the issue formally in the presidential election on May 27 1990.

As Jorge Enrique (2011, my translation, emphasis added) similarly explains:

The informal count of these ballots... revealed more than two million votes in favour of the proposal to call a National Constituent Assembly, *which led the government of Virgilio Barco to recognize the de facto situation created by the people themselves.*

And Colón-Ríos (2012, p. 92) argues that:

Although not legally binding, the expression in favour of the Constituent Assembly was so strong that President Virgilio Barco issued a Decree ordering that, during the presidential elections of May 1990, voters would be formally asked whether they wished to convene a Constitutional Assembly...<sup>26</sup>

These accounts suggest a relatively straightforward connection between popular support for a particular policy or government action, and the enactment of this policy or action. The problem with these accounts is that the relationship between

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26 Later in this text, Colón-Ríos in fact expands on the role of the *seventh ballot*, suggesting it functioned to 'activate' the exercise of constituent power. In his account a distinction is made between the *activation* and the *exercise* of constituent power. The exercise of constituent power is understood as the institutional process through which the 'constituent will' is transformed into law, whilst the activation of constituent power refers to those actions or events which make such a process possible. Hence a more elaborate account of the *seventh ballot's* function is provided. However, when we ask *how* it worked to activate constituent power, there is much the same logic at work. Actors seeking transformation of the constitutional regime, it is explained: "attempt to create the climate necessary (e.g. convince other citizens that an important constitutional transformation is desirable) for an exercise of constituent power to take place and a new constitutional regime to be produced" (ibid., p.175). Hence the activation of constituent power is understood as involving the creation of the necessary "climate" (ibid.) for change, which is understood in terms of widespread popular support for the proposed change.

public opinion and government action is, at best, more complicated than is suggested here. Popular support for constitutional change in many instances has not and does not result in the proposed change taking place. In Colombia, there was ample evidence of widespread popular support for constitutional change in the years preceding the *seventh ballot* initiative. In 1987, for example, the National Commission for a Constituent Assembly was formed by key trade unions, NGOs and politicians (Fox, Gallón-Giraldo and Stetson, 2010; Instituto de Estudios para el Desarrollo y La Paz 2011). The students' mass March of Silence,<sup>27</sup> and the various mass petitions carried out in 1989 (Torres Forero 2006), demonstrated significant support for a constituent assembly amongst ordinary citizens. If the *seventh ballot* is understood as no more than a demonstration of public opinion, it is difficult to explain why it prompted a reaction that these earlier efforts did not. Of course, this event might simply have been the straw that broke the camel's back: the build-up of pressure for constitutional change from civil society, public opinion, and the media is charted in most accounts of the period (Torres Forero 2006; Novoa García 2011; Fox, Gallón-Giraldo and Stetson, 2010). Hence, the response to the *seventh ballot* might be better explained through its timing than anything intrinsic to the action itself. However, whilst timing is no doubt part of any explanation, it is important to consider whether there was indeed something particular about this form of action which generated effects which other actions could not.

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27 After the assassination of Liberal party presidential candidate, Senator Galán, students organised a mass march through Bogotá in protest at escalating violence and calling for constitutional reform. Approximately 25,000 protestors participated. The distinctive feature was that the march was carried out in complete silence. The March of Silence, as it was known, marked the start of a new more active phase in the student movement for constitutional change (Fundación Séptima Papeleta, 1989).

There is another explanation offered in the accounts of the *seventh ballot* which is potentially helpful here. Donna Van Cott (2000, p.58) reflects:

The ANC [National Constituent Assembly] would not have taken place without the favourable decisions of the Supreme Court on the legality of Decrees 927 and 1926.<sup>28</sup> At the time, several commentators used the arguments of Rousseau and Condorcet with respect to the primary constitutive power of the people, which, they argued, was prior to any written constitution or law and, thus, could not inhabit the constitutive power of future generations (Buenahora 1991:149; Angarita Serrano 1994; 36). What gave force to these theoretical arguments was the unique fact that in the Colombian case, through the seventh ballot, the 'autonomous and sovereign people' was not just a theoretical construct but a tangible political actor (Van Cott, 2000).

Van Cott suggests that the *seventh ballot* assumed a meaning as the material incarnation of constituent power. The suggestion is intriguing, and provides a step forward. It improves on accounts which emphasise the level of participation, because it suggests why this event might have elicited a reaction that other mass protest events did not. Which is that, for whatever combination of reasons, the mass participation in this event assumed a somewhat different meaning as the ambiguous but more powerful notion of the 'constituent will'. As Colón-Ríos (2011) has highlighted, in contrast to much of the world, it is not unusual for courts in Latin America to appeal to the notion of constituent power, as an authority and force which survives "alongside and above" the constitution (Schmitt cited in *ibid.*, p.365). This is what happened in the Colombian Supreme Court ruling on President Barco's Decree 927. What is particularly interesting however, is how the *seventh ballot* functioned to

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<sup>28</sup> Decree 1926 was a subsequent Decree issued in August 1990, which implemented the accord that was reached between political parties regarding the make-up of the constituent assembly, following the results of the formal consultation (Méndez Morales 1990).

operationalise the abstract theoretical argument and in this way permit the decision to open Colombia's constitutional order up for transformative change.

However, various questions remain. Why was this event interpreted as the 'constituent will' where earlier protests were not? What factors or combination of factors helped create this meaning? What does an expression of the 'constituent will' even mean, when clearly some citizens opposed reform whilst others supported it? And what is the relationship between its status as the constituent will and the government and Supreme Court's decisions? Van Cott (2000) does not explain how the *seventh ballot* earned its title as an expression of the constituent will. Neither does she, nor do other scholars, explain precisely how this led to the decisions which were made by the president and the courts. If any substantive lessons are to be drawn from this case about the potential impact of a-legal space more generally, we would need to answer these questions.

Drawing on the theory of a-legal space developed in chapter 2 can, I suggest, help to answer these questions and fill in some of the gaps in existing accounts of the *seventh ballot* and its apparently extraordinary impact. In chapter 2 I suggested that the use of a-legal space be explored as a way to shift the political grammar (Norval 2006; Hausknost 2011). More specifically, through gaining an association with both *constituted* and *constituent* power, a-legal initiatives have the potential to create tipping events which shift the grammatical structures which delimit political possibilities. There is reason to believe that the *seventh ballot* was particularly successful in establishing an association with both constituted and constituent power. Firstly, the initiative not only adopted the form of an official institutional process;

through audaciously using the existing elections it took place literally within and through the formal electoral process. In this way it maximised the potential to capture the hegemonic authority of constituted power. And secondly, as the statements of President Barco and the Supreme Court, as well as subsequent scholarly analyses make clear, it was widely accepted as an expression of constituent power.<sup>29</sup> Indeed, the extra-ordinary actions of both the president and the Supreme Court can be well explained through the notion of political grammar change. After the *seventh ballot* had taken place, it appears as if the political and legal barriers to convocation of constituent assembly had changed. And both felt able to take actions that were previously untenable.

These events make sense when we see the *seventh ballot* as a tipping event which shifted the political grammar, opening up new political possibilities, and closing off others. In this case, a formal consultation of the population regarding the creation of a constituent assembly had become possible and indeed, in the eyes of the Supreme Court, *necessary*, as they add:

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29 I am here equating 'expression of constituent will' with 'expression of constituent power'. This is in line with some theories of constituent power and not with others. In some accounts, popular uprisings and mass protests are interpreted as expressions of constituent power (e.g. Negri 1999). In these accounts, what is understood by 'expression of constituent will' and by 'expression of constituent power' is interchangeable. Other scholars have understood the latter more specifically as the process by which the constituent will is turned into law (Colón-Ríos 2012; Dalmau and Pastor 2010), and thereby denoting an institutional process, such as a constituent assembly. The 'expression' or 'exercise' of constituent power is distinguished from activities which 'activate' the constituent power; the *seventh ballot* is an example of the latter (Colón-Ríos 2012). I suggest that there is a value in retaining the notion of constituent power as something which can also operate outside of the state. Though, like Ciccariello-Maher (2013, p.127), would seek to avoid "fetishizing" this idea of constituent power from below, as Negri (1999) does. In this study I am interested specifically in the hegemonic power associated with expressions of the 'constituent will'. Hence the power gained through successfully appearing as an expression of the constituent will. This idea is similar to Kalyvas's (2000, p. 343) account of 'hegemonic sovereignty', in which he interprets Schmitt's theory of constituent power and Gramsci's theory of hegemony as "two distinct variations on a single theme". The difference here is that I am interested in the hegemonic power gained once a proposition, action or social movement is accepted as expressing 'the constituent will'. So, constituent will and hegemony are closely related and interconnected but not one and the same.

To not open the way to register this will, would mean the disregard of the political event called the "seventh ballot", which spontaneously occurred last March 11th, as well as the public expressions of political parties and presidential candidates (Colombian Supreme Court 1990).

Turning for a moment to the Honduran case: this theory is similarly useful. The perceived threat posed by the *fourth ballot box* referendum for traditional political elites can also be explained through this theory of a-legal space. Like the *seventh ballot*, Zelaya's poll promised to be a particularly powerful utilisation of a-legal space. Originating from the presidential office, it would be hard to dismiss this initiative as legally irrelevant, despite its non-binding status. Furthermore, its association with the government conferred an authority on the event, an authority normally associated with constituted power, despite the fact that this consultation was not legally recognised. Equally, one can assume that opponents feared the level of participation that Zelaya's national poll would generate, which might then assume the feeling of a mandate. The lengths taken by the Honduran political establishment to avoid this poll taking place, and the urgency with which they were taken, suggest there was a sense it would somehow change things. The theory of political grammar change through the use of a-legal space explains how it might have done this.

### **Consequences for a theory of a-legal space**

The aim of this discussion has been to better understand what happened in the cases of the *seventh ballot* and the *fourth ballot box*, why they had such apparently extraordinary impacts, and to consider the implications for a broader theory of a-

legal space. A number of observations can be made. Firstly: the theory of a-legal space as a discursive strategy to shift the political grammar can be neatly applied to these cases and has strong explanatory power. This supports the credibility of this theory as an account of the a-legal space phenomenon. Secondly, it seems that successfully emulating constituted power whilst also appearing as an expression of the constituent will is, as the theory would suggest, related to impact. The potential of a-legal initiatives to bring about discursive change is – according to this theory - related to their ability to harness the hegemonic influence of both constituted and constituent power. The Colombian and Honduran cases support what is the logical conclusion of this claim: a-legal initiatives have impact where they do both well.

But what factors are important in gaining acceptance as ‘the constituent will’? Earlier protests did not gain the same accolade as the *seventh ballot* did, despite mass participation. Interestingly, it seems that the quasi-legal, quasi-institutional format contributed to its acceptance as a demonstration of the ‘constituent will’, since this is the feature which distinguished the action from earlier protests. In other words, gaining acceptance as *the constituent will* is, paradoxically, in some way related to assuming the form of or successfully appropriating the appearance of *constituted* power. That constituent power creates constituted power is contained in their definition. But the case of the *seventh ballot* which was widely accepted as embodying the constituent will, at least in part it would seem because of its quasi-institutional, quasi-legal format, suggests the opposite is also true. It suggests that for an act to be recognised as an expression of constituent power it can help if it borrows aspects and symbols of the existing constituted order. Perhaps it helps that there are familiar already recognised legal forms, mixed in with the new proposal.



In the Colombian case, potentially, merging the a-legal referendum with a formal election was effective in helping it capture the hegemonic influence and heightened authority of constituted power. Hence other a-legal initiatives may want to explore how this innovative approach might be replicated in other contexts. In the Honduran case, the initiation of the a-legal referendum by the president helped it gain association with constituted power. Perhaps, then, a-legal initiatives organised by governments, or other institutional actors, have greater potential impact.

A final observation concerns the relationship between constituent power and change. In contemporary and scholarly accounts of the *seventh ballot* alike, there is an equivocation between depictions of the event as 'an expression of the constituent will' and the suggestion that it created a new political reality or 'political fact'. Baez Vera (2011), for example, describes the “de-facto situation created by the people themselves”. Similarly, the Supreme Court explains that when the people vote on the possibility of calling a constituent assembly following Barco's decree it “will constitute a political fact that translates into a real mandate of equal nature” (Colombian Supreme Court 1990). And Fernando Carrillo (2009), the university professor credited with originally proposing the *seventh ballot*, explains that they had “created a supra-constitutional political fact”. The idea that an expression of the constituent will equates to a new 'political fact' is frequently implied in the literature but not elaborated on. The theory of political grammar change as a result of the exercise of constituent power helps to elaborate on the connection between the two.

### 3.3.3. The struggle to define (il)legality and the two 'axes of legality'

An examination of the events leading up to and following the *fourth ballot box* referendum in Honduras and the *seventh ballot* in Colombia helps illuminate how the a-legal space tactic plays out in practice. One prominent feature of both episodes was a struggle to define the (il)legality, and relatedly, (il)legitimacy of what was taking place. In each case this struggle is two-dimensional, involving two different disputes along what might be seen as two 'axes of legality'. Moreover, similar dual struggles can be spotted in other instances where actors have made use of a-legal space. This is indicative, I will argue, of what is going on when actors attempt to use a-legal space(s) to create change. Of the Honduran and Colombian cases, this dual struggle to define (il)legality is most pronounced in Zelaya's *fourth ballot box* case, which I turn to first.

From the outset Zelaya faced legal challenges. His initial proposal for a 'broad popular consultation' on the possibility of creating a constituent assembly was ruled unconstitutional by the Attorney General. The revised proposal, two months later, was for a 'national poll' was essentially the same proposal bar the name change, but a 'national poll' could be presented within the legal framework of the existing Citizens' Participation Law, which recognised the right of citizens to be consulted on government policy (Llanos and Marsteintredet 2010). However, the Honduran courts were unconvinced. The Court of Contentious Administration ruled that the 'national poll' was covered by the earlier ruling against a 'popular consultation', a decision which was then upheld by the Supreme Court who ruled the poll illegal (ibid.). For good measure, the National Congress passed an additional law, just four days before

the *fourth ballot box* poll was to take place, preventing any form of plebiscite or referendum from taking place within 180 days of general elections.

In the face of these multiple legal challenges Zelaya pursued an interesting dual strategy to defend the planned poll. On the one hand he sought to downplay the significance of the poll, emphasising its non-binding status. Speaking to the media, just days before the event he explained:

The poll has no binding character. That is, its results – yes or no – does not obligate the state to do anything. It's a public opinion poll. It's a poll that does not create new rights, does not create a new law (Zelaya cited in CNN 2009)

Hence its non-binding, *non-legal* status was used as a defence against its alleged illegality. At the same time, and somewhat at odds with the first line of defence, Zelaya appealed to the ultimate authority and constituent power of the people in his statements and actions in defence of the *fourth ballot box* in the days leading up to the action. On the day that the Supreme Court returned its negative decision, Zelaya led a protest to the military base where ballot papers for the poll had been stored but which the military were now refusing to distribute. Whilst reportedly singing the national anthem, several hundred supporters retrieved the boxes of ballot papers, and at the entrance to the military base Zelaya announced to the crowd and the press:

Sunday's referendum will not be stopped...We have the right to vote and the right to organize. The military should rectify their position in favour of the people and ignore the extortion of the elite (Zelaya cited in CNN 2009)

The different tactics employed here to establish the (il)legality of the planned poll reflect the struggles for ground along two connected but distinct 'axes of legality'. On the one hand, Zelaya's opponents sought to establish the poll as illegal and unconstitutional, and to criminalise anyone who would administer the exercise, whilst Zelaya sought to refute these charges and demonstrate that the poll would not break any laws, this was done through emphasising its non-legal, non-binding status. On the other hand, he sought simultaneously to demonstrate that the initiative indeed had a form of legality in the sense of an institutional basis (in the Citizens' Participation Law) whilst also asserting a more fundamental claim to legality based on the democratic authority of the people. So a struggle to resist criminalisation (one axis of legality) was accompanied by another struggle for institutionalisation (the other axis of legality). Significantly, tactics in one struggle did not necessarily help in the other. For example, Zelaya's attempts to downplay the significance of the poll, emphasising its non-binding, non-legal status, may have helped him contest charges of illegality and unconstitutionality. But they are quite at odds with his defiant assertion that the people have "the right to vote and the right to organise" (ibid.), and arguably undermined his appeal to the democratic authority of the people as grounds for institutionalising this exercise. It is for this reason that it is helpful to see the struggle to establish legality as two-dimensional.

A similar struggle to establish (il)legality is evident in the Colombian *seventh ballot*. Most prominent in this case, however, was activity aimed at gaining ground on the axis of institutionalisation. Prior to the event the student organisers established that according to the electoral code, votes for an unknown candidate did indeed have to be counted and retained, and kept apart from the votes for registered candidates. On this

basis the text on the *seventh ballot* commenced “I vote for Colombia” (Torres Forero 2006). This can be read as an attempt by organisers to utilise a legal loop hole to achieve a form (albeit ambiguous) of legal recognition. The votes for 'Colombia' would officially have no legal consequences. However, if they were counted and recorded through the institutional apparatus of the state, and classified as 'votes for an unknown person' – a category recognised within the existing electoral code – arguably, the *seventh ballot* might have established its status as something other and different to a civil society based protest. The electoral organisation, for their part, can be seen to have resisted these efforts towards institutionalisation. Claiming lack of time and organisational capacity, the organisation refused to count the votes submitted as part of the *seventh ballot* (Torres Forero 2006). However, as was highlighted by the *fourth ballot box* case, attempts to institutionalise an a-legal initiative can involve two kinds of approaches. A technocratic appeal to existing codes, regulations and other legal structures, can take place alongside a different kind of appeal based on the ultimate authority of the people. As is evident in the subsequent statements and actions of the president and the Supreme Court, the latter approach was successful in the case of the *seventh ballot*. Citing the authority of the *seventh ballot* as a reflection of the constituent will, both took the necessary steps to allow a binding consultation on the possibility of a constituent assembly to take place through the institutional apparatus of the state.

Activity directed at the prohibition or criminalisation of the *seventh ballot*, which is to say activity located on the *other* axis of legality, is less prominent. The legal case against President Barco's decree was presented to the Supreme Court by citizens

opposed to the ruling, and is recorded in the court's final judgement.<sup>30</sup> What is striking, given the centrality of the *seventh ballot* to Barco's decree, is the complete omission of references to the event by those opposing the Decree. Instead, arguments focus on the unconstitutionality of the proposed binding consultation, on the basis that it would violate various constitutional norms.<sup>31</sup> The strategy of those who opposed the creation of a constituent assembly was, it would appear, to ignore the *seventh ballot* rather than attempt to criminalise it.

The Honduran and Colombian case studies suggest that a struggle to define (il)legality is central to this tactic, and that this struggle is two-dimensional, taking place on two interconnected but distinct axes, towards institutionalisation on the one hand, and criminalisation or prohibition on the other. This is an interesting insight. But to what extent does it apply to the wider phenomenon of a-legal space as a tactic? A brief exploration of other cases is helpful here to test this claim. I suggest that similar two-dimensional struggles to define (il)legality can be spotted in other instances of a-legal space(s). To help illustrate this I provide a brief overview of two cases where both dimensions to this struggle are particularly evident. These include the first Catalan independence referendum, which took place in 2009 in the small town of Arenys de Munt in Catalonia and the *Aboriginal Tent Embassy* (both of which were discussed in chapter 1).

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30 The existing constitution provided the right for citizens to petition the Court for and against the ruling (Constitution of Colombia 1886, article 214).

31 Including article 171, which dictated the kinds of decisions which could be subject to a vote; article 218, which stipulated the appropriate mechanism for constitutional reform; and article 13 of the Plebiscite of 1957, which prohibited the use of the referendum mechanism (Constitution of Colombia 1886).

The Arenys de Munt referendum on Catalan independence shares a number of parallels with Zelaya's *fourth ballot box*. This non-binding referendum was, like the fourth ballot box, initiated by an institutional actor. The proposal to hold a public “consultation” on Catalan independence was made by Popular Unity Candidates party in Arenys de Munt, and subsequently passed in a council motion (Govan 2009). The consultation was non-binding, and was to be a purely symbolic exercise. However, arguably it held an ambiguous legal status as a consequence of its institutional origins in local government. This was the perspective of the Spanish government, who challenged the council's planned consultation through the courts. Interestingly, in their defence the council took much the same approach as Zelaya in Honduras, in an effort to resist charges of illegality and unconstitutionality. The council argued that it was not a council run referendum, and that the council was merely providing the venue in which the event would take place (Baiget 2009). Hence, like Zelaya they emphasised the non-legal, unofficial status in an effort to refute charges of illegality. However, the Spanish court was unconvinced. The judge argued that the exercise would “clearly invade powers expressly reserved for the State”, and ordered the council to cancel the referendum (quoted in *ibid.*). The organisers were forced to relocate the event from the council building to a private social club. In the face of this set back, the local council can be seen to engage with the other axis of legality, with the town mayor announcing that the decision was “bad for democracy” and that he would still take part (quoted in *ibid.*).

Another good example, in which activity directed at both axes of legality is evident, is the *Aboriginal Tent Embassy*.<sup>32</sup> This initiative had a contested and changing legal

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32 In 1972 aboriginal activists set up a camp on the lawn outside Parliament House, in protest at the

status throughout the period of its encampment on the lawn of the Australian Parliament in 1972. When the Embassy was originally erected the government was unable to order police to remove it as a result of a legal loop hole. Camping on Crown land without a permit was prohibited, but Aboriginal people were exempt from this law (Schaap and Muldoon 2012; Schaap 2008). The Australian government was forced to adapt a 1932 Trespass ordinance in order to legally remove the Embassy, a process which took the government six months during which time the Tent Embassy remained legally on the lawns of Parliament House. When the new ordinance was finally drafted in July of 1972 the police moved in and the Tent Embassy was violently dismantled. However, the Tent Embassy organisers challenged the legality of the new ordinance (Robinson 1994). And just two months later a court found that the government had failed to follow the correct legal process in drafting the new ordinance which “was not notified in accordance with the provisions of the Act” (Blackburn quoted in *ibid.*). Whilst the judge stopped short of ordering that the Tent Embassy be reinstated, the legality of its removal was put into question. The Embassy organisers wasted no time, and the following day they returned to Parliament house and re-erected the tents (Robinson 1994). Hence, the official legal status of the Tent Embassy changed in accordance with the legal and political battle between the government and the Embassy organisers. This reflects the struggle to define (il)legality on one axis. Meanwhile, however, organisers engaged in a parallel process directed at gaining official recognition and institutionalisation. As one organiser admits, the decision to call their protest an 'embassy' “started off as a joke” (Paul Coe, Tent Embassy organiser, quoted in Cowan, 2001). However, within days they were

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Prime Minister’s refusal to recognise their claim to land rights. The protesters set up a sign declaring the camp the ‘Aboriginal Tent Embassy’. The Tent Embassy remained there for a number of months, during which time hundreds of aboriginal and non-aboriginal supporters passed through and the Embassy was the subject of significant national and international news coverage. See chapter 1, section 1.1.6, for a fuller discussion of the case.



receiving international mail and held a series of press conferences, in some instances involving the leader of the opposition Labour party. It would appear that the space which was created assumed a kind of formality, which arguably was quite distinct from a typical protest or occupation. In the following months the Embassy received formal state visits from Soviet Union diplomats, a cadre from the IRA, and a representative from the Canadian Indian Claims Commission (Robinson 1994). In this way, whilst not formally recognised by other states, the Tent Embassy might be said to have begun in a small way to fulfil some of the functions of an Embassy.

The Colombian and Honduran a-legal referenda, the Catalan independence referendum and the *Aboriginal Tent Embassy* represent just a fraction of the countless times in which actors have taken the a-legal approach. However, I hope to have provided sufficient evidence to support the claim that a struggle to establish (il)legality is a central feature of how this tactic plays out. And that this struggle is two-dimensional: involving attempts to establish legality in two different ways, or along two 'axes'. Organisers seek to resist criminalisation or prohibition, at the same time as they seek to institutionalise what they are doing; and the two are not always complementary.

### **Consequences for a theory of a-legal space**

So, what is the significance of this observation and how does it contribute to an account of a-legal space? It is helpful here to revisit some aspects of the theory of a-legal space so far developed. The theory has drawn on the different but complementary accounts of a-legality of Harnecker (2007) and Lindahl (2013). For

Harnecker (ibid.), the a-legal is the realm between the legal and the illegal, distinctive because no law provides for it but neither does any law prohibit it. The problem with this account is that behaviours can be *lawful*, whilst not legally *sanctioned* and *institutionalised*. This does not define what is distinctive about the phenomenon. Lindahl (2013) offers a way forward by suggesting that a-legality is a *relational* concept: a behaviour or situation is not a-legal per se, but with respect to a particular legal order. It resists categorisation as legal or illegal because the behaviour appears as if governed by another legal order. Combining the two accounts, I suggested that a-legal initiatives question and contest the extant legal or political order, and exemplify and promote an alternative. And they do this through prefiguring an institutional structure or process of this alternative, not yet actualised other order. Following this theory of a-legal space, we should see a-legal initiatives such as these referenda in Colombia and Honduras as attempting to construct reality: they are a type of hegemonic struggle. The two-dimensional struggle to define (il)legality reflects the struggle to define reality. When organisers make efforts to institutionalise what they are doing they are acting on the offensive. When they are forced to deny charges of illegality from the courts or other critics they are back on the defensive, operating within the terms of the extant legal order.

Observing the two-dimensional struggle to define (il)legality is helpful because it draws out the nature, and highlights the complexity, of the legal, political and discursive struggle in which organisers are engaged, when they attempt to use this tactic. Organisers must resist criminalisation and prohibition, at the same time as they try to institutionalise what they are doing. And efforts to achieve one do not always support the other. Attempts to resist prohibition often involve emphasising

the unofficial, non-legal status of the initiative, which can undermine the parallel objective to institutionalise what is taking place. Likewise, it would seem that the more successful organisers are at institutionalising the different way of doing things, the more of a threat they become, and hence the more opponents seek to illegalise what they are doing.

An additional reflection which is prompted by this discussion is that a-legal space is no one's end goal. For organisers, the objective is the transformation of the legal and/or political, democratic order: the institutionalisation of the a-legal exercise. For opponents, the objective is to resist the disruption brought through the a-legal exercise and for normality to be restored. A-legal initiatives are a tool which, where successful, can create a space in which a different ordering of reality is available, alongside the normal ordering. In this space another order can be envisioned from within the existing legal and political order. This is not the end goal, but a necessary stage in a process of transforming the existing order. This also highlights the transient nature of a-legal space. It does not exist *de facto* but must be actively created. And the outcome of struggles along the two axes of legality determines whether it is created and maintained, transformed into law, or conversely, extinguished.

As a final point, it is worth noting that the criminalisation/prohibition axis is more prominent where institutional actors have made use of a-legal space. In the Catalan referendum and the *fourth ballot box* organisers faced formal legal challenges and were issued court orders to cancel the event on the grounds that they had exceeded their constitutional powers. This perhaps reflects the heightened threat posed by institutionally based a-legal initiatives.

### 3.3.5. The location of a-legal space

The *seventh ballot* is interesting from a spatial perspective. The Colombian student group, like most actors who turn to the use of a-legal space(s), had no formal authority or jurisdiction to call a referendum. But through their creative, audacious use of the congressional elections, they created a space for their referendum within the formal electoral process. In this way the *seventh ballot* stands out from other cases of civil society-led non-binding referenda. Whilst it is standard for a-legal referenda to emulate the procedures of an official referendum in an effort to confer authority on the event, the *seventh ballot* went even further in taking place literally within and through an official election.

A-legal initiatives have often been framed as an extension of existing institutions or official processes.<sup>33</sup> However, in most cases, they take place in a different geographical and temporal location. As has been argued, these initiatives create a space in which social reality and the law are ordered in a somewhat different way. Participants, organisers and onlookers are provided an opportunity to think and behave in a different way, as if in accordance with a different set of rules. What the *seventh ballot* referendum shows is that a-legal space need not be geographically or temporally apart. Literally at the same time as citizens performed their participation in the existing democratic system - through voting in the Congressional, Mayoral and Senate elections - they were enabled to exceed their role as citizens in a representative democratic system and participate in this other unauthorised ballot.

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33 As one example, the Tokyo based *Women's International War Crimes Tribunal* which addressed the human rights abuses of women subjected to sexual slavery by the Japanese military during World War II was framed as "a derivative of" the post war Tokyo Trial, and intended to continue the work of this official trial (Chinkin 2006, p. 16).

The particular subjective experience, amongst other effects, of the blurring of legal and a-legal spaces is one issue worth considering. More generally the case contributes to an account of a-legal spaces and the kinds of sites where they may be created.

### **3.3.6. The use of a-legal space by constituted power**

In other parts of the world, the a-legal tactic has sometimes also been employed by actors within constituted power. For example, the first (non-binding) Catalan independence referendum in 2009 was initiated by a local council in Catalalonia (Baiget 2009) and the UK's *Police Monitoring Unit* was an initiative of Manchester City council. However, in the vast majority of cases, outside of Latin America this tactic is employed by actors without formal power, within civil society. In contrast, President Zelaya's attempted *fourth ballot box* referendum, the Ecuadorian Government's *Public Debt Audit Commission*, and the Bolivian Government's support for a *World Referendum on Climate Change*, are examples of the tactic's relatively frequent application by constituted power in Latin America. Therefore, the *fourth ballot box* initiative is an important case to explore and hopefully better understand a broader phenomenon: the use of a-legal space(s) by state-based actors in Latin America. Key questions include: when do governments turn to this type of space? What are the distinguishing features of government initiated a-legal space(s)? What factors influence the success of this tactic when employed by governments, or other institutional actors? I consider what the case of the *fourth ballot box* can tell us about each.

On the basis of Zelaya's *fourth ballot box*, it would seem that governments adopt this tactic in much the same context as non-state actors. President Zelaya was forced to take an a-legal approach - with his 'national poll' - despite his position as president because he faced opposition within Congress, the Supreme Court and other centres of constituted power. As Llanos and Marsteintredet (2010) point out, Zelaya had initially intended to draft a bill which would force a referendum on the convocation of a constituent assembly. Yet his diminished support in Congress meant he could not count on a legislative majority. As an alternative, Zelaya announced the 'broad popular consultation' on a constituent assembly, and later the 'national poll', to take place by presidential decree. The approach enabled him to bypass Congress and create an exercise which, though non-binding, would appear much like and be experienced much like a referendum. Hence the exercise can be seen as an attempt to create an opening for constitutional change, where routes through the formal channels were closed off. Just as social movements, NGOs and other civil society groups pushing for radical change can find formal political or legal channels closed off, so too can actors based within constituted power. And in such scenarios the use of a-legal space(s) can offer one way forward.

This argument, that governments (or other institutional actors) turn to the use of a-legal space in an attempt to create an opening for legal or constitutional change, where routes through the formal channels are closed, can be extended to other cases in Latin America. The Ecuadorian Government's *Public Debt Audit Commission* carried out an audit of Ecuador's foreign debt, much of which was accrued during the period of authoritarian rule. It was initiated in the absence of formal legal mechanisms through which Ecuador could contest the legality and legitimacy of its foreign debts.

Hence, just like with the *fourth ballot box* poll, in the absence or closure of formal channels, the government turned to this new and as yet unrecognised mechanism, in an attempt to shift the political situation and the existing constituted order at the international level.

One distinguishing feature of a-legal space(s) initiated by governments or other institutional actors has already been touched upon. These initiatives, it would seem (admittedly, on the basis of only a limited sample) are more commonly subject to legal challenges. The institutional response to a-legal referenda, peoples' tribunals or other initiatives organised by civil society is usually to ignore them. Where an a-legal initiative is initiated by a government or council, this is less so the case: perhaps because it is more difficult to ignore them. As was suggested in the previous sub-section, activity directed at the axis of criminalisation/prohibition is more prominent than in a-legal spaces which are entirely extra-institutional. There are no doubt other interesting features which distinguish this important sub-section of a-legal activity. An analysis of more initiatives of this form would be needed to explore this fully.

What about the success of these initiatives? What factors influence the successful use of a-legal space by institutional actors? The failed *fourth ballot box* initiative is instructive here also. Some accounts suggest that Zelaya might have been successfully returned to power had the popular resistance against the coup happened sooner, and been better organised (Cunha Filho, Coelho and Flores 2013). Zelaya lacked strong connections or support amongst the main Honduran social movements, whilst in power (ibid.). Even in the last days before the coup, when the very public legal and political battle over the *fourth ballot box* had reached its peak, there were limited

public displays of support from civil society (ibid.). This made it easier for opponents to depict the *fourth ballot box* as little more than a power grab by Zelaya, seeking to use a constituent assembly to remove limitations on term limits. And meant there was limited resistance to the coup until after it had taken place. Hence, it seems that whilst initiated by actors within *constituted* power, these initiatives depend heavily on the role of *constituent* power to be successful.

This is interesting to consider in relation to wider debates on contemporary Latin American politics. Firstly, the case highlights the heterogeneous nature of constituted power. That there is an inherent tension between social movements and the state; constituent and constituted power, is recognised in most analyses of contemporary Latin American politics (Lander and Maya 2007; Schiller 2011). Negotiation of this tension, in such a way that the new ideas and values of social movements can be institutionalised, and spaces created for their ongoing contribution to governance, yet without eliminating their autonomy, ability to critique and dissent, is often considered the central challenge for new governments in power in the region (ibid.). However, instances where actors within constituted power have made use of a-legal space highlight the centrality of struggles between different sections of constituted power, for example between a new left-wing executive branch of government, and other centres of power within the state. This also highlights the centrality of struggles between constituted power at the national and international levels. Moreover, instances where Latin American governments have turned to the use of a-legal spaces offer one way to explore how states and social movements have worked together (or failed to do so, as with the *fourth ballot box* case) to transform the constituted order at the national level, or at the international level.



### **3.4. The significance of a-legal space for research into new Latin American constitutionalism**

In this section I show how understanding a-legal space as part of a broader constitutional process and struggle promises to enrich existing debates on processes of constitutional change in contemporary Latin America. There are two ways in which it does this. Firstly, in these spaces actors explore radical institutional reforms, away from the pressures and constraints which delimit political possibilities within formal politics. Therefore, a focus on what takes place in these spaces could contribute to our understanding of the potential and the limitations of new constitutionalism as a strategy for transformative change. Secondly, a focus on these initiatives promises to help expand the conceptual framework through which scholars assess these processes. Generally, scholarly assessments of real world constituent assembly processes, and the criteria advocated as important to enable the expression of constituent power, are shaped by the participatory democratic framework. As Dinerstein and Ferrero (2012) have highlighted, this framework fails to capture all activities which are important to democracy. A focus on the use of a-legal spaces, in addition to what happens within formal constituent assemblies, necessitates a broader conceptual framework which will contribute to this gap in the literature. I expand on each argument in turn.

#### **3.4.1. The potential and the limitations of new Latin American constitutionalism**

A central debate within contemporary radical scholarship on Latin America concerns the potential and the limitations of the constitutional strategy as a route to

substantive and transformative change. I will briefly summarise the debate, before considering the contribution of a-legal space to this literature. Critics suggest that hope placed in new constitutions to 're-found' the nation and thereby transform society and the state is misguided. Two main arguments are made: firstly, that too much hope is invested in what is "primarily a legal document", whilst existing social and economic relations remain unchanged (Mendoza 2012). As Mendoza (ibid.) puts it: "you can't decree social change". Secondly, the argument is that the constitutional form does not provide a blank slate to 're-found' nations, but tends towards the recreation of past oppressive structures and patterns. Pointing to the historical use of law and constitutionalism to support colonialism, capitalism and social exclusion, Mendoza (ibid.) wonders: "can the masters' tools dismantle the masters' house (Lorde, 1984)?"<sup>34</sup> In the Honduran context in particular, she notes, the (current) constitution and law have been central tools in the legitimisation of the 2009 coup.

In contrast, proponents of this approach argue that it is indeed a route to meaningful change. Walsh (2012), for example, asserts that:

for those of us involved in Latin America in the present processes of socio-political transformation, the role of State, constitutions and law in helping to push social justice and build a radically distinct society cannot be denied.

Whilst it is agreed (by some) that 'you can't decree social change', this is to misunderstand the constitutionalist strategy in Latin America today. As Walsh (2012) explains:

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<sup>34</sup> As Mendoza (2012) points out, even constitutions which were written as part of an emancipatory process have been used to inscribe new and old forms of social exclusion, such as the US constitution which excluded blacks and women.

a Constituent Assembly... does not just write a new Charter but, in the process, contributes to and is part of the developing consciousness and transformation. Here the Constitution is not just a product; it is a medium and tool for change (Walsh, 2012).

Hence, it is argued that the creation of new national constitutions is valuable as much for the collective process it enables as for the legal document which is created. Moreover, it is possible to transcend the colonial, neoliberal and oppressive constitutional structures of the past and constitute a radically different constitutional order. Contrasting the Ecuadorian Constituent Assembly process of 2008 with the earlier Ecuadorian Assembly process of 1997 to 1998, and the Colombian Constituent Assembly process of 1990, Walsh (2012) distinguishes between different phases in the Latin American constitutional project. These earlier episodes, she agrees, indeed failed to re-structure the state so as to move beyond “the multicultural logic of transnational global capitalism” (ibid.).

The Colombian constitutional process of 1990 and the Ecuadorian Assembly of the late 1990s, sometimes referred to as 'multicultural constitutionalism', put much emphasis on the inclusion of traditionally excluded groups, such as indigenous and afro-descendant peoples, within the constituent assembly process. However, this nominal inclusion was not accompanied by any real commitment to engage with new demands or different ways of thinking: “such politics and reforms did not take seriously social movement demands, nor did they portend to push structural change” (ibid.). In this way, the inclusion of new groups in a constituent assembly process: “instead of altering, strengthened the structures and systems of power” (ibid.). However, in “deep contrast” argues Walsh (ibid.), the 2008 Ecuadorian Constituent

Assembly process and Constitution reflect a different phenomenon. The aim here has been “not to simply 'include' that which historically has been subjugated, denied and negated, but instead to 'think with' these subjects, knowledges, and cosmic or life-visions” (Walsh 2012). Radically different and counter-hegemonic concepts such as the Pachamama<sup>35</sup> and 'buen vivir'<sup>36</sup> are identified as the “philosophical and orientating force of the new social project”, notes Walsh. In addition, the constitutional recognition of the Rights of Nature and of ancestral knowledge as also 'scientific', are examples of advances which involve a fundamental shift from the old constitutional order. Hence, in contrast to the pessimistic projections of Mendoza (2012), it is argued that constitutionalism can indeed be re-claimed and used as a tool for the radical transformation of the social world.

However, despite the appeal of this argument and Walsh's persuasive defence of Ecuador's ambitious constitutional project, there is good reason to question the real achievements of new constitutionalism in Latin America. As both Walsh (2012) and Mendoza (2012) acknowledge, in both Bolivia and Ecuador laudable new constitutional visions have in many ways not reflected the lived reality. In both countries, governments have systematically violated new constitutional rights and principles. In Ecuador, as just one example, several months after the ratification of the constitution in 2008, the government's new Mining Law granted companies freedom to prospect without community permission and without community consultation until after concessions have been granted. This directly violated the rights to

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35 'Mother Earth' in Ecuadorian and Bolivian indigenous languages.

36 The Spanish term 'buen vivir' or 'vivir bien' emerged in the late twentieth century to refer to a concept central to Andean indigenous cultures and philosophies. The original indigenous language terms ('sumaq qamaña' in Aymara and 'sumak kawsay' in Quechua) have no direct translation, but have been variously interpreted as 'plentiful life', 'to know how to live', 'the good life', 'the sweet life', 'living well', 'harmonious life', and 'sublime life' (Systemic Alternatives 2015).

community consultation and community participation in decision making.<sup>37</sup> The law also criminalised attempts to disrupt mining activities, in addition to posing a threat to the Rights of Nature (Walsh 2012). In Bolivia, a similar Mining Law was passed by the Morales administration, which is equally considered to undermine Human and Mother Earth rights (Peralta 2014).<sup>38</sup> The ongoing TIPNIS conflict is perhaps the best exemplification of the broader phenomenon. In 2011 the government announced plans for a motorway to be built through the 1.2 million hectare indigenous territory and national park, TIPNIS (*Parque Nacional y Territorio Indígena y Parque Nacional Isiboro Secure*). The new road would connect the Amazonian region in the south with the Andes in the north and, so Morales argued, was essential for 'development' of the region, and Bolivian economic prosperity more generally. The majority of the indigenous communities based within the TIPNIS strongly opposed the road, fearing it would lead to destruction of the forest and aid the incursion of illegal loggers into the region.<sup>39</sup> The government had failed to seek the "free, prior, and informed consent" of indigenous residents prior to signing the contract for construction of the highway, violating the Constitutional Right to Previous Consultation (Achtenberg 2011). In September 2011 the indigenous march against the TIPNIS highway was brutally repressed by the police, resulting in 45 protesters injured and the death of a baby (Achtenberg 2011; Thornton 2013). The conflict resulted in the division of the Pact of Unity, the coalition of Bolivia's five main social movements which formed in 2005 and was instrumental in bringing the MAS government to power. The two

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37 Stipulated in articles 57.7 and 395.3 of the Constitution, respectively

38 The Mining Law is described by Mama Nilda Rojas, leader of CONAMAQ, one of the country's main indigenous social movements as: "a murderous and terrible law which puts human rights below the rights of miners" (cited in Peralta 2014).

39 Fears which were well founded, according to a study conducted by Bolivia's Nature Foundation, which suggested the park would be reduced by 64% within 18 years.

indigenous social movements have left the Pact and come out against the MAS government (Peralta 2014).

For some, the TIPNIS conflict exemplifies the 'neo-extractivist' economic model of the Morales administration (Webber 2015; Gudynas 2012; Walsh 2012). As Webber (2015, p. 320) reflects:

Similar to the period normally described as 'neoliberal', massive multinational corporations are deeply implicated in the extension of extraction at the heart of this primary-commodity-led growth everywhere in the region. Those cases in which centre-left regimes have entered into joint contracts between state-owned enterprises and multinationals, and negotiated relatively higher royalties and taxes on these extractive activities, are no exception.

Within this model, states maintain their legitimacy through "modest redistribution", for example through cash-transfer schemes to the very poor, but "without touching the underlying class structure of society" (ibid.).<sup>40</sup> As Webber (2015, p.320) adds:

Indeed, the very reproduction of these political economies depends upon states prioritising the maintenance and security of private property rights and juridical environments in which multinationals can profit.

Whilst Webber's appraisal of the MAS government's social achievements (which include massive reductions in extreme poverty and child malnutrition, amongst others<sup>41</sup>) seems somewhat dismissive, his broader point is persuasive in light of the

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<sup>40</sup> Eduardo Gudynas has coined the term 'compensatory states' to capture this dynamic (2012)

<sup>41</sup> Public spending increased by 750 percent between 2005 and 2014; chronic child malnutrition in under threes reduced from 41.7 percent in 1989 to 18.5 percent in 2012; and extreme poverty

TIPNIS conflict and the Ecuadorian Mining Law.<sup>42</sup> Hence it seems that the governments of Bolivia and Ecuador follow a political and economic logic in some ways completely at odds with their idealistic constitutions. Walsh (2012) agrees, noting that in both countries, “the State, despite its 'progressive' stature, defies the Constitution and denigrates its process and goals”.

The lived realities in Bolivia and Ecuador provide empirical support for both arguments against the potential of new Latin American constitutionalism. The promulgation of laws such as Ecuadorian and Bolivian Mining Laws illustrates how an extractivist logic, apparently so at odds with these countries’ constitutions, has continued to shape and find support in the law. Equally, the repeated violation of constitutional rights by the governments of both countries, including the right to previous consultation; the rights of Nature; and the right to protest, amongst others, supports Mendoza's objection that “you can't decree social change” (2012). It is clear that the prevailing economic model, based on environmentally and socially devastating extractive industries, has continued unabated, often in patent violation of the new constitution.

The use of a-legal space is a potentially crucial strategy in this context. And a scholarly sensitivity to this type of activity will enable a deeper debate on the potential and the limitations of the new constitutionalist strategy. A-legal spaces such as citizens' debt audits, peoples' tribunals on corporate power or climate justice, or referenda on the rights of mother earth, are just some examples where citizens have

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reduced from 38.2 percent in 2005 to 21.6 percent in 2012 (Singham 2014).

42 A more sympathetic account describes the model as 'social extractivism' (Fabricant and Gustafson 2015).

attempted to rethink institutions and laws which will mark a break with the past. Also the a-legal status creates a space free from the pressures inherent in any state-based process, where alternative ways of thinking have greater potential to develop and thrive. Through an examination of the discourses and concrete proposals which emerge from these spaces it will be easier to assess the inherent limitations – or lack thereof – to the constitutional and legal form. It will be possible to assess whether setbacks within the constitutional projects of Bolivia and Ecuador should be attributed to the intense pressures on states from capital and other powerful groups, or something more insidious, inherent to the use of law and the constitutional form in these contexts.

Advocates of left governments' constitutional strategy, such as Walsh (2012), have suggested that the “constitution is not just a product; it is a medium and tool for change”, which contributes to “developing consciousness and transformation”. Walsh does not elaborate on the mechanism by which it does this but it seems that the creation of a public space, which endures over a period of time, with the remit to reflect on and debate the structure of society and the State, must be part of the picture. She adds: the Constitution may “give process, substance, and hope to transformation” (ibid.). However, events in Bolivia and Ecuador suggest the constitutional strategy has, so far, failed to achieve the radical changes that were promised. For Walsh (ibid.), the problem is rooted in the consolidation of power with the State, and limited real influence of communities. In both Bolivia and Ecuador, she argues:



There is not a new configuration of power or a critical revision of the models of thinking and exercising power... Rather there is a consolidation of power that, in essence, reifies the State. It is the State that has the final say; participation of social sectors and community consultation are tokens in this regard.<sup>43</sup>

So, whilst on the one hand, the Constitution may “give process, substance, and hope to transformation”, on the other hand, the “government and/as State can co-opt, signify, and define politics, law, and even change on its own terms” (ibid.). The value of a-legal space(s), in such a context, can be to provide a discursive challenge to co-optation. Functioning as a form of subaltern counter-public (Fraser 1990), organisers and participants in such spaces elaborate the legal and technical details of aspects of an alternative legal and/or political order.

In an extended essay on the contemporary politics of Latin America, Arturo Escobar (2010, p.1) reflected on the relative significance of political developments in formal and informal politics. He observed that:

Whereas at the level of the states the transformations do not seem to venture beyond alternative forms of modernization, the discourses and strategies of some social movements suggest radical possibilities towards post-liberal, post-developmental, and post-capitalist social forms.

A-legal space(s) are where these “radical possibilities towards post-liberal, post-developmental, and post-capitalist social forms” (ibid.) are explored in an

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<sup>43</sup> Research into the Morales government’s adherence to the Right to Community Consultation on mining and other development projects supports this claim. CEJIS (2010) have documented the systematic violation of constitutional rights to community consultation and the procedures around community consultation.

institutional language. Organisers do not reject the state and the law as “colonial-predator” institutions – as Mendoza (2012) appears to advocate - but attempt to re-think both.

### **3.4.2. An expanded conceptual framework for exploring processes of constitutional change in Latin America**

A focus on the use of a-legal spaces, as part of a wider constitutional process through which states are transformed, can enrich contemporary research on the constitutional process. The constitutional process is most commonly interpreted in narrower terms as involving the selection, deliberation and decision-making of the constituent assembly. However, much empirical research into real world constituent assemblies is located within a participatory democratic paradigm which fails to capture all factors which affect the democratic quality of the event. A broader lens, which considers these extra-institutional initiatives as also part of the constitutional process could help address this problem.

The radical processes of constitutional reform which have taken place in Venezuela, Ecuador and Bolivia have been the subject of much scrutiny. Scholars have sought to assess the democratic quality of these exercises, as well as to suggest improvements for future constitution (re)writing episodes. Commonly, scholars have turned to the criteria emphasised in the participatory democratic literature as a measure of democratic quality. Cameron (2009, p.342), for example, argues that constitutional reform by the new Latin American left must be subject to “tough questions”:

... was the constitutional assembly truly sovereign, or was it an instrument of the executive? Did it limit itself to writing the constitution, or did it also pass ordinary legislation? Were the procedures for writing the constitution truly deliberative? Did the assembly reflect the plurality of the nation?

Similarly, Cameron and Sharpe (2010, p.101) observe that some see “constitutional reform as a matter of inclusion of voices that have been silenced from time immemorial, and of creating a more participatory democracy”, to which there is an “important truth”. And in a similar vein, Colón-Ríos (2012, p.154) emphasises the importance of two “basic principles” in a constitutional regime. These include 'popular participation' and 'democratic openness'. The first requires that the constituent assembly be as inclusive as possible and that there are as many opportunities as possible for wider society to engage with and feed into the constituent assembly process. The second principle of democratic openness requires that the constitution remains open to future change. But this too is conceived in purely participatory democratic terms: the solution is that constitutional mechanisms exist which enable ordinary people to institute such changes, (such as a mechanism for triggering a referendum on a constituent assembly if a certain number of signatures are collected) (ibid.).

Common to these analyses is (in varying degrees) an emphasis on participation and inclusion, equal participation of delegates and genuine decision-making autonomy, the absence of executive influence, and access and transparency for those outside of the constituent assembly process. Scholars are seeking, it would seem, a setting which as far as possible approximates an 'ideal speech situation'

(Habermas 1970) wherein delegates can best deliberate the contents of the new national constitution.

These criteria are, clearly, fundamental to the democratic quality of the constitutional process. However, they are not the only criteria to consider. From the radical democratic perspective, the participatory model has significant limitations which point to the inadequacy of this framework to critique a constituent assembly process.<sup>44</sup> One central objection is to the participatory model's inadequate consideration of the workings of hegemony. Emphases on participation, inclusion, equal opportunity to contribute, and so on, within the participatory account suggest that such measures can achieve a level playing field. And the process by which delegates arrive at a final draft constitution can approximate a battle of ideas. The model rests on a faith in ordinary peoples' abilities to process complex information, engage in rational deliberation, and eventually, ideally, arrive at consensus, and the resultant draft constitution has legitimacy because of the quality of the deliberative process. Despite the appeal of this model, it is hard to deny that something is missing. From the radical democratic perspective, this account ignores the influence of hegemony on the process through which delegates develop a new constitution.

The following imaginary scenario can help to illustrate this. In this scenario, the British government have agreed to establish a Constitutional Convention; as has

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<sup>44</sup> It is worth noting that these objections are in reality to the *deliberative* democratic framework on which accounts of participatory democracy are commonly based. Participatory democracy could be understood through a radical democratic framework, (for example through a focus on the creation of new subjectivities through engagement in participatory democratic processes). However, this remains a notable gap in the literature. Hence, unless stated otherwise 'participatory democracy' can be understood to refer to this approach in its deliberative democratic incarnation.

been called for by sectors of UK civil society.<sup>45</sup> The remit of a Constitutional Convention, much like a Constituent Assembly, is to debate the contents of a new national constitution. In this scenario, the British Constitutional Convention has been given complete freedom and the authority to develop a codified constitution, which will then be put to the public in a national referendum to ratify, or alternatively to reject. Delegates to the Convention include representatives of civil society and some politicians, but the majority are ordinary members of the public, selected by lots. There are equal numbers of women and men, and representatives for each political party. They will have an extended period of time, around two years, to receive input from the wider population and debate the contents of the new constitution.<sup>46</sup>

Now, according to the theory of constituent power, which is the theoretical and philosophical basis to the constituent assembly or constitutional convention process, 'the people' must be able to draw up any kind of constitution they want. If it is decided, for example, that the stability of the earth's ecosystems must be protected for the safety of current and future generations, and for their intrinsic value, delegates of the Constitutional Convention might decide to enshrine the Rights of Nature in the constitution.<sup>47</sup> Equally, the delegates might decide to facilitate tighter regulation of capital and create new institutions to support the development of alternatives to capitalist modes of production. Or they might decide to re-think the criminal justice system and abolish prisons. Alternatively, (or additionally), delegates

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45 Sectors of UK civil society have recently starting calling for a constitutional convention process (c.f. Barnett, 2015; Hind, 2015), and proposals for one were contained in the 2015 General Election manifestos of the Green Party, as well as (albeit in a limited form) the Labour and Liberal Democrat Parties (White 2015).

46 This is roughly the model which has been suggested by advocates of a Constitutional Convention for the UK, which is similar to the recent Irish Constitutional Convention (White, 2015; Hind, 2015).

47 As the Ecuadorian people have done in their 2009 constitution.

can decide to limit civil liberty protections to better enable anti-terrorism activity by the state; or they can prioritise the free movement of capital through de-regulation. More generally, they can choose to radically rethink the existing components of the UK's un-codified constitution. Or they can take a more conservative path, and approach constitution-writing as an exercise in formalising the ideas and practices contained in the various statutes, treaties and legal rulings currently taken to comprise a British Constitution. As Colón-Ríos (2012, p. 2) points out, constitutions include substantive choices. Contrary to the claims of some traditional constitutionalists, which would seek to naturalise the contents of liberal constitutions, constitutions include provisions which “organize the structure of the state... establish or facilitate certain forms of economic (de)regulation, or... limit the duties of government towards citizens.”

However, whilst the delegates of the Convention are formally free to take any path, some scenarios seem far more probable than others. That delegates in contemporary Britain will decide to enshrine the Rights of Nature, lay the foundations for a post-capitalist state or abolish prisons seems unlikely. And if they did, the ratification of such a constitution by the British public seems less likely still. Within the deliberative account, so long as delegates have considered these proposals with access to adequate information, the process is democratic. There are two interconnected problems with this account. Firstly, competing proposals for the new British constitution will in some instances reflect incommensurate discourses, in which the world is made sense of in entirely different ways. The deliberative model cannot account for how delegates choose between incommensurate ideas. Secondly, the

deliberative model cannot account for the structural barriers to proposals for Earth Rights or other radical or marginal ideas getting into the new constitution.

What is needed is a more sophisticated theory of how the delegates make sense of the world, which can recognise the invisible structures that shape political possibilities and how these impact on democracy. In their critique of the participatory paradigm in the context of Latin America, Dinerstein and Ferrero (2012) advocate a turn to radical democracy to better address these concerns. However, in concrete terms, for scholars critiquing constituent assembly processes, it is less obvious what they should do differently. The kinds of qualities which are important within a radical democratic framework are less tangible and easy to measure than those of the deliberative democrat. Norval (2009, p.308), for example, has advocated an “attentiveness to the possibility of 'deprivation of voice'” to supplement the concern for inclusion within deliberative accounts. But how exactly one assesses the presence or absence of this quality within a given constituent assembly process is not obvious.

This challenge is well illustrated in Walsh's (2012) account of the Ecuadorian Constituent Assembly process, which she argues went beyond nominal inclusion of traditionally marginalised groups, to “instead... 'think with' these subjects, knowledges, and cosmic or life-visions”. It is claimed that “in its organization and practice, the Ecuadorian Constitutional Assembly worked pedagogically to engender, enable, and push this “thinking with”” (ibid.). Interestingly, however, in accounting for its success she does not go much beyond the deliberative democratic ideal:

The popularly-elected Assembly women and men did not represent political parties but social and political movements and varied social sectors and regions of the country. Most were new to the political arena, were of a younger generation, and were there to contribute to the learning, thinking, and debate entailed in the shaping and making of the Constitution. Organization was through thematic *mesas* that endeavoured to study the issues of concern with readings, discussions and debates, and invited presentations. Only with consensus and profound understanding did these *mesas* then propose to the plenary the articles for consideration (ibid.).

Key criteria, it seems, were the inclusion of representatives from different social movements, social sectors and geographical regions; the absence of political party influence; a spirit of openness among delegates; and that delegates had the time and space to reflect deeply on the issues at hand before developing proposals. So whilst Walsh emphasises the importance that a constituent assembly not only includes but 'thinks-with' subjugated groups, the specific criteria she lists as important are much the same as the deliberative democrat's. It seems that something is missing. Walsh, who herself was closely involved with the Ecuadorian process,<sup>48</sup> concludes that she "can attest to the socio-political, epistemic, and pedagogical significance of this practice and process" (ibid.). My intention is not to challenge this claim, but rather suggest that something is missing from her account of what enabled the epistemic and socio-political shift she describes. It seems that accounting for the conditions which enable the emergence of new voices, claims and ways of thinking is difficult and elusive.

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48 As an invitee and as an "unofficial advisor" to an Afro-Ecuadorian Assembly woman (Walsh 2012).



The problem, I suggest, lies with the limited focus on the constituent assembly as encompassing the struggle for constitutional change and the process by which constitutional change comes about. As Illan Rua Wall (forthcoming, p.13) reflects in a discussion of new Latin American constitutionalism:

the danger of taking constituent power [as operating only] within the state structure is that 'participation' with the new constitutional structures is taken to be the full expression of constituent power... if constituent power is understood to be entirely within the system, when radical dissensus is expressed, it will be rejected absolutely, with the same violence that was meted out under the previous constitutional regime.

Violent repression of indigenous protests by both the Morales and Correa administrations in recent years supports this claim. It is here that the value of a focus on a-legal space(s) can be appreciated. In most cases these initiatives emerge from social movements and informal political settings. And in all cases they make demands for institutional change which could not be addressed within the formal system. In this way, they reveal the invisible constraints on democratic openness, in a given constitutional regime. They widen the discursive space and concretely they provide a point of comparison, with which the formal constituent assembly process can be compared, in order to explore which voices and ideas might have been shut out.

### 3.5. Conclusions

I have argued that the emergence of peoples' tribunals, non-binding citizen-led referenda, unofficial commissions and debt audits, and other forms of a-legal space, particularly over the last two decades, reflects the embrace of constitutionalism on the part of civil society, social movements and left governments in Latin America. More specifically, these initiatives are a response to closure in the constitutional order, where formal legal and political channels have been exhausted. Whilst lacking law-making authority, a-legal initiatives create spaces in which political demands can be constructed as the 'constituent will'. Where they are successful in this construction they can sometimes shift the range of political and legal possibilities available, as in the case of the Colombian students' *seventh ballot*, opening up the constituted order to transformative change.

Understanding these spaces as part of the broader constitutional process and struggle can contribute to theories and debates on new Latin American constitutionalism. Particularly, it can build on Colón-Ríos' (2012) account of the need for 'democratic openness' as one of two basic principles within a democratic constitutional theory. As was highlighted through considering the possibility of a British Constitutional Convention, barriers to constitutional change comprise more than material or legal obstacles. Expanding our conception of the constitutional process to include these extra-institutional and semi-institutional spaces can help identify the invisible barriers constraining democratic openness.

In the subsequent two chapters I turn to a discussion of these issues in relation to the final two case studies: the unofficial referendum on Venezuelan President Carlos Andrés Pérez, organised by the *Radical Cause* party and the *International Tribunal on Climate Justice*, organised in 2009 by Bolivian civil society.



## **Chapter 4: The *Radical Cause* party's referendum on the rule of Carlos Andrés Pérez, Venezuela, 1992**

In the midst of a profound social and political crisis, the *Radical Cause*, then a marginal political party with only three representatives in the Venezuelan parliament, announced there would be a referendum on the continued rule of Carlos Andrés Pérez. Up to half a million people are cited as participating, with nearly ninety percent voting that 'no' they did not support his continued rule (Harnecker 2007). This unofficial referendum was the original inspiration for Harnecker's (ibid., p. 111) notion of a-legal space, who argued that it “helped to create a political situation in favour of the president's resignation”. In this chapter I explore this case and what it might tell us about the broader phenomenon of a-legal space. Drawing on interviews with individuals who organised the referendum and participated in the event and other commentators from the period, in addition to documentary data including newspaper coverage and publicity materials, I explore what took place, and how it has been understood by those involved. In sections 4.1 and 4.2 I provide an account of the referendum as an historical event. I discuss the political and social context in which it took place, what happened on the day of the referendum, and its impact and legacy. In 4.3 I discuss the objectives of organisers and other participants. Taking a discourse analytical approach, I explore how organisers depict what they were hoping to achieve and how they expected the referendum to help their project. In 4.4 I consider the implications for a general theory of a-legal space as a strategy for political change.

## 4.1 An account of the case

### 4.1.1. Early 1990s Venezuela: the social and political context

In December 1988 Carlos Andrés Pérez was elected for his second time as president of Venezuela. He won with a 53% share of the vote and his party, Democratic Action (Acción Democrática, AD), gained a strong majority in both the Senate and the Chamber of Deputies.<sup>1</sup> Venezuelans were said to be hoping for a return to the prosperous boom years of his first presidency a decade earlier, during which unparalleled oil revenues were funnelled into social, health and education programmes and a series of ambitious mega-projects for industrialisation (Bridges 1988).<sup>2</sup> However, during what has been described as “the most dramatic presidential term since the establishment of democracy in 1958” (Lalander 2010, p. 129), the economic situation would decline, contributing to a severe economic, social and political crisis, culminating in the impeachment and imprisonment of Pérez, and the first and only time in Venezuelan democracy in which a president has been removed from office before the end of his term. The unofficial referendum on the presidency of Pérez organised by the *Radical Cause* party which took place in June 1992 - less than a year before Pérez would be forced out of office - should be understood as a reaction to, and an attempt to capitalise on, the political and social crisis. There are several key events and wider trends which are central to an account of the context in which this

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1 The Venezuelan political system at this time consisted of the Executive and Congress. Congress consisted of the Chamber of Deputies and the Senate.

2 Pérez' first presidency (1974 – 1979) had coincided with a unique period in Venezuela's history. Government revenues quadrupled from 1972 to 1974, following the Middle East oil embargo in '73 (Wilpert 2003). Taking office in 1974 Pérez was able to embark on his project for 'La Gran Venezuela' (The Great Venezuela) as it was known, in which oil revenues were channelled into a series of ambitious mega-projects and government social programmes, including housing projects, industrial parks and a subway in Caracas (The Economist 2011). In 1976 he nationalised the oil industry. However, with the collapse of oil prices in the 1980s Venezuela's economy was badly affected, with significant increases in the numbers of Venezuelans living in poverty and extreme poverty (Galbraith and Garza-Cantu 2001).

initiative took place, which I will discuss in turn, before turning to the events of the referendum day and its impact and legacy.

#### **4.1.2. Pérez's neoliberal 'package' and the Caracazo**

Two weeks after taking office in February 1989, Carlos Andrés Pérez announced a series of economic reforms which were to form the basis of his macroeconomic plan for the country. 'The package' as the reforms became known were based on the International Monetary Fund's (IMF) neoliberal programme for indebted developing countries, including the termination of price controls, the discontinuation of state subsidies, and deregulation of the currency rate. In exchange Venezuela received a four and a half billion-dollar loan from the IMF (Gott 2000). The neoliberal plan came as a shock to voters, and even to some within the president's own party. In the election campaign he had promised a return to the social democratic policies of his first presidency and denounced the IMF as "a neutron bomb that killed people, but left buildings standing" (cited in Ali 2006).

The reforms generated an immediate impact with an episode that is characterised by some as "the beginning of the end of Venezuela's *ancien régime*" (Gott 2000, p. 44, italics in original). The cessation of government fuel subsidies, one of the new reforms, took effect on February 26<sup>th</sup> 1989. The following day bus fares were increased by bus companies by 100% to cover the companies' additional fuel costs. The first protests broke out amongst groups of angry commuters in the early morning which quickly spread, with the aid of television coverage, to the major cities across the country. Protests over bus fares escalated into widespread rioting and looting

across the centre and subsequently the wealthy suburbs of Caracas. In response the government announced a state of martial law, the suspension of civil liberties, and brought in the National Guard, followed by the army (ibid.).

The violent repression which followed was unprecedented in Venezuelan history, with the police and army shooting at groups of unarmed protesters and directly into residential buildings in working class barrios. Whilst the official figure put the death toll at 276, human rights organisations have suggested the actual figure is much higher, with some estimates as high as three thousand deaths (Agencia Bolivariana de Noticias 2009). Subsequent research has shown that the majority were killed at close range inside their own homes (Valery 2009). Mass graves were established within the city, to dispose of the dead, many of whom were never identified (Agencia Bolivariana de Noticias 2009). This week-long episode of protests, riots, and looting, and the government repression which followed is known as the 'Caracazo',<sup>3</sup> and is critical to understanding the political climate in early nineties Venezuela.

#### **4.1.3. February 4<sup>th</sup> 1992: attempted coup**

February 4<sup>th</sup> 1992, marked the next critical event of this period, with the attempt at a military coup led by lieutenant colonel Hugo Chávez. Though unsuccessful, the challenge had a significant impact on the perceived legitimacy and stability of the Pérez government. Promised civilian support for the coup leaders did not materialise, in part contributing to its failure (Gott 2000). However, various accounts suggest that the coup had widespread popular support (Gott 2000; Lopez Maya 1997). Chávez

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<sup>3</sup> A rough translation is 'Caracas big one'.



became a household name overnight after he was permitted a short television appearance in which he accepted defeat and asked troops to step down. In his (now infamous) remark that they had failed '*...for now*', he “caught the popular imagination” (Gott 2000, p. 68), and established the idea that another attempt to overthrow the government was on its way. As one *ex-Radical Cause* leader puts it, February 4<sup>th</sup> “produced a mass de-freezing of politics in Venezuela...a mass destabilization of the political system and a mass de-freezing of the political climate” (Urgelles 2012).

Within the government itself, Pérez' position was precarious. Following the coup attempt he was humiliatingly unable to secure a congressional declaration of support for the government and rejection of the coup leaders, due to criticism from ex-president Rafael Caldera, and *Radical Cause* deputy Aristóbulo Istúriz. Only a more limited resolution could be passed, and Pérez was strongly criticised in speeches from Caldera and Istúriz, in which they held the government responsible for creating the conditions which had given rise to the military insurgency (Lopez Maya 1997).

#### **4.1.4. The crisis of the political system and decentralisation**

However, the critical situation in which the Pérez government found themselves had deeper roots than the Caracazo and attempted coup. The perception that the Venezuelan political system was 'in crisis' had been growing for over a decade. Since the overthrow of the dictatorship in 1958 Venezuela had been ruled by a form of 'pacted democracy', in which power alternated between the two main parties, the social democratic party, *Democratic Action* (Acción Democrática, AD) and the Social-Christian Party, *Independent Political Electoral Organising Committee* (COPEI). The

Pact of Punto Fijo, named after the house in which it was signed by leaders of AD, COPEI and a third party, the *Democratic Republican Union* (URD), was intended to ensure political stability through excluding both the far right and the far left from the political system. The *Venezuelan Communist Party* was made illegal, and power centralised; elections were held for the presidency and ruling party, in which the electorate chose between ideologically similar parties. All other regional and local positions were appointed by the ruling party, often including representatives from both parties, in accordance with their pact to establish governments of national unity (Galbraith and Garza-Cantu 2001).

Despite the democratic deficit, however, the regime maintained a form of legitimacy as long as oil revenues could be used to sustain economic and social well-being in the population. Various scholars note how Venezuela was able during this period to both satisfy “demands of private capital for accumulation” whilst funding health, education and social development programmes (Smilde 2011, p. 3; Crisp, Levine and Rey 1995), resulting in massive improvements in life expectancy, infant mortality, and literacy levels (Smilde 2011). However, with the collapse of oil prices in the early nineteen eighties, this social contract was over. Unemployment and informal employment soared, real wages declined, and inequality increased, with the poorest the worst affected (ibid.).

Worsened by a series of corruption scandals, a widespread antipathy towards politicians and political parties developed, evident in high levels of voter abstention<sup>4</sup>

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<sup>4</sup> Voter abstention was 42% in the 1984 municipal elections, 22% in the 1988 presidential elections, and 55% in the municipal-gubernatorial elections of 1989, and 51% in 1992; despite the fact that abstention was illegal (Ellner 1993).

and intense “anti-party rhetoric” in civil society organisations (Ellner 1993, p. 7). The idea that structural reform of the state and the electoral system was needed to regain legitimacy took hold and in 1983 President Campíns established the Presidential Commission for the Reform of the State (COPRE) to investigate the reforms needed. The key recommendation of COPRE involved the decentralisation of power; however, no actual reforms would be implemented for the rest of the decade, with the government reluctant to let go of power (López Maya 1997). The necessary push would come through the Caracazo, shortly after which President Pérez finally implemented recommendations including the direct election of state governors and municipal mayors, in a bid to regain public support. These reforms would be crucial in opening up space within the political system, and prove critical to the development of the *Radical Cause* party.

#### 4.1.5. The Radical Cause party

As one ex party leader put it: “In the middle of all this, the misery and the sense of abandonment in the population, you have a revolutionary party, that was the *Radical Cause*” (Palavicini 2012). The *Radical Cause* (LCR; *La Causa Radical* or *La Causa R* as it was more commonly known)<sup>5</sup> was founded in 1971 by the intellectual and ex guerrilla movement leader, Alfredo Maneiro, and a small group of supporters who split from the Venezuelan Communist Party. By the late sixties it was clear that the

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5 The name was originally simply 'la Causa R': 'The R Cause', until in 1973 they were required by the Supreme Electoral Commission to assign the R a meaning. The R was assigned the meaning of 'radical' in the sense of 'enrooted' (Sesto cited in López Maya 1997). López-Maya notes that 'radical' in the sense of enrooted or deep, has quite a different sense from its connotation in English with 'extreme' or 'distant from tradition'. “La Causa R” she notes “never sought to be confused with extremists” (López Maya 1997, p. 146).

armed struggle had failed as a political strategy and leaders such as Maneiro searched for “a new articulation with the popular movement” (López Maya 1997, p. 123).

From its inception, *Radical Cause* (LCR) was a non-conventional political party, closer in some ways to a social movement. There was no formal charter, bureaucracy or statutes, and it was believed that the party should be in a “permanent process of formation” (López-Maya 1997, p. 123). Described by Ellner as “ideologically ill-defined” (1993, p6) and by López-Maya as guided by a “conceptual framework... [which] was fundamentally Marxist, though... far from orthodox” (1997, p. 127), the party during this period did not fit into traditional categories. The focus was on achieving greater power for the popular classes<sup>6</sup> as a means to a more just society (Lopez Maya 1997). However, the party sought to avoid association with traditional left groups, and was motivated in part by the failures they perceived in the Venezuelan Communist Party and the traditional left (ibid.; Urgelles 2012).

Maneiro's vision was to create a “movement of movements” which could connect the diverse popular struggles in society (Urgelles 2012). Central to this would be the construction of a vanguard which would consist of the *Radical Cause* party and the leadership of organically occurring mass movements, so in their early days the party focused on seeking out the right movements, as a prospective source for the vanguard (López Maya 1997). Three key movements were consciously selected and targeted by the party, including a workers' movement at the large steel works in the east of the country, the student movement at the Central University in Caracas, and the popular movement in Catia, a mixed district in inner city Caracas. Their greatest success was

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<sup>6</sup> The 'popular classes' is the preferred term in Latin America to refer to the working or lower classes.

with the workers' movement where they initiated a new form of democratic unionism, which by the late eighties had control of over forty unions and labour movements across the country (López Maya 1997). Their impact within the student and popular movements was not so spectacular, however they established a solid support base which would remain loyal into the nineties.

The party is best understood as a response to the political moment in which it emerged. The strategy of the revolutionary left in previous decades had clearly failed, and as López Maya notes: “Maneiro understood early on that in Venezuela it would be necessary to seek transformation through [...] the political system's institutional mechanisms” (1997 p. 128). However, they sought to advance their project without accepting the existing terms of electoral politics. The notion of 'radical democracy' was a central and constant unifying concept in *Radical Cause* party discourse. Though somewhat ambiguous, the concept was orientated around demands for greater popular participation and, concretely, mechanisms for direct consultation of the electorate, like referenda. Despite their participation – and success – in the formal political system, they are described by one ex-party leader as directed towards the creation of a “parallel power, rather than a vision of contributing to ratifying the existing power”. He clarifies this:

*Radical Cause* itself is an expression of an extra-parliamentary project. Outside of a vision of the legal struggle, subject to the established rules of the Punto Fijo agreement (Uzcategui 2012).

To this end they experimented with a significant array of tactics. In addition to their activities in union politics and the student movement, the party published several

different newspapers, organised petitions, marches, and occupations, as well as less explicitly political activities such as salsa competitions and sports competitions in Caracas barrios, intended to “develop popular class consciousness and leadership” (Albornos 2012). As I will show in subsequent sections, the unofficial referendum on the rule of Carlos Andrés Pérez in 1992 was understood as yet another strategy to build popular class consciousness and contribute to the creation of a 'parallel power'.

#### 4.1.6. The referendum

The idea that Carlos Andrés Pérez must leave the presidency of the Republic in the short term has turned into a political and social clamour. Whether it is through his voluntary resignation, as has been requested of him by voices of national prestige, through a shortening of his presidential mandate as has been discussed in various political circles or through a referendum as the *Radical Cause* have been preaching – up to organising a 'simulation'... day by day his exit becomes more necessary (SIC, Venezuelan political analysis magazine editorial, July 1992).<sup>7</sup>

Amidst the cacophony of calls for a solution to 'the crisis' in the weeks following the February 4<sup>th</sup> coup attempt, *Radical Cause* started calling for a recall referendum on President Pérez. In full page national newspaper adverts the party outlined the case for a “Referendum so that the people decide” and a “Referendum for a different government” (Ultimás Noticias, 29<sup>th</sup> February 1992, p. 11; Ultimás Noticias, 11<sup>th</sup> March 1992, p.23). Then, as debates in Congress and in the media over 'the crisis', reform of the state, and President Pérez' tenure continued, and the government

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<sup>7</sup> The editors of SIC magazine continue: “...principally because he gives no signs of changing his national political focus and orientating his presidential action towards a democratic way out of the crisis of legitimacy that affects the heart of the system of reconciliation of elites and political parties” (SIC 1992).

resisted mounting pressure to respond, the *Radical Cause* announced that there *would be* a referendum on Pérez. June 11<sup>th</sup> was declared “the national day for a referendum”, in an announcement taken out in the national press. “Communities, guilds, neighbourhood associations” were invited “to join the day, and organise the referendum in their sector” and detailed instructions for how to participate were provided (Radical Cause, *Ultimás Noticias*, 1<sup>st</sup> June 1992, p. 9).<sup>8</sup> On June 10<sup>th</sup> a 'public telegram' was published in the press, addressed to the President and the General Secretary of COPEI (the main opposition party), inviting them to send their own witnesses to the different polling stations and to the final count.<sup>9</sup>

Early in the morning of June 11<sup>th</sup>, voting points were set up across Caracas and other major cities, covering the main avenues, plazas, metro stations and the stopping points for buses from the poorer barrios on the outskirts of the city (Melo 2012). The locations of voting points in each region were published in the press on the day, so that citizens could find out where to vote (Radical Cause, *Ultimás Noticias*, June 11<sup>th</sup> 1992, p. 23). Whilst most activity and public participation took place in Caracas, where up to eighty voting points were set up, organisers recall that the referendum was carried out in the fifteen other principal states, including Bolívar, Sucre, Anzuatagui, Miranda, Zulia, Tachira, Merida and Falcon, through utilisation of the party's national infrastructure (Melo 2012).

A plenary room was set up in central Caracas, where the votes from each district were counted manually by organisers and volunteers. Open to the public, the activities

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<sup>8</sup> See Appendix E for full details of instructions given to those who wished to participate.

<sup>9</sup> The telegram was in fact addressed to 'Mr Carlos Andrés Pérez and Mr Eduardo Fernández [General Secretary of COPEI], Miraflores Palace', omitting the title of 'president' (Melo 2012). (see appendix A).

attracted crowds of “students, housewives... anyone who was interested”, with up to three thousand people purportedly passing by over the course of the day (Uzcategui 2012). At six in the evening, in front of the crowd and television news cameras, the General Secretary of the *Radical Cause* and coordinator of the referendum, Pablo Medina, read out the first results (Melo 2012; Rodriguez 2012). The results from across the country would be coming in over the next day and a half, but in the meantime the outcome in Caracas was clear. Of the 163, 428 votes counted, there were 149, 771 votes for 'No'; Carlos Andrés Pérez should not continue governing, and 11, 253 votes that 'Yes'; he should continue, (with 1,202 null votes counted) (Ultimás Noticias, June 12<sup>th</sup> 1992, p. 57). As one headline read the following day: “92.32% of Caraqueños [people from Caracas] said No to President Pérez” (Ibid.).

So who engaged with this event? Who voted and who responded to the *Radical Cause* party's call out to help organise a referendum? In other words, to what extent and in what ways did the event genuinely engage groups and communities beyond the party's activist base? Interviews with organisers and other participants reflect varying experiences. Instead of attempting to generalise, I draw on these accounts to provide snapshots of the referendum and how it played out in particular areas, for particular groups.

### **23 de Enero: inner-city working class Caracas barrio**

Despite the public call out to neighbourhood organisations and other groups to establish polling stations, some accounts suggest that most of the real logistical and organisational work was driven by the party. As one organiser, Gregorio Pérez, explains: “you need the discipline of a party to pull off something like this” (2012).



However, groups and individuals outside the party played an important role supporting the event; distributing leaflets, promoting the event and encouraging people to vote (ibid.).

Juan Contreras, activist and community organiser from el 23 de Enero (el 23) in Caracas, is one individual who participated in this way.<sup>10</sup> Contreras was not a member of the *Radical Cause* party but helped with the referendum in the barrio. His account provides insight into how people outside of the party engaged with the event, in some cases:

We were part of those people that they called on, that also supported the *Radical Cause*, that day we went not only to vote but to invite people and seek out people, and do the call out...We participated, collaborated, calling out to the people with megaphones that they come out to vote, and with big signs that we set up. And delivering leaflets, publicising the event. It was part of a whole campaign that culminated that day with the referendum (Interview, 2012).

Participation in el 23 was high, he recalls: "I would dare to say about seventy percent of people [participated]", which he attributes to widespread public anger at the government and the particular political culture and history of el 23:

El 23 has always been different from the other communities that there were here in Caracas, the other barrios. I don't know if it has to do with the form of the buildings, the mood of the people, but here things are different. Well, here, the people participate. Obviously not everyone. But there is a sector, a significant number of people that take a stand on all these things... and that express themselves in all these demonstrations. Here there was fighting on February 4<sup>th</sup> of 92, in the coup. The base for the coup was here... And that day also [referendum day], it worked like this – it was in the metro, it was... I don't remember if it was in the Miradora, but in various areas here in el 23, where people were voting, people went to express themselves (Contreras 2012).

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10 Juan Contreras is also founder and head of the influential community organisation Coordinadora Simón Bolívar, based in 23 de Enero, in Caracas.

He describes how in el 23 the referendum offered a way for people to express their anger at the government, and at a culture of political repression and violence:

Many people [participated]. Because, El 23 de Enero was one of the sectors most hit by the issue of . . . repression. By the deaths, by the political persecution, by the imprisonment of people. For example, in my case, every time something happened, well the police would come after me, and the same for many here in El 23, that have been persecuted, that have been imprisoned. - In the best of cases, because other comrades have ended up murdered, by the security services. So El 23 was like a bastion, a political boiling pot, of debates, confrontations, street fighting. So, well, it expressed itself in this moment [the referendum] also (Contreras 2012).<sup>11</sup>

### **Catia: a large, mixed district in Caracas**

Some organisers, however, recount a deeper level of civil society involvement in the organisation of this event. José Albornos was a member of the National Leadership in 1992 and based in Catia district in Caracas. He recalls how volunteers got together to organise voting points and promote the event, principally through the initiative of the Catia-based community organisation *Procatia*. “There was a sense of participation that was generated spontaneously”, he reflects:

...The majority of people that organised the event did it with their own resources, because we didn't have any money. How did they do it? So the people in Procatia [a community organisation in Catia barrio with historic links to the *Radical Cause*], the director and the

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11 It is noteworthy that in 2008, the Coordinadora Simón Bolívar (a community organisation in el 23, headed by Juan Contreras), ran a similar informal referendum, inspired by the Radical Cause referendum of 1992, this time on the presence of US military bases in Colombia. They ran voting points in el 23 de Enero, and online voting. Participation reached the tens of thousands, according to Contreras, with online votes received from around the world (Contreras 2012).

people themselves, they set up their box, got the ballot slips, they named those that were going to be the witnesses... *it was a total movement* (Albornos 2012).

Albornos notes that it was the *Radical Cause's* rootedness in the community and their close connections with a diverse range of community organisations and social movements that made large scale mobilisations such as this one possible (ibid.).

### **San Antonio: a small satellite city on the outskirts of Caracas**

A similar picture of grassroots engagement emerges in San Antonio, a small city on the outskirts of Caracas. Luis Trincado was also a member of the National Leadership at this time and head of the *Radical Cause* party in San Antonio. He describes how organising the referendum worked as a tool to engage new groups:

In San Antonio Los Altos, where I lived, we organised through a Committee for Organisation of the Referendum, there more than seventy people participated... the Radical Cause of San Antonio was ten people. But others started to approach us, they heard our call out, and they started to come, as a result of the execution of the referendum (Personal communication, 2012).

Through a media outreach campaign, where they bought short radio adverts, appeared on radio programmes, and placed adverts in the local press, Trincado describes how they successfully reached out to previously inactive sectors:

We gave out our telephone numbers... and the people called us and said that they wanted to participate, how could they help – one woman started to make sandwiches during the day, someone else bought water...they arrived, 'I want to participate, how can I do that?', 'Right,

well I'll print out the tickets', 'there's a computer at my house...', from there started an organisation. I'd say that the referendum was not the only factor but it helped us a lot, to mobilise people that were discontent with Carlos Andrés Pérez but that didn't know how to mobilise, how to express it (Trincado 2012).

### **Puerto Ordaz, Guayana: industrial city in Eastern Venezuela**

Puerto Ordaz is a city in the industrial heartland of East Venezuela. The Venezuelan *Magazine of Industrial and Labour Relations* has a regular section which documents events in the labour movement, called 'documented labour chronicles', in which the organisation of the referendum in Puerto Ordaz is recounted. A 'Broad Pro-Referendum Committee', comprised of representatives from neighbourhood organisations, universities, further education colleges, and other public figures, was formed, with the task of organising the referendum in Puerto Ordaz (Urquijo and Bonilla 1992). The Committee is described as having "two principal responsibilities": "to achieve success in the national day of protest denominated 'referendum'", and to ensure the participation of all sectors, because: "in this activity every citizen that is hurt by this country can and should participate" (Freddy Serano, Radical Cause National Leadership, cited in Urquijo and Bonilla 1992).

## 4.2. Impact and legacy

Assessing the impact and the legacy of the *Radical Cause* referendum on Pérez is complex. This is not only because it is difficult to attribute cause and effect in such a chaotic political and social context. I received wildly different accounts of the event, in terms of its impact and significance, from different informants. What one participant describes as “one of the four key events of the period, along with the Caracazo and the two attempted coups” (Contreras 2012) has gone unrecorded in historical accounts of the period and is largely forgotten by those who were not directly involved with organising or supporting the action. In this sub-section I expand on these differences, and consider what it might tell us about the use of a-legal space to constitute new political realities.

### 4.2.1. The referendum in public memory

Firstly, to the extent that one can speak of a singular national consciousness, in no sense is this event a part of Venezuelan consciousness. The *Radical Cause* referendum is not referred to in popular discourse, there is almost nothing written about it in scholarly accounts of the period, and most people who were not involved with the *Radical Cause* party at this time have no memory or knowledge of the event.<sup>12</sup> So what does the referendum's almost total absence from public memory tell us? To what extent should this be taken as evidence of the event's marginal impact and marginal perceived significance at the time? And by extension, what do these findings suggest

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12 Indeed, a principal challenge I faced in researching this event was locating individuals who had voted, or had other experience and knowledge of the event but had not been involved with organising it. Most people I encountered, including in some instances those who had been involved in political activism in Caracas in the early nineties, did not remember the event.

about the potential and the limitations of the a-legal space strategy? For several reasons I would argue that the limited public recall and absence of the event from popular history is unsurprising. Firstly, between February 1992 and May 1993, there were two coup attempts, almost daily protests, strikes and occupations across Venezuela and the president was impeached, suspended from office and placed under house arrest. It seems plausible that, as Reyes (Interview, 2012) suggests: this referendum “was something that was passed over by the very dynamic history of the period”. Secondly, in 1997 the internal divisions which had characterised the *Radical Cause* party since its inception finally led to a formal split. The party divided with a majority, including Pablo Medina and others from the Caracas faction who had spearheaded the referendum, leaving to form *Patria Para Todos* (Homeland for All, PPT). *PPT* would go on to support Chávez's candidacy in the 1998 presidential elections, and form part of the government in 1999. The smaller group which remained as the *Radical Cause* included Andrés Valesquez (the governor of Bolivar State and *Radical Cause* presidential candidate in 1993) and others from Bolivar state, for whom the referendum and arguably the kind of politics this exemplified had been less a priority than the candidacy of Andrés Valesquez.<sup>13</sup> With the main group of individuals involved now engaged in a new project, under a new banner, there was no organisation with the institutional memory or motivation to preserve the event. Information which might have been preserved such as publicity materials and voter records was lost.<sup>14</sup> Furthermore, the decline of the *Radical Cause* meant there was no widespread effort to rescue and mythologise the actions and history of the party. The story of the phenomenal rise of the *Radical Cause* and the large scale mobilisations

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13 Gregorio Pérez from the Caracas faction reports that some in Bolivar considered the referendum a 'distraction' from the central project of promoting Andrés Valesquez (2012).

14 Several organisers make this point.

they led at this critical juncture in Venezuelan history did not fit with the emerging popular left wing narrative of history.

According to the thesis elaborated in previous chapters, the successful use of a-legal space promises to shift the political grammar. Through appearing at once as an expression of constituent power and constituted power, these initiatives harness the constitutive effects of each, and in this way create tipping events which rupture the political grammar, opening up space for new political possibilities. It would seem, however, that these effects were not realised in the case of the *Radical Cause* referendum. Whilst the limited public record and memory of this event can be accounted for by various contextual factors, this would also suggest that the organisers did not successfully reset the political grammar and shift the horizons of the possible. For surely if the referendum had constituted a tipping event, the event would generate greater public resonance now? Media scholar, Professor Reyes, is helpful here. Whilst the referendum can be said to have 'set the agenda', he argues, it failed to 'construct' it:

It constructed an agenda in the media. For this you can find it in the media. Or rather, the process of *agenda setting* was carried out. But the process of *'Agenda Building'*, no. So you have a certain recollection in the political class... but you are not going to have neither recollection nor recognition in the electorate (2012).

Reyes' distinction can be well conceived in terms of political grammar change, where 'setting the agenda' equates to some transient impact on mainstream discourse, whilst 'constructing the agenda' equates to a deeper discursive impact, closer to the level of political grammar. For Reyes, the referendum failed to 'construct the agenda',

(or shift the political grammar) for various reasons:

Because it was an idea that was unprecedented, something new. No one talked about this before. It was something unviable at that moment. Because the revolution of 61 was clear. And it was something that did not correspond with the real concerns of Venezuelans at that moment. The coup of November, the second coup of November 27th, completely put a lid on any type of consequence that it could have had, this attempt at a referendum of 92' (2012).

#### **4.2.2. The referendum in organiser and participant accounts**

However, limited public recall and knowledge of this event belie the vivid and significant experiences and impressions of those who organised and participated in it. Without exception, organisers who were interviewed describe the referendum as a significant success, with mass participation and important impacts. The referendum, it is suggested, was an important and effective tool for consciousness raising and mobilisation (Pérez 2012; Albornos 2012; Trincado 2012; Palavicini 2012; Uzcategui 2012). Organisers argue that it contributed to the impeachment of Pérez and the subsequent rise of the *Radical Cause* party: there is indeed evidence to support both claims.

In March 1993 the Attorney General charged Carlos Andrés Pérez with the mismanagement of state funds. On May 20<sup>th</sup> the Supreme Court ruled that there was sufficient evidence to proceed to trial, and the Senate stripped him of immunity and suspended him from office (Lalander 2010). *Radical Cause* were implicated at various stages in this turn of events. In addition to maintaining constant political pressure for



the departure of Pérez throughout this period, it was *Radical Cause* deputies Pablo Medina and Aristóbulo Istúriz who in December 1992 had obtained evidence of corruption which they submitted to the Supreme Court. The evidence was accepted by the court, which led to the subsequent charges made against Pérez (Medina 2012). Medina claims that the referendum of June 1992 served to “support this constitutional action”:

In the sense that the immense majority of the referendum rejected Carlos Andrés Pérez. Later this was a political argument: that the people in that referendum had rejected him - that Carlos Andrés Pérez was not working for us (2012).

Indeed, there is scholarly support for the claim that the impeachment of Pérez was at least in part a political decision. Lalander (2010, p1) highlights the weakness of the legal case against Pérez<sup>15</sup> and argues that “Corruption charges... functioned... as an emergency exit from the acute regime crisis” and were “a civilian coup against the president” (ibid., p. 140). Similarly Pérez Perdomo (1993) cites Pérez's unpopularity, as well as pressure on the Venezuelan institutional system to be seen to be addressing corruption, as explanations for the Supreme Court's decision.

Thus the impeachment of Pérez was the product of political pressures, and according to Medina, the referendum was an important contribution to these political pressures. An additional, surprising, source of support for this claim can arguably be found in the account of Pérez' finance minister: Dr. Pedro Rosas. Rosas considers the impacts of the referendum to have been “very marginal”, the event

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15 He notes: “In the 250-page decision of the court hardly any references were made to why and how the use of 250 million bolivars from the secret presidential security funds constituted a crime, and the right to defence was violated” (Lalander 2010, p. 139).

was “not given much importance”. He doesn't recall any actions taken to stop it: the government “just tried to ignore it”. However, it is noteworthy that he remembers the event twenty years later, and moreover recalls being informed of the event at the Home Secretary's weekly cabinet briefing (Rosas 2012). Importantly, when asked if he saw a connection between the referendum and the impeachment of Pérez, for example if the *Radical Cause* had used the event as 'political capital', Rosas is unambiguous:

Without a doubt. The conspiracy against CAP took arguments from the referendum. It was a small indication that 'CAP and his neoliberal government had to go' (ibid.).

The other significant outcome organisers attribute in part to this referendum is the party's subsequent electoral success. In the December 1992 elections the *Radical Cause* won a number of new local government posts, including the Mayoralty of the central Caracas municipality Libertador. In the following year's presidential and parliamentary elections, the party made dramatic gains in Congress: from just three representatives in the Chamber of deputies, they won 40 of a total 198 seats, and 9 of 50 seats in the Senate (López Maya 1997). Andrés Valesquez, for the *Radical Cause*, officially finished fourth in the presidential race, with 21.97% of the vote.<sup>16</sup> However, every organiser interviewed claimed they had in fact won, but were the victim of electoral fraud. A claim which has some support in scholarly research of the period (Buxton 2001; Lalander 2004).<sup>17</sup>

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16 A less than a two percent difference with Democratic Actions's 23.23% and COPEI's 22.11% (Consejo Supremo Electoral, Dirección de Estadísticas cited in López-Maya, 1997)

17 Lalander notes the alleged collaboration between the two hegemonic political parties, Acción Democrática and COPEI, in order to avert the *Radical Cause* victory, which was seen as a “dangerous threat... given its electoral promise to radically transform political structures” (2010, p. 141).

Luis Trincado, from the *Radical Cause* National Leadership in 1992, describes the referendum as facilitating a “tremendous organisational leap forward”, which enabled them to capture previously undirected public anger and discontent, and thereby build support for the party which translated into electoral success. “After the count of votes in San Antonio, we had a team of seventy people attending weekly meetings, coming everyday... like this the *Radical Cause* grew” (Trincado 2012). But importantly, the outcome in San Antonio, a small satellite city on the outskirts of Caracas, where the *Radical Cause* gained their first two councillors in December 1992, was not unique:

What happened in San Antonio happened in all the districts of Caracas...organising the referendum, participating, forming teams, and from there a political enthusiasm to achieve the political objective of getting Democratic Action and COPEI out of power in Caracas (Ibid.).

Finally, various organisers note the event's significance as precursor to the participatory democratic initiatives which would be institutionalised by the Chávez government after 1998 (Trincado 2012; Almeida Pérez 2012; Palavicini 2012). This is supported by scholar Professor Reyes, who notes that “for many scholars, this referendum attempt of the *Radical Cause* served as a basis for what in '97 would be the Law of Political Participation” (2012).

### **4.2.3. Making sense of the referendum: impact, legacy and political grammar change**

A review of the scholarly literature, the accounts of ordinary Venezuelans not involved with the referendum and interviews with organisers and some participants give wildly different pictures of this event and its impact and legacy. Whilst the event has been largely forgotten by those not involved, organisers describe a meaningful and significant experience which is interesting to consider from the perspective of political grammar change. What is required is a more sophisticated and multi-layered model of political grammar. Just as the concept of discourse can be applied to different levels and sectors of society, from the national or international level to small social groups, grammatical structures will vary at the macro and micro level, and between particular sub-cultures. If this is the case, the accounts of organisers and some participants suggest the referendum may have functioned as a tipping event which shifted the grammatical structures delimiting the possible within certain communities and sub-cultures. This idea is explored in more depth in the subsequent sections in which I discuss organiser objectives and what might the implications of this case might be for a general theory of a-legal space as a political strategy.

### 4.3. What did organisers hope to achieve? Analysing organiser aims and objectives

In this section I draw on interviews with organisers of the referendum, in addition to other participants and commentators, in order to explore what the event was intended to achieve, its perceived effects, and how it relates to and what it might tell us about organisers' broader theory of change. Fourteen in-depth interviews were conducted with a variety of sources: see Table 1, below, for details. I interviewed nine *Radical Cause* party members and ex-members (or 'militants' as they are known) who had been involved with organising the referendum. The majority (seven) had been members of the *Radical Cause* National Leadership - a group of approximately twenty party leaders who ran the party - and played key roles in organising this event. Of the other two, one was a middle-ranking party deputy and the other an ordinary rank-and-file party activist. All had been based in the Venezuelan capital of Caracas at the time of the referendum.<sup>1 2</sup> In addition to the nine organisers, I interviewed one of the founders of the *Radical Cause* party, Thailman Urgelles. Urgelles had left the party in the early eighties, shortly after the death of founder and party leader, Alfredo Maneiro. Urgelles was not involved with the referendum initiative, and hence helped provide a counterbalance to the accounts of organisers. Also helpful for triangulating the accounts of organisers were interviews with two individuals not associated with the *Radical Cause* party but who had participated in the event. Juan Contreras is an activist and community leader based in the Caracas barrio 23 de Enero; he is the

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1 Except for one interview subject who was based in San Antonio: a satellite city on the outskirts of Caracas.

2 This was partly a result of logistical limitations which prevented travelling to different regions of the country to carry out field work. However, it can be justified by the fact that *Radical Cause* activity at this time was most concentrated in two regions: Caracas and Bolivar state, in the east of the country. According to organiser accounts, it was in Caracas where most activity around this referendum took place.

founder and director of the influential political organisation Coordinadora Simón Bolívar. He participated in the referendum and helped to promote it in 23 de Enero. Delia Castillo is a journalist, who was employed by the government's press office during the period of the referendum.<sup>3</sup> She also participated in the event, through voting, and helped to set up one of the voting points.

A final two interview subjects allowed for a very different perspective on the event. Dr. Pedro Rosas was the Minister of Finance in Perez' government, in 1992. His comments provide some insight into how the event was perceived by the government and, interestingly, provide unexpected support for some of the claims of organisers. Prof. Reyes is an academic and scholar of media and communication theory. He has researched the *Radical Cause* referendum on Pérez in the context of research into 'agenda building' and legitimacy. Table 1, below, provides the full details of interview participants, including their name, their role in the referendum, current occupation and current political affiliation. As the table shows, informants included supporters of the current administration and supporters of the opposition. This is relevant as current political affiliation emerged as a key variable which correlated with how the referendum was constructed by informants, as I discuss below. Other relevant contextual information includes informants' current occupation and in particular whether they are still involved in professional political and whether they are in the *Radical Cause* party. The positions and statements of informants should be considered with these contextual factors kept in mind.

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<sup>3</sup> She could not recall whether she was working for the Government on the date of the referendum or had left shortly prior to this, but claimed that in any case her government job would not have prevented her participation.

**Table 1: Interview subjects, Radical Cause referendum on Carlos Andrés Pérez**

Interview Subject	Role in referendum	Current occupation & political affiliation	Interview Date
Pablo Medina	Coordinator of the referendum, General Secretary of the <i>Radical Cause</i> in 1992	Identifies with the opposition, no political party (at time of interview).	August 2012
Luis Trincado	National leadership in 1992, key organiser	<i>Radical Cause</i> party national leadership, National Secretary of the Organisation. Part of the opposition.	July 2012
Rafael Uzcategui	National leadership in 1992, key organiser	General Secretary of <i>Patria Para Todos</i> , critical of government from leftist perspective.	August 2012
Carlos Melo	National leadership in 1992, key organiser	General Secretary of <i>COPEI</i> (at time of interview), part of opposition.	July 2012
David Palavicini	National leadership in 1992, key organiser	Teacher in sixth form college. Identifies with the government.	July 2012
Jose Albornos	National leadership in 1992, key organiser	General Secretary of <i>Movimiento Progresista de Venezuela</i> (MPV) (breakaway party from PPT), part of the opposition.	August 2012
Jose Lira	National leadership in 1992, key organiser	<i>Radical Cause</i> party national leadership. Part of the opposition.	July 2012
Gregorio Almeida Pérez	Middle-ranking <i>Radical Cause</i> deputy in 1992, 'suplente' (stand-in) for Pablo Medina in Congress. Organiser of referendum.	Retired philosophy professor. Identifies with the government.	July 2012; August 2012
Roberto Rodriguez	Rank and file <i>Radical Cause</i> militant in 1992. Helped organise referendum.	Librarian. Identifies with the government.	August 2012
Thailman Urgelles	One of the founders of	Film director. Identifies	August 2012

	the <i>Radical Cause</i> party, left the party in 1980s. Not involved in the referendum.	with opposition.	
Juan Contreras	Participated in the referendum.	Founder and head of influential community organisation <i>Coordinadora Simón Bolívar</i> . Identifies with the government.	July 2012
Delia Castillo	Participated in the referendum.	Journalist. Identifies with the opposition.	August 2012
Dr. Pedro Rosas	Venezuelan Minister of Finance, 1992 - 1993	Retired. Identifies with the opposition.	July 2012 (via email)
Prof. Reyes	Too young to have participated in the referendum. Reyes has studied the event in the context of research into legitimacy and 'agenda building'.	Academic. Identifies with opposition.	August 2012

All interview participants were asked what the principal objective(s) of the referendum was; what they had hoped to achieve (or what they thought it was intended to achieve, for non-organisers); and what its impacts were. One surprising finding was the commonalities between accounts. Regardless of their current political allegiances and position, organisers and participants in the referendum each articulated one or all of several key interconnected themes, which I discuss in turn.

#### 4.3.1. A “measurement” ... and a “demonstration”

One recurring way in which organisers described the referendum was as a way to *measure* and to *demonstrate* the level of dissent. As one organiser comments; “it was an *exploration*, right? To see how far the proposal of the *Radical Cause* had gone” (Almeida Pérez 2012). Similarly, Pablo Medina comments “it was a way to measure



public opinion, a way to know what the people were thinking, what was the mood of the people” (2012). And participant, Juan Contreras, echoes; “it was also a way to measure the sympathy and to measure what was felt... to measure the level of acceptance of a correct politics, that said that we had to remove Pérez” (2012). However, in a jump which is common in accounts of the a-legal space tactic, claims that the referendum was hoped to ‘measure’ dissent are made interchangeably with claims that it would serve to ‘demonstrate’ it. As another organiser explained: “the objective was to demonstrate the size of the crisis, to demonstrate the rupture, and it was very effective” (Uzcategui 2012). Much like peoples’ tribunals act out the stages of a trial, with no doubt over the eventual outcome, the *Radical Cause* went through the motions of measuring support for Pérez, whilst simultaneously presenting the event as “for a different government” (*Radical Cause*, *Ultimás Noticias*, June 1<sup>st</sup> 1992, p. 9).

Arguably, however, their claims to want to ‘measure’ the crisis should not be taken as disingenuous. The comments of Pablo Medina, coordinator of the event, are interesting. He explains:

We knew that the referendum would be a success... the 11<sup>th</sup> of June was to finally formalise as an approval a rejection of his methods and of him as president (2012).

It seems that whilst the party were confident of the result it would produce, actually enacting the referendum was expected to change something.

#### 4.3.2. “So that the people could express themselves”

Unprompted and by way of an introduction at the start of his interview, Pablo Medina explained:

There was a desire, in the Venezuelan population, to express their opinion and to search for a way out of the government of Carlos Andrés Pérez (2012).

This construction, and the importance it is given, exemplifies another recurring theme in the accounts of organisers and participants alike: the referendum as “a tool to enable the people to express themselves” was presented as an objective of the event and one of the reasons for its success. As another key organiser comments:

I think that there was a sentiment below, in the popular sectors of the population, that they did not have a way to express themselves... When we launched the proposal [for the referendum] it had acceptance. And why did it have a lot of acceptance? Because the people understood that it was one of the possible routes to express themselves, their point of view, their opinion, with respect to what was happening (Albornos 2012).

In the absence of institutionalised mechanisms for the expression of discontent, it is suggested that this event offered an alternative. As Juan Contreras from 23 de Enero barrio in Caracas recalls; “It wasn't binding but we did it anyway because it was the way in which ... the people could express themselves” (2012). Equally, however, it is presented as an alternative to other forms of extra-institutional politics:

The referendum signified the possibility that the people express themselves. That they overcome their fear. The people that at times don't leave their house, don't go to a protest, that didn't go to a march for fear that they would imprison you, for fear that they are going to kill you in a protest. That day the people expressed themselves (Contreras 2012).

Juan Contreras is speaking from the Caracas barrio of 23 de Enero which suffered particularly brutal repression during the Caracazo.<sup>4</sup> Several of the organisers and participants interviewed (as well as scholars of the period (e.g. Gott 2005)) refer to a climate of fear characterising much of the city in the years following the massacre. However, the period in which the referendum took place is described as marking a change. As Medina reflects:

Venezuela started to live a different climate, another environment, different to the years before [...] Because that date was the awakening – the people started to lose their fear (2012).

Indeed, Lopez Maya (1999) demonstrates the sharp increase in protests in 1992, in contrast with earlier years. Mass participation in this referendum can be seen as an expression of this change, and arguably will have functioned to encourage subsequent protests. Moreover, as Contreras' account suggests, the event enabled a form of political engagement accessible to those who feared for their safety at more confrontational protests or marches. Walking to a voting point, filling out a ballot slip,

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<sup>4</sup> In one account, for example, a resident describes the presence of a tank outside their block of flats for a period of six days, with soldiers firing into the building at random. The resident describes hiding with her family in a small corridor, the one part of the flat out of shooting range of the window, for the duration of the six days, as bullets were sporadically shot into the flat, leaving only early in the morning to stock up on supplies before rushing back. This account reflects the experiences of many residents, and is supported by subsequent research which has shown that the majority of victims killed in the Caracazo were shot at close range inside their own homes (Valery 2009). Government repression during the Caracazo was potentially particularly acute in El 23 de Enero, given its history as a base for radical left groups, including guerrilla groups (Contreras 2012).

and posting it in the home-made ballot box, would probably have felt less threatening than attending a march or protest. Perhaps also the novelty of the pseudo legal-institutional form played some role in enabling a different kind of behaviour. In any case and regardless of whether it was a less risky and visceral an experience than other political actions, participation enabled a form of expression for those who voted.

Interviews with organisers suggest that the expected subjective experience for those participating in the referendum and in this way 'expressing themselves', was indeed central to the purpose of the event. Asked about the 'added value' of the informal, non-binding form, organiser José Albornos comments:

the people demonstrated in that referendum that it was possible to act like the state, to have the capacity to act, if they were organised, like the actual state on certain things... because the people started to realise that yes it was possible. [Q: What was possible?] ...A change. That a change was possible. That it was possible to do things without the need to have the guidance of institutions. I think that that ...well it was created and diffused, and well many people worked on that in that spontaneous manner, and I think that that honestly is going to make a difference (Interview, 2012).

As such quotes demonstrate, organisers believed that the experience of participating – whether simply through voting, or in a more engaged capacity – had transformative potential. It is suggested that through organising and participating in this informal referendum citizens would gain a sense of their own agency and capacity to influence change: “without the need to have the guidance of institutions” (ibid.). Such comments are interesting to consider in light of Norval’s (2006) account of

democratic subjectivity formation.<sup>5</sup> Organisers demonstrate their aspirations to foster a new kind of democratic agency in the population. And their sense that popular participation in this referendum could help do this finds support in Norval's account of democratic subjectivity formation through key experiential moments. Whether the referendum could really be said to have had this impact is an issue I return to in section 4.4.4.

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<sup>5</sup> Discussed in-depth in chapter 2.

#### 4.3.3. “To give a peaceful and democratic way out of the crisis”

“It was a tool to give us a way out”, explains ex-*Radical Cause* leader, Rafael Uzcategui, “- a legal, constitutional, participatory democratic way out” (2012). He articulates the most ubiquitous claim made by organisers regarding the purpose of the referendum: that it was intended to 'give a way out', of 'the crisis' and the government of Carlos Andrés Pérez. Every organiser and participant interviewed described the referendum in this way at some point, and for some this was the main way in which they explained its purpose and significance.

But what exactly can they mean? In what sense could this non-binding mock referendum have offered a way out of anything? A way out of what exactly? And in exchange for what alternative state of affairs? I suggest that in order to make sense of this construction it is necessary to situate the referendum in its social and political context, and the complex struggles for and against reform of the state taking place at this time. When viewed in this light, organisers' depiction of the referendum as a 'way out of the crisis' is revealing of a discursive strategy at the heart of this initiative. I elaborate on this before turning to a closer analysis of this discursive strand in organiser accounts of the referendum. Despite the similarities in organiser accounts there are important cleavages in their constructions of the referendum as a 'way out of the crisis', which are interesting to consider.

As highlighted in section 4.1, by 1992, a decade of worsening economic crisis had morphed into a full-blown social and political crisis. Widespread anger at politicians, high voter abstention, combined with increasing social unrest, contributed to growing demands for reform of the political system and the state (Ellner 2013). President

Pérez himself was in a highly vulnerable position. Whilst supported by a certain sector within *Democratic Action*, there was fierce opposition from the traditional base angered by the unexpected economic programme (Trincado 2012; Joquera 2003).<sup>1</sup> It is the perspective of various commentators and scholars that Carlos Andrés Pérez was to some extent the unwitting victim of political circumstance (Ellner 2008; Lalander 2010). As Lalander puts it: “CAP was certainly a scapegoat of the collapse of partyarchy<sup>2</sup> and of the revenge against the political culture of corruption” (2010, p. 143).

It was in this context that the demand for 'A Way Out' ('Una Salida'), defined in opposition to Pérez, gained ground. In discourse theoretical terms, 'A Way Out' emerged as a nodal point and potential empty signifier within various different discourses, uniting different groups and on which a multitude of different demands were pegged. This discursive formation was based on the creation of a political frontier between the notion of a 'way out' of the crisis; all that this might mean and all those working towards this, and President Pérez, who functioned as the enemy responsible for blocking attainment of the Way Out. The *Radical Cause* party was just one of several different groups consciously promoting this discursive formation. Another group, and probably the most influential, were 'the Notables', as they were named by the press. This group of public intellectuals including novelists and prominent members of the clergy had arrived on the political scene when they sent an open letter to President Pérez, Congress and the political parties in August 1990.

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1 Traditionally a centrist to centre-left party, with a basis in the labour movement, there had been surprise and anger at key decisions taken by Pérez since commencing the presidency. In addition to the 'package' of neoliberal reforms, key positions in the cabinet were given to non-AD members connected with Venezuela's elite business school, Instituto de Estudios Superiores de Administracion (Joquera 2003).

2 'Partyarchy' refers to a system of two party rule (Lalander 2010). This was the effective outcome of the Punto Fijo Pact which dominant political leaders signed in 1958.

They called on the government to implement a series of reforms designed to resolve the crisis including proposals for the reform of the state and the existing electoral system, to be replaced by democratic mechanisms for “real participation of the electorate” (Lalander 2010). Amongst the proposed reforms was a recall referendum on President Pérez. Following this initial contribution to the debate, the Notables became fierce critics of Pérez (and were subsequently blamed by Pérez himself for his downfall (El Universal 2010)<sup>3</sup>).

As one referendum organiser put it, the *Radical Cause* party: “...saw all this, and we took advantage” (Almeida Pérez 2012). As Pérez was constructed as the problem and his removal the solution, across a range of different discourses operating at the time, the *Radical Cause* attempted to radicalise the central (still floating) signifier 'a way out (of the crisis)' and to capitalise on the opportunity to attract support outside of their traditional base.<sup>4</sup> This process is best captured through their interactions with the so-called Notables. Despite the groups' divergent background, politics, and arguably, motivations, the *Radical Cause* publicly aligned themselves with the Notables' proposals. On the evening of the referendum day, when *Radical Cause* General Secretary, Pablo Medina, read out the results to a waiting crowd in central Caracas, he commenced by reading out the proposal of the Notables (Rodriguez 2012). In this way the *Radical Cause* party's subversive action was framed as part of a much wider movement, and supporting and supported by these respected establishment figures. From the perspective of hegemonic struggle this was

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3 They were influential in the reformulation of the Supreme Court (another one of their demands for reform of the state). The newly constituted Supreme Court would then go on to approve impeachment of Perez the following year.

4 In Political Discourse Theory, a 'floating signifier' is a signifier whose meaning remains contested, as different discourses attempt to define its meaning in their own terms. If any given discourse successfully achieves hegemony the signifier is de-contested, and expands to enable the inscription of countless demands, hence it is denominated an 'empty' signifier (Howarth 2004).



potentially effective in two ways. On the one hand, new groups may have identified with the *Radical Cause* party through their association with the Notables, helping the party build support in sectors outside of their traditional base in the popular classes, student movement and the labour movement.<sup>5</sup> And on the other hand, the action supported their efforts to capture and define the signifier 'way out of the crisis' on their terms, and universalise *Radical Cause* party discourse.

The *Radical Cause*, during this period, should be understood as attempting to build a hegemonic block, which would have the strength to challenge the Pérez government and more fundamentally the Punto Fijo system – the system of pacted democracy which had prevailed since the 1950s. References to the referendum as offering a 'way out of the crisis' reflect a conscious discursive strategy on their part to capitalise on wider discursive trends and build a movement in opposition to the government, and the existing political system. The removal of Pérez through a referendum was consciously constructed as the route to transformative change and real democracy in the *Radical Cause's* communications and – as the informant responses illustrate – subsequently came to be seen in this way by members and supporters alike. As Gregorio Almeida Pérez puts it; "...[Pérez was] like a piece that had to be moved in order to open the path to democracy, because Carlos Andrés Pérez had turned into a.. shall we say, a kind of stopper" (ibid.).

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5 Indeed, some organiser accounts suggest that they were successful in building connections outside their traditional base. Gregorio Almeida Pérez comments; "what you call the 'organised middle class' were very involved, they helped us a lot." He recalls how middle class professionals associations and movements, principally those who had lost their savings as a result of the banking crisis, became involved with the *Radical Cause* during this period. "We even managed to have a movement of judges!" he recalls, demonstrating the breadth of Radical Cause links with civil society (2012).

The debate around a referendum on Pérez, therefore, encapsulates an unusual situation in which factions within both the right and the left proposed a referendum as a concrete solution to the crisis, using much the same rhetoric, and each suggesting it offered 'a way out'. However, whilst the Notables hoped to create an outlet for popular unrest and thereby 'save democracy', *Radical Cause* hoped the event would be a catalyst for more fundamental change. They hoped the removal of Pérez as a result of public pressure would give force to the popular movement, opening up political space and creating opportunities for change previously impossible under the Punto Fijo regime. Therefore, below common rhetorical references to a 'way out' and a solution to the crisis is a struggle to define exactly what these claims actually mean and the kind of post-Pérez political order for which they would serve as a basis.

#### **4.3.4. Radical Cause constructions of the referendum as a “peaceful and democratic way out”**

Even within *Radical Cause* members' accounts there is evidence of a discursive struggle, where different factions attempt to define the signifier 'Way Out (of the crisis)' in quite different terms. Within the repeated descriptions of the referendum as 'offering a way out', several different discursive constructions can be identified. At opposite ends of the spectrum there are what I will reductively call the 'radical' way out and the 'conservative' way out narratives. Both narratives are constructed around the central claim that the referendum offered a 'peaceful and democratic way out' and an 'alternative' (to violence), but with quite different meanings and implications for how the tactic should be understood.

The central difference between the two narratives is how the referendum, as a tactic, is constructed in relation to illegal and/or violent tactics, most evident in references made to the possibility of a second coup attempt against the government of Carlos Andrés Pérez. Within the conservative narrative the referendum is presented as intended to avoid a second coup. Carlos Melo exemplifies this perspective and wider discursive formation when he claims: “The principal objective was to demonstrate that we could find a way out of Perez through the peaceful route.” “We have had the coup and we have had the referendum...” he adds, constructing the events in opposition to one another (2012). Within this narrative, armed struggle and the use of violent and un-democratic means are rejected on ideological grounds. This is evident mostly through the implicit value attributed to an alternative to such means. Melo, for example, observes: “It could have been a way out... through the route of the referendum, we have could come out democratic” and “[the idea of a referendum was important] ...because it was a peaceful way out. Political. It could be legitimate, democratic – it was a way out of the crisis” (2012).

In contrast, within the radical way out narrative the referendum is presented as an alternative *but additional* tactic, intended to work in parallel and indeed to support more clandestine activity. Gregorio Almeida Pérez captures this most pointedly when he argues:

So that was what we were saying with this referendum [the need to find a way out from CAP]. And above all to support a coup against Carlos Andrés Pérez (2012).

Pablo Medina (General Secretary in '92 and coordinator of the referendum), similarly demonstrates his support for this perspective, stressing that the event was not intended to prevent a second uprising against the government:

It wasn't referring to the coup. It wasn't about that. It was about the figure and the methods which were used by Carlos Andrés Pérez. What's more if that was the purpose for some in the *Radical Cause* well... it was a failure! Because in December was the other coup (2012)

Unsurprisingly there is a correlation between organisers' current political allegiances and which of these narrative strands they articulate. In general, organisers who most clearly articulate the radical way out narrative align themselves with the government.<sup>6</sup> Whilst those who most clearly exemplify the conservative way out narrative are aligned with the opposition and critical of the government. Given President Hugo Chávez'<sup>7</sup> involvement with these early nineties' coup attempts it is unsurprising that opposition politicians are critical and seek to distance themselves, whilst government supporters do the opposite.<sup>8</sup>

There is however a third, more ambiguous, narrative strand: located somewhere between the radical and conservative versions. In this account the referendum is constructed in opposition to 'the violent route', yet without the ideological condemnation of violent or illegal tactics. For some articulating this position, violence

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6 Though not always: Pablo Medina, for example, now aligns himself with the opposition and is very critical of the government. He was however part of the Chávez government for a number of years.

7 Hugo Chávez was the president at the time of interviews: July to August, 2012.

8 Of course, just as organisers' political affiliations and position have in several cases changed since 1992, so may the ways in which they construct this event. Those articulating the conservative way out narrative now – or the radical version – may well have presented the event differently at the time.

is rejected but on pragmatic rather than ideological grounds. Rafael Uzcategui, himself a former guerrilla, comments:

The left had to revise their mistake – to have initiated an armed struggle, and in one way contributed to their own disarray, and to the loss of their relation with the people<sup>9</sup> (2012).

Similarly, Jose Albornos comments:

Venezuela was coming from this history of armed struggle, this resounding failure... the popular movement did not take it up, why? Because it was fear that the guerrilla movement produced in the people rather than anything else (2012).

For others, the violent and/or illegal route is not rejected on ideological nor pragmatic grounds, but the solution of a referendum is presented as offering a *preferable* alternative. One participant comments:

Now, the referendum is like one weapon, and like it says here [pointing to publicity material for the event] 'a peaceful, democratic way out before the crisis', it was a very important tool. For consciousness raising. Or rather, facing a violent way out, well there was a methodology that was the referendum. That the people express themselves. But what happened was that it was not taken into account (Contreras 2012)

Making a similar point, Gregorio Almeida Pérez reminds us that if the same ends could be achieved through the existing system, this would of course be preferable:

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<sup>9</sup> Uzcategui elaborates on this point: "...It was then that Acción Democrática and COPEI received the biggest electoral success. Around 90% of the votes in the country" (2012)

Well no group in the *Radical Cause* wanted a violent way out...because if you lose, well at the very least you have to leave the country, if they don't kill you, or imprison you. Because, well, you are doing something totally illegal... violently against a constitutional regime (2012)

In this narrative, therefore, the referendum is presented as an alternative, 'peaceful, democratic way out', which promised to help avoid a second coup: in line with the conservative narrative. However, unlike the conservative narrative, and much like the radical narrative, the referendum is not distinguished from what the coup leaders were trying to achieve. It is understood as part of the same process, or project, and "one weapon" in a wider struggle, comprised of the full range of tactics: "...open, closed, legal, clandestine", all of which were important in the struggle against Pérez (Contreras 2012).

The divergence in organiser accounts of the referendum as a way out reveal the complexity of the discursive struggle around transformation of the state, as well as how differently the a-legal strategy was understood by different organisers in this instance. I return to a discussion of this construction of the referendum as 'to give a way out' and its implications for a theory of a-legal space in section 4.4.3.

#### **4.4. Implications for a theory of a-legal space**

The aim of this section is to develop the account of a-legal space as a strategy for political change which has so far been developed. In the first three sub-sections I consider ways in which the a-legal initiatives which are the subject of this study diverge from Hans Lindahl's (2013) notion of a-legality. They do so in several important ways. Firstly, they emulate an institutional process which is demanded, and which embodies aspects of another kind of order. To this extent they do more than “fleetingly” “intimate” another way of ordering, as Lindahl puts it (2013, p. 1). Secondly, these initiatives are in general *lawful*, in contrast to Lindahl's legally ambiguous and transgressive scenarios. Thirdly, arguably, the a-legal space strategy is inconsistent with Lindahl's central distinction between weak and strong a-legality. I expand on each of these in turn and, drawing on the *Radical Cause* referendum on Pérez, develop an account which allows us to explain how a-legal initiatives belong to the same category of behaviour as Lindahl's a-legality, whilst also recognising how they are different. In the fourth sub-section (4.4.4) I take the opportunity to explore the connection between a-legal space, democratic subjectivity formation and political grammar change in more depth.

##### **4.4.1. From 'intimating' to legitimating and institutionalising another order, through the use of a-legal space**

I have argued that the a-legal initiatives which are the subject of this study are a variant of the behaviour Lindahl (2013) denominates as a-legal. However, it is also clear that these initiatives also do something quite different to the scenarios Lindahl describes. Recounting the 'vagrant's' unusual behaviour in the restaurant, Lindahl

notes how “*fleetingly*” he disrupted the extant legal order and “*intimated* another way of ordering” (2013 p. 1, emphasis added). Peoples’ tribunals, unofficial referenda and other a-legal initiatives do more than fleetingly intimate another way of ordering. They explicitly enact an institutional process which exemplifies another order. In this sub-section I address this difference and what a-legal initiatives do which exceeds the behaviour described by Lindahl. Drawing on the *Radical Cause* referendum on Pérez I suggest that they attempt to legitimate and institutionalise, rather than merely intimate, an alternative order. The accounts of several different interview participants support this characterisation, and three specific strategies can be identified by which organisers attempt to legitimate and begin to institutionalise the referendum, and by extension another way of ordering.

As has been argued, Carlos Andrés Pérez was constructed as the ‘Other’ in *Radical Cause* party discourse and in other discursive strands dominant in earlier nineties Venezuela. He had become synonymous with the wider political and legal order in which the lower classes were denied political agency, and which was thereby “blocking the full constitution of...[their] self-identity” (Griggs and Howarth 2000, p. 56). The specific function of the referendum, I suggest, was related to legitimating their counter-hegemonic project and de-legitimating the existing order. This is supported by several different sources. Activist and referendum participant, Juan Contreras, reflects:

The people had to legitimate that action of 27<sup>th</sup>, 28<sup>th</sup> of February [the Caracazo], of February 4<sup>th</sup> [first failed coup attempt], together with that generation of young military men, that expressed themselves... It was in that context that this [the referendum] was organised (2012).



Hence, for Contreras at least, the significance of the referendum was to legitimate the Caracazo and the attempted military coups. Hence, significantly, this *a-legal* action is depicted as intended to legitimate the unambiguously *illegal* actions of rioting, looting, and insurrection. Media and communication scholar, Professor Reyes, takes much the same perspective:

...February 4<sup>th</sup> there was the attempt at a coup by President Chávez. The *Radical Cause* was totally aligned with the president [Chávez]. It was the civil arm of the coup. And the attempt at a referendum was an attempt to demonstrate the lack of legitimacy of performance of President Pérez. It was intended to show that the government lacked legitimacy, in order to prepare for what was in November the second attempt at a coup, that was more civil than military. The intention of the *Radical Cause* in June was to demonstrate through the media that the government of President Pérez lacked legitimacy of performance (Interview, 2012).

Interestingly, Pérez' finance minister, Dr. Pedro Rosas shares this interpretation. When asked what he thought the organisers of the referendum wanted to achieve, he is in no doubt:

Without a doubt, demonstrate that the government had no legitimacy, and that it had to be replaced by a temporary government that would promptly call new elections (2012).

There is support, therefore, from diverse sources, for characterising the referendum as part of a broader counter-hegemonic project, and explicitly intended to legitimate the broader project to which it belonged and de-legitimize the extant hegemonic

order. Understanding how exactly it was hoped to play this function requires a closer analysis of the actions and statements of organisers. Here we can find an analysis of three inter-connected strategies intended to establish legitimacy and begin to institutionalise another order.

Firstly, and most obviously, the referendum involved a performance of formality as is characteristic of the a-legal form. Organisers not only declared the event a 'referendum' rather than an opinion poll or a protest, but emulated the format and procedures of an official state-based electoral process. Cardboard ballot boxes were constructed and anonymous ballot papers, which were later counted publicly and in the presence of members of the public who had volunteered as "witnesses" (Melo 2012; Albornos 2012). One organiser recalls that voters had to show their identification card and number, which was recorded along with their name, in order to vote (Melo 2012). And another organiser recalls how they enlisted the support of international advisers, flown in from other countries such as Brazil that had experience of referenda. This wasn't a major feature of the event, he notes, but was intended to "give a better image of legality" (Almeida Pérez 2012). This quasi-legal, quasi-institutional approach, which is a defining feature of a-legal initiatives, can be understood as an attempt to claim legitimacy through adherence to recognised norms and procedures. It is a claim to a Weberian rational-legal authority (Weber 1958).

Secondly, in addition to imitating a formal institutional process, organisers attempted to utilise institutional resources and openings where possible. As one example, efforts were made to engage the formal body in charge of election management during this period, the Supreme Electoral Commission (Consejo Supremo Electoral, CSE), in the

referendum process. The *Radical Cause* party initially submitted a proposal to the CSE to oversee the referendum. When the CSE unsurprisingly refused the *Radical Cause* continued to implicate it in the referendum process. Publicity materials for the event listed the contact details of the CSE, and the *Radical Cause* representative there. As one organiser explains, “we had a representative at the CSE,<sup>10</sup> so we used the CSE to receive the results, we presented them to the CSE” (Uzcategui 2012). In Bolivar State, *Radical Cause* state governor, Andrés Valesquez reportedly called on all members of the cabinet and government support staff to participate in the referendum (Luis Trincado, Interview, 2012). So here, as Luis Trincado observes, “whilst it was not formal... there was structural support.”<sup>11</sup> Efforts were also made to advance the broader campaign for a recall referendum on Pérez through the formal channels: agreements were made between the *Radical Cause* and other parties to back calls for a referendum in Congress (Melo 2012). Therefore, as one organiser put it, they “used the parliamentary route with the extra-parliamentary route, a combination of the new elements with the state based element” (Uzcategui 2012).

In some instances, we can see that there is an ambiguity and cross-over between these two strategies of emulation of official processes on the one hand, and attempts to utilise institutional resources and mechanisms on the other hand. Organiser, José Albornos, elaborates on their attempts to engage the Supreme Electoral Commission:

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10 The Supreme Electoral Commission (CSE) was made up of representatives from the different political parties. At this time there was one *Radical Cause* representative at the CSE: José Lira, who is also one of the interview subjects.

11 This is reminiscent of the first Catalan independence referendum held in the town of Arenys de Munt in 2009, in which the mayor declared his support for the initiative and announced he would be participating. This was despite the Spanish Supreme Court ruling that the initiative was 'unconstitutional' and must not take place within the council buildings (Castillo 2009).

JA: We made the formal solicitations for the referendum [to the CSE], and of course they didn't grant it legality. Well, they wouldn't permit it. But-

C: But you tried to achieve a formality?

JA: Of course – it had formality. The legal administration and formal... was done, to request that the CSE could be the body in charge and direct it.

(Albornos 2012)

So it seems that recognised procedures for administration of an election were adhered to (at least in some ways and to some extent) and formal solicitations made to the CSE, despite an understanding that the institutional support would “of course” not be granted (ibid.). That efforts to engage the CSE were made without any expectation of success is evidence that they played some other function: I suggest they be seen as supporting and indeed part of the performance of formality.

In other instances, they were able to use the institutional powers they held *in combination* with this performance of formality. One organiser describes how *Radical Cause* party deputies Pablo Medina and Aristóbulo Istúriz spoke about the referendum in Congress on the day of the event:

They were saying that there is a referendum going on outside, the people are already deciding, and that the decision *had to be* taken into account inside [of Congress] (Rodriguez, 2012).

Then, upon exiting the Congressional building, the deputies went directly to join the crowds in front of the statue of Bolívar in Bolívar Plaza in central Caracas. The national anthem was sung, before Medina read out the first results that were in, from

the Caracas region (Rodriguez 2012). Recitals of the national anthem and the symbolically important location contributed to a performance of formality and officialdom, which underlies the creation of a-legal space. What is interesting in this instance is how the party used their access to formal legal spaces, such as congressional debates, to promote the event and assert its legitimacy. This can be understood as going a small way towards merging the legal and a-legal spaces, as was so successful in the Colombian students' *seventh* ballot initiative. And indeed there is some evidence of their success. Organiser Roberto Rodriguez recalls media coverage of the event, in the press and on television where “they even debated if it was legal or it wasn't legal” (2012).

Alongside these two strategies was another somewhat different way in which organisers attempted to demonstrate the legitimacy of the referendum, and their wider political project. In newspaper coverage and *Radical Cause* party promotional literature, as well as organiser testimony, is evidence of a conscious effort to construct the referendum as an expression of 'the popular will'. The *Radical Cause* representative at the Supreme Electoral Commission, quoted in newspaper coverage of the event, exemplifies this framing when he asserts:

It is clear that this referendum ceased to be a rehearsal, to become an expression of the popular will, expressed by the people that are calling out for Carlos Andrés Pérez to go (José Lira, quoted in *Ultimas Noticias*, 13<sup>th</sup> June, 1992).

This framing was also adopted in some of the more sympathetic newspaper coverage of the event, such as one article two days after the event which declared: “The Popular Will is that CAP Goes” (Morillo, *Ultimas Noticias*, June 13<sup>th</sup> 1992). And it is

evident in the discourse of all organisers interviewed. As one organiser reflected:

It's not legal [the referendum], but it is legitimate. It is the popular expression... [Legitimacy derives] from what we call the original power of the people (Trincado 2012)

And as another echoed:

The Supreme Electoral Commission did not validate us. Congress didn't validate us. But it had the force of the street. Of the population... Legitimacy came from the people that participated...the volume of participants. The event was given legitimacy because the people, at the end of the day, assumed the referendum as a way out, as a possibility. That gave it legitimacy (Melo 2012).

And as yet another explained:

So the governing party, Democratic Action, decided that that was not valid... because they decided that it did not have legal support. But the population, the social fact, made it legal (Rodriguez 2012).

In this third strategy we can see how the referendum was constructed in organisers' discourse and explicitly in publicity materials as an expression of the 'popular will'. As I have argued, the a-legal space strategy involves a dual claim to authority, based on an appeal to both existing constituted norms and procedures and to constituent power. The latter is exemplified here in organisers' attempts to present the referendum as expressing the 'popular will'.

In chapter three I introduced the notion of ‘two axes of legality’. I argued that one feature of how the use of a-legal space plays out is a two-dimensional struggle to define (il)legality. Organisers attempt to institutionalise what they are doing, which is reflected through progress on the axis of institutionalisation, whilst the government or other opponents seek to prohibit or criminalise what they are doing, which is reflected on the axis of prohibition/criminalisation. Whilst attempting to institutionalise the initiative, organisers must resist government efforts to prohibit and criminalise them. And likewise, the government must undermine their attempts at institutionalisation.

Understood through this framework, we can see that the referendum organisers’ three strategies to legitimate and begin to institutionalise the referendum are primarily directed at progress on the axis of institutionalisation. In fact, there is only limited evidence of activity directed at progressing on the axis of prohibition/criminalisation. On the day before the event was due to take place the Supreme Electoral Commission reportedly held an emergency meeting, which was kept secret from the *Radical Cause* representative at the commission, in which they agreed to prohibit use of the CSE offices for administration of the referendum. Subsequently, the CSE is quoted in the press as describing the referendum as “absolutely offensive”. These can be interpreted as preliminary moves towards an attempt to construct the referendum as unlawful. The account of Pérez’ finance minister in 1992, Pedro Rosas, is illuminating here. He explains that:

When the security organisations detected the network of leaders from the Radical Cause who were involved, the government took action to stop the referendum but it was too late.

What's more CAP was a leader who was open to opposition, and didn't want to silence his critics (Pedro Rosas Bravo 2012).

From Rosas' account at least it would seem that efforts to prevent the referendum may have been considered, but for the main part the strategy of the government was to "try to ignore" the event (ibid.).

The three strategic approaches to legitimate and begin to institutionalize the referendum are what distinguish a-legal initiatives from the broader category of a-legality, in which another legal order is merely "intimated" (Lindahl 2013, p. 1). So we can see perhaps another more fundamental difference between a-legal initiatives and the wider category of a-legality. On the basis of this case it seems that a-legal initiatives are distinguished by their engagement with the axis of institutionalization. Why this might be is one issue I consider in the following sub-section.

To conclude: the *Radical Cause* referendum supports an interpretation of the a-legal space strategy as designed to legitimate and begin to institutionalise another order. To this extent, initiatives of this form go further than the activities described by Lindahl which merely "intimate" another way of ordering (2013, p.1). Three interconnected strategies can be spotted through an analysis of the *Radical Cause* party's actions and public communications. These include an emulation of formal legal symbols, language and procedures; attempts to utilise institutional openings and resources where possible; and an attempt to frame the referendum as an expression of the popular will. These constitute the organisers' strategy to legitimate and institutionalise what they are doing. In terms of the two 'axes of legality', these



activities are directed at the axis of institutionalisation. Therefore, the case suggests that one way in which a-legal initiatives can be distinguished from the broader category of a-legality is through their engagement with the axis of institutionalisation.

#### **4.4.2. The importance of “breaking the rules!” for referendum organisers: a different kind of boundary transgression?**

As was noted in chapter two, another notable difference between a-legal initiatives and Lindahl's (2013) notion of a-legality is the transgressive nature of the behaviours involved. Peoples' tribunals, citizens' debt audits, non-binding referenda and other forms are, on the whole, *lawful*. The legality of these activities is sometimes strongly contested, as the Honduran *fourth ballot box* and the first Catalan independence referendum well illustrate. (Indeed, as suggested in the previous chapter, it might be a mark of more successful a-legal initiatives that they face legal challenges). However, the case for their illegality must be constructed through legal work: the onus is on critics to show that a law has been broken. In Lindahl's examples, such as the autoréduction, land occupations or insurrection, the challenge to and transgression of extant legal boundaries is immediately apparent. Potentially, this is a problem. For Lindahl, the transgression or at least the contestation of extant legal boundaries is central. Indeed, it is the *modus operandi* of a-legality. As he explains:

By questioning how a legal order sets the boundaries that give shape to the distinction between legality and illegality, a-legality challenges how a concrete legal collective draws the limit between legal (dis)order and the unordered (2013, p. 158).

Hence the *limits* of a legal order - which reveal its contingency and the possibility for alternatives - are made visible only indirectly, through this questioning of legal

boundaries. The French autoréduction protesters in the supermarket, for example, questioned existing legal boundaries through their transgressive behaviour which couldn't quite be categorised as legal or illegal. Was it charity work or extortion? Neither seems quite right.<sup>12</sup> Crucially, the protestors behaved in a way that you are not supposed to. But because the behaviour did not easily fit into recognised categories of illegal action, nor legal action, it functioned – according to Lindahl's theory, at least – to challenge and reveal the limits of the extant legal order.

The problem, therefore, is this: given the centrality of legally transgressive behaviour for Lindahl, can the mainly *lawful* initiatives which are here under investigation be expected to have the same disruptive effects? Indeed, should they even be understood as doing the same thing, and belonging to the same category of behaviour? If not, the utility of Lindahl's theory of a-legality for understanding these initiatives, which I have asserted throughout this thesis, is in question. However, one theme that emerges in the accounts of ex-*Radical Cause* leaders is intriguing. In organising the referendum, (some) organisers indeed understood themselves to be acting outside of the law; and transgressing extant legal boundaries. Moreover, the predicted effects of “*breaking the rules!*” in this way were central to what they hoped to achieve (Palavicini 2012).

All referendum organisers and participants were asked if they saw any 'added-value' in the event's informal status. Which is to say, did it have any additional benefits when compared with a scenario in which the government had agreed to initiate a

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<sup>12</sup> See Eolas (2009) for a discussion of whether the action constitutes extortion. As Lindahl notes, interestingly, the jurist author broadly argues that it does but: “is careful, however, to go no further than asserting that the autoréduction is ‘very probably’ extortion” (Lindahl 2013, p. 46).

binding recall referendum on President Carlos Andrés Pérez.<sup>13</sup> The following interchange with ex-*Radical Cause* leader, David Palavicini, is revealing:

DP: ...Well of course. Its fundamental value was that it was illegal... *This was the value*. That it was illegal.

CH: That is was *illegal*?

DP: Of course – to call on the people to *break the rules*!

CH: Ah, this was fundamental?

DP: of course. If not, how can one change the state? To change the state you have to bring the people with you, so that they break the status quo.

(Interview, 2012)

When I objected that the referendum was in fact not *illegal*, Palavicini clarified: “illegal, because it was not in the law” (ibid.). Hence, acting outside of the legally recognised provisions and procedures of the existing democratic system was understood as transgressive, in a similar way to actually breaking the law. When pressed on the significance of this rule breaking behaviour Palavicini suggests that part of the value is in the expected subjective experience for participants:

The referendum was another instrument to - as well as propagate ideas - to capture the attitude of the people towards a change and to dare them to do things that whilst they are not legal, they are legitimate... In this order between legality and legitimacy. And that itself produces endorphins... It stimulates the production of adrenaline. [Which effects] the mind and the creativity, it stimulates the need to be organised.

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<sup>13</sup> Which was not completely outside the bounds of possibility, given his eventual fate at the hands of Congress and his own party.

Palavicini's comments are significant in light of Lindahl's theory of a-legality. The benefits he foresees in participants' daring to transgress the rules and decide for themselves, and "do things that whilst they are not legal, they are legitimate" (ibid.), share comparisons with Lindahl's scenarios in which actors resist classification as illegal through their claim to legitimacy within a different legal order. Moreover, Palavicini's description of the effects of such behaviour takes us beyond Lindahl's account, in which the mechanics of the disruptive experience of a-legality are not spelled out. Lindahl talks only of a 'fleeting' disruption of the extant legal order and the 'intimation' of an alternative. Whilst Palavicini, in explaining the effects on "endorphins", "the mind", "creativity" and "the need to be organised" (ibid.), offers the beginnings of a deeper theorisation of what might be going on.

Other organisers, similarly, identify a value in what they see as the provocative, subversive nature of the event. Luis Trincado observes:

The fact that it did not have legality added an element, which was an impudence, a cheekiness, a daringness. That's to say, the state doesn't want it but we are doing it. It was a challenge. A challenge to the State. To say, you, with your institutions, are not capable of channelling this imminent political crisis (Interview, 2012).

In a similar vein, another organiser comments, "it was one more *taunt*" (Almeida Pérez 2012).

One possibility is to understand the referendum, and other a-legal initiatives, as disrupting the legal order through a different channel. Instead of enacting unfamiliar behaviours which intimate a radically different legal order, they enact an institutional

process which could only belong to a radically different order. So despite their differences in style, both approaches may invoke a radically different legal order for those who are receptive to such a suggestion. This interpretation allows us to explain how a-legal initiatives belong to the same category of behaviour as Lindahl's a-legality, whilst also recognising how they are different.

Moreover, arguably, this idea can contribute to a gap in Lindahl's theory of legal boundaries and how they can be transgressed. As Lindahl explains, legal boundaries “establish what is legally important and relevant, and what is not” (2013, p. 159): they “join and separate places, times, subjects, and act contents within the concrete unity of a legal order” (ibid., p. 4). In other words, they are how a legal order manifests, in a specific set of laws which order social reality. Also, however, it is explained that boundaries are what “give shape to the distinction between legality and illegality” (ibid., p. 158): they “determine what is (il)legal” (ibid.). And when a-legal behaviours challenge boundaries they “challenge(s) the illegality/legality disjunction” (ibid., p. 188). It is these latter descriptions of boundaries, which imply a dichotomous distinction between the categories of the legal and the illegal which, arguably, are problematic. As was argued in chapter 2, 'legal' can be conceived in two ways: *lawful* and *legally recognised and sanctioned in law*. The *Radical Cause* referendum, for example, was lawful but not legally recognised or sanctioned. If, as Lindahl claims, legal boundaries are to be conceived as that which “establish what is legally important and relevant, and what is not” (2013, p. 159), then they determine what is legal in both senses of the term. To put it another way: a legal order does more than tell us what we can't do; it recognises and apportions rights and provisions to particular behaviours, identities and other phenomena. On this basis, legal

boundaries might be better conceived as comprised of two kinds of dichotomous distinction. On the one hand, between behaviours, identities and other phenomena which have a basis in law and hence enjoy certain rights and provisions, and those that are not. And on the other hand, between behaviours, actions and other phenomena which are legally prohibited, and those that are not.

However, Lindahl's examples of a-legality engage primarily with the latter dichotomy. He describes situations in which agents behave in a strange and unfamiliar way, and the question is whether this should be allowed: whether they have broken the law. In fact, in a footnote Lindahl notes how he was criticised for his “one-sided focus on illegality” in earlier accounts of a-legality (2013, p. 187 – 188). He is keen to stress that “(il)legality can be challenged from both sides of the disjunction, and not only by questioning what counts as illegal” (ibid., p. 159). To illustrate the potential for a-legal challenges from the other side of the disjunction, “from the pole of *legality*” (ibid.) as he puts it, he cites a case of politicised dog-walking:

...in the face of a decree by the Serbian government prohibiting persons from gathering together in public places, people took massively to the streets to ‘walk their dogs’ in the period leading up to the downfall of Milosevic’s regime (ibid.).

I’d argue, however, that this too continues to engage the latter dichotomy: whether an action is legally permissible or whether it is not. The dog walkers may be closer to the ‘pole of legality’ than the French autoréduction protesters or a political group plotting armed insurrection. But the question they pose concerns whether their behaviour has broken the law. The scenario is provocative and earns its ‘a-legal’ designation because

although citizens are walking their dogs it is clear that something else is going on too which is rather close to the legally prohibited act of gathering in public.

Activity which challenges the other kind of legal dichotomy would not question whether a behaviour is permissible or not, but whether a behaviour should be legally recognised and accorded certain legal provisions and/or otherwise institutionalised. For example, if a polyamorous trio attempted to gain legal recognition through requesting a marriage license. Or, to take a recent real world example: various Caribbean nations have initiated a legal case against the British government, requesting reparations for damages caused by slavery (Pryce 2015). These scenarios question the position of legal boundaries within the extant order, but in a different way. The polyamorous trio contest the categorisation of marriage within the extant legal order as between two people. The Caribbean nations contest the absence of legal recognition and provisions for the victims of historic crimes (amongst other issues) within the extant order. Like Lindahl's examples of a-legality, these scenarios are intriguing, provocative and thought provoking. But crucially there is no suggestion of law breaking, because they challenge extant legal boundaries in a different way.

The *Radical Cause* referendum on Pérez, I suggest, belongs in this other category of a-legal behaviour. Through enacting a revocatory referendum on the president when no such mechanism existed within the Venezuelan democratic system they contested the absence of this mechanism and the structure of the existing system more generally. Turning to a-legal initiatives in general: the nature of the a-legality they enact is complex. In many instances – particularly, for example, with peoples' tribunals – explicit claims are made concerning the injustice and illegality of behaviours which

are normalised and institutionalised. Such claims contest legal boundaries in the way that Lindahl's examples do: they demand a shift in the line delineating the illegal and the legally permissible. Always, however, these initiatives engage in a-legality of this other kind, not considered by Lindahl. Through prefiguring an institutional process which *could only* belong to a different legal order, they challenge the institutions of the extant order and the values and conceptual frameworks on which these institutions are based. Considering a-legal initiatives in this way allows us to address a gap in Lindahl's account, and to appreciate the complexity of a-legal challenges to the legal order.



#### 4.4.3 A “democratic, constitutional and legal way out of the crisis”? Possibilities for radical change within the extant order

There is another possible objection to the a-legal space strategy, as it has been outlined so far. Arguably, attempts to use a-legal space to bring about fundamental structural change within the legal or political order are inconsistent with how Hans Lindahl (2013) has understood the potential and the limitations of a-legal activity. More specifically, this strategy is inconsistent with Lindahl’s central distinction between ‘weak’ and ‘strong’ a-legality, and their respective potential to transform the extant legal order. In this sub-section I explain why, and offer a solution to this problem.

As discussed in chapter 2, Lindahl distinguishes between a-legality in its ‘weak’ and ‘strong’ dimensions. This is not a value judgement, but relates to the nature and the extent of the challenge which is posed by an a-legal scenario or behaviour to the extant legal order. The Brazilian Landless Workers Movement (MST), who occupy disused land where they set up schools, farms and other useful activities, are given as one example of a-legality in its weak form. In the context of the extant Brazilian legal order, this behaviour is illegal: it is in violation of private property law. However, the MST argue that such actions should in fact be understood as legal and, crucially, they do so through an appeal to the extant Brazilian Constitution, claiming: “land occupations are rooted in the Brazilian Constitution, which says land that remains unproductive should be used for a ‘larger social function’” (MST cited in Lindahl 2013, p. 166). This behaviour exemplifies weak a-legality in Lindahl’s typology because it calls for a shift in the boundaries which define (il)legality, *in the terms of and through an appeal to* the extant legal order.

Strong a-legality, on the other hand, presents a more fundamental challenge to the extant legal order. This behaviour “has a normative point that definitively eludes both terms of the [legal/illegal] disjunction” (ibid., p. 169). The French *autoréduction* protesters might be used to exemplify strong a-legality. In attempting to take luxury goods for the unemployed they behaved in a way that is not easily defined within the extant legal order. Neither the familiar legal category of charity work nor the illegal category of extortion seems quite right, because both “miss the normative point” of the action (ibid., p. 165). Whilst weak a-legality demands a shift in legal boundaries “*in light of* the normative point of joint action” (ibid., emphasis added), strongly a-legal activity has an entirely different ‘normative point’ altogether. It is here that Lindahl’s central categories of ‘limits’ and ‘fault lines’ come into play: weak a-legality reveals the *limits* of a legal order, which are the lines between what is ordered and what is unordered within a given legal order. Strong a-legality reveals the *fault lines*: the lines between legally ordered behaviour and behaviours which are not only unordered but *could not be ordered* within this particular legal order, because they presuppose a fundamentally different way of ordering society altogether, where the law is directed towards a different ‘normative point’ (ibid.).

This has significant consequences in Lindahl’s account. Whilst weak a-legality presents a “provisional interference”, which can be resolved through a shift in the boundaries which determine (il)legality within the extant legal order (ibid., p. 164), strong a-legality cannot be resolved through a shift in legal boundaries. The fault lines of a legal order, unlike its limits, cannot be moved. Instead: “they must be *overstepped*, and in being overstepped lead over from one legal collective into another” (ibid., p. 176, emphasis in original). In other words, the extant legal order cannot be

transformed to accommodate the challenge contained in strongly a-legal behaviours and scenarios: the formation of a new legal order is required. As Lindahl explains:

What cannot be said and done in one legal order can only be said and done by taking leave of that legal collective and entering another. The practical possibilities intimated by the strong dimension of a-legality, and which interfere with the range of practical possibilities available to a legal collective, can only be realized as our own possibilities if one adopts *another* first-person plural perspective. To accede to the normative demand raised by the strong dimension of a-legality is to take a one-way ticket across a normative fault line. A fault line marks the *end* of a legal collective in the spatial and temporal senses of the term: a place and a time beyond which it can no longer exist (Lindahl 2013, p..).

Indeed, Lindahl suggests that all strong a-legality might be understood as a type of secessionist movement:

What goes under the name of 'secessionist' movements is but one instance of the strong dimension of a-legality, although perhaps it would be more correct to say that a-legality confronts every legal collective with multifarious figures of secessionist aspirations, whether tumultuous or halcyon, heeded or ignored (ibid., p. 181 – 182).

Strongly a-legal demands cannot be addressed within the extant legal order, instead they require a ruptural break and the creation of a new legal order within which these demands make sense. The problem, then, is that many or most a-legal initiatives seek to do exactly what Lindahl suggests cannot be done. Organisers seek transformational structural changes in extant political and legal systems, and hope to institutionalise aspects of the alternative legal and/or political order that they

exemplify. With a few obvious exceptions,<sup>1</sup> organisers do not hope to *secede* from but to *transform* the extant legal order. This is particularly evident in organiser accounts of the *Radical Cause* referendum on President Pérez. As highlighted in section 4.3., the most frequent way that organisers described the referendum was as intended “to give a way out of the crisis”, and in particular “a democratic, constitutional and legal way out”. This common discursive construction in organiser accounts belies a more complex and contested discursive terrain, in which organisers struggle to define the signifier ‘way out’ in accordance with their past and present political projects and allegiances. In what I call the ‘conservative’ way out narrative, the referendum as ‘way out’ is depicted as a way to avoid further violence. Contrastingly, a ‘radical’ way out narrative casts the referendum as an ‘additional tool’ to support and legitimate a second coup. Most interesting, however, is a third more ambiguous narrative, located discursively somewhere between the other two. Articulated explicitly by a number of organisers and evident to some degree in all organiser accounts, the referendum is depicted as an alternative to ‘the violent route’, whilst still in pursuit of a radical and fundamental constitutional shift. Sharing much with Harnecker’s (2007) interpretation of the a-legal space tactic, this ‘middle way’ narrative of the referendum as ‘way out’ suggests that this referendum somehow transcended the legal/illegal; reform/revolution dichotomy of the past. As organiser, Luis Trincado, puts it:

The referendum was a type of call out ['campanazo'] to wake everyone up. To say we don't have to wait until he finishes his mandate, we don't want him to finish. We want to break the constitutional democratically. With popular participation. Not with a coup. Not with

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1 Such as the various a-legal Catalan Independence referenda, and other initiatives associated with independence movements.

measures of force. But with a mass popular movement that says to the political class: it's over (2012).

And as Rafael Uzcategui explains:

All this [the various actions taken to promote the referendum including in the international media] helped us; there was a type of accumulation, of a force... an *insurrectionary* exercise. It was an *insurrectionary* exercise. From a non-violent route. Because we said that it was the popular way out, the constitutional way out, the democratic way out (2012).

These accounts of an “*insurrectionary* exercise” (ibid.), intended to “break the constitutional democratically” (Trincado 2012), exemplify a construction of the referendum as intended to achieve radical and fundamental constitutional change, from within the strictures of the existing legal order. Organisers hoped to usher in a new legal and political order, structured to support the democratic agency of ordinary citizens and to remove the power of Venezuela's traditional political class, without seizing power through force nor any kind of ruptural break with the existing legal order. The problem is that if we accept Lindahl's framework, then strongly a-legal challenges, which call for a realignment of the legal and political order around a different set of collective values, cannot be resolved within the extant legal order. Strongly a-legal demands will be ignored or co-opted; they cannot be met. Hence constructions of the referendum as a ‘way out’ reveal a fundamental problem in the *Radical Cause* party's political strategy. Following Lindahl, it would seem that the party misunderstood the types of changes which are possible through this form of political action. More generally, we may have uncovered a limitation to the use of a-legal space as a strategy for transformative change.

In what follows, I suggest that theories of political grammar change can be used to provide a solution to this deadlock. Norval's (2006) model of political grammar change as 'aspect-change' provides a way to explain how what is unthinkable and unintelligible becomes *intelligible*, but in such a way that it "steers a path between radical rupture and continuity" (Norval 2006, p. 238). Moreover, research into the conditions in which political grammar change might occur supports the idea that a-legal space can be used in this way.

As a starting point, it is helpful to point out, as one reviewer has, that legal order in Lindahl's account is "first and foremost a *symbolic order*" (Geenans 2015, p. 84, emphasis in original).<sup>2</sup> Building on this, I suggest that Lindahl's conception of legal order lends itself particularly well to comparison with the notion of political grammar. As already noted in chapter 2, the concepts of political grammar and discourse are similar: both providing a schema through which social reality is made sense of. The added-value of the less established concept of political grammar is to help explain why certain discourses flourish and others flounder in a given social context (Hausknost 2011). It can be seen as a more foundational level within the discursive structures which prevail in a given context. Much like political grammar, in Lindahl's framework, legal order functions as a foundational symbolic structure, which delimits the possibilities for discursive change and has greater rigidity and resistance to change than particular discursive formations.

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2 Indeed, Lindahl is criticised by this reviewer for failing to spell out the influence of continental philosophy on his theory of a-legality and for the "quasi-absence of Foucault" given the resemblance of legal order in this account to the Foucauldian notion of 'truth-regime' (Geenans 2015, p. 84). As Geenans (ibid.) notes: "For Foucault, an order of truth lays down what kind of statements can be considered true or false, and thus makes meaningful speech possible; yet it does so by creating a certain blindness for the limits of the order in which one finds oneself."

Drawing on Wittgenstein's notion of 'aspect-change', Norval (2006) argues that political grammar change – the adoption of new ways of seeing and thinking – is analogous to the process by which a rabbit-duck optical illusion is seen suddenly as a duck, after it had always appeared previously to be a rabbit. An entirely different picture has emerged, but nothing external has changed. And importantly, the process:

should not be treated as a moment of radical break, but as a rearrangement of elements that makes possible a new way of seeing something (Norval 2006, p. 238)

I suggest that this can be used as a theoretical model for the process of legal order change. Following an aspect-change at the societal level, a legal order is changed. The specific contents of laws and constitutions of course remain unchanged, at least in the short term. But the way in which members of a legal collective understand the 'normative point' of their collective action: the normative point of the legal order, can be shifted through a collective aspect-change. Following this shift, there may be a new impetus to change now 'outdated' laws; a shift in the standard way in which particular kinds of laws are interpreted; and new legal developments are seen as legally possible.

As a highly abstracted theoretical model, this provides a way to conceive of radical change within a given legal order without the need for a ruptural break. Moreover, there is evidence to suggest that the use of a-legal space can on occasion satisfy the conditions for a collective aspect-change. Probably the most explicit example of this phenomenon is provided by the Colombian *seventh ballot* in 1990, when the idea of holding a referendum on the creation of a constituent assembly to re-write the constitution went from legally *impossible* to legally *necessary*, in the eyes of the

Colombian Supreme Court, the government, and – it would seem – the wider Colombian public.<sup>3</sup> Repeated attempts at constitutional reform had been made by both Liberal and Conservative administrations throughout the 1970s and 1980s.<sup>4</sup> This included President Barco's 1988 proposal for a referendum to reform the constitution to allow for a future referendum on the convocation of a constituent assembly. In all cases, these attempts at reform were overturned by the Colombian Supreme Court, deemed unconstitutional. After the Colombian student movement's a-legal, *seventh ballot* referendum in which millions of Colombians participated, a shift had occurred within the extant Colombian legal order. The government took action which was previously explicitly ruled unconstitutional, organising a binding consultation on the convocation of a constituent assembly. The government explained it was now "complying with its constitutional obligation to preserve public order and search for all the means necessary to achieve the re-establishment of this" (Republic of Colombia 1990). And the Supreme Court upheld this extra-ordinary action, citing as justification the *seventh ballot* as evidence of the "Colombian will" (Colombian Supreme Court 1990).

I have offered an account of a-legal activity and the effect it might have on the legal order which differs to that of Lindahl. However, it offers theoretical and practical advantages over Lindahl's rather rigid categorisation of weak and strong a-legality, and their respective capacities to bring about change. Possibilities for change are seriously constrained within Lindahl's framework. But for exceptional events, such as revolutions, coups, or secession, the 'normative point' of a legal order must

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<sup>3</sup> Discussed in-depth in chapter 3.

<sup>4</sup> Failed attempts at constitutional reform were made by the governments of Liberal presidents López Michelsen, Turbay Ayala and Virgilio Barco, in 1977, 78 and 88 respectively, and Conservative president Betancur in 1984 – 85. In all cases these moves were overturned by the Supreme Court.



remain unchanged. This is to say: the conceptual and normative framework on which a legal order is based cannot shift or evolve, not even incrementally. Not only does this present a pessimistic picture, it fails to reflect the way in which law evolves and changes over time.

Lindahl is right to distinguish between weak and strong dimensions of a-legality.<sup>5</sup> Empirical research into the use of a-legal space broadly supports this typology. Some initiatives call for a shift in the boundaries of (il)legality, through appealing to the extant legal and political order. Others embody and exemplify aspects of an incommensurate legal order, demanding a radical re-think of what the law is for. Equally, Lindahl is right that weak a-legality can be more easily accommodated by the extant legal order. However, as I hope to have shown, strong a-legality can also be addressed without the end of the extant legal order. Through a shift in the political grammar, that which could not be said and done within a given legal order can become possible.

#### **4.4.4. Political grammar change through the formation of new democratic subjectivities in a-legal spaces**

In this final sub-section, I turn back to the *Radical Cause* referendum on President Pérez and explore what evidence we have to believe it affected the political grammar through prompting collective aspect change. In the previous section I argued, against Lindahl, for the conceptual possibility of fundamental change within a given legal order. The conceptual and moral framework on which a legal order is based can change, without a ruptural break and the need to create an entirely new legal order.

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<sup>5</sup> Of course, as ideal types: in reality, instances of a-legal activity will tend to involve a messier mix of both strong and weak a-legal demands (Lindahl 2013).

Contrary to what Lindahl argues, the *fault lines* which delineate the currently *ordered* and the *unordered* can indeed be shifted: theories of political grammar change provide a way to understand and model this process whereby the unintelligible becomes intelligible. But how likely and achievable is this outcome in most instances where the a-legal space strategy is used? The *conceptual possibility* of radical change in the legal order does not imply this outcome is likely or common. In fact, the *seventh ballot* - which I used to illustrate the potential for political grammar change through the use of a-legal space - is exceptional for its apparently outstanding impact. Indeed, it was selected as a case study because of its unusual association with radical change. In most instances impact is much harder to gauge. The limited public record and memory of the unofficial referendum on President Pérez suggest that organisers failed to reset the political grammar and thereby shift the horizons of the possible through this event, at least at the whole societal level. However, as I argued in section 4.2, political grammar must be conceived like discourse as complex and multi-layered, and applicable to the micro as well as macro level. As such, it is worth exploring the impact of a-legal space on political grammar within the small groups and communities most directly involved. On this basis, in this section I explore the evidence that the *Radical Cause* referendum created the conditions for an aspect-change for the communities and sub-cultural groups who participated.

I draw on Aletta Norval's (2006) account of aspect-change through democratic subjectivity formation to explore this question. Seeking to address a gap within democratic theory, Norval (ibid.) has sought to explain the process by which democratic subjectivities are formed and re-activated. She argues that central to the process by which we "become democrats" are key experiential moments (ibid., p.

230). These moments function to trigger an 'aspect-change' (or 'aspect-dawning'<sup>6</sup>), through which subjects attain a new sense of themselves as democrats: as actors in a democracy with agency. As one example, she describes the experience of participation in South Africa's first democratic elections in 1994:

Occupying the position of democratic subject brought a forceful new sense of subjectivity as equals into play, one that depended upon a public enactment at a particular point in time. Crucial to this enactment was a bodily participation, quite beyond the mere fact of the invisible ink marking being stamped on every voter's hand (2006, p. 230).

Whilst ideas about democracy had occupied the public sphere for years and were central to the anti-apartheid struggle (Howarth 2000), the *experience* of this day contributed something *new* to public consciousness. The bodily experience of participation was central to the public assumption of a new democratic subjectivity. Importantly, on this day, external reality remained unchanged but it was perceived in a suddenly different way. Citizens underwent an aspect-change – analogous to seeing a rabbit-duck optical illusion as a duck, after it had always previously appeared as a rabbit. Through this key experience, a grammatical shift occurred and citizens emerged as democrats.<sup>7</sup>

To be clear: the formation and re-activation of democratic subjectivities is just one way in which political grammars can change. Or to put it another way: just one kind of possible aspect-change. Whilst political grammar can be understood as "those

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6 As discussed in section 2.2, Norval distinguishes between the original moment of identification and subsequent moments in which democratic subjectivities are re-activated. 'Aspect-dawning' is the term which refers to a first moment of democratic identification, and 'aspect-change' refers to subsequent moments of re-identification. Importantly, though, the two are understood to involve the same process (Norval 2006).

7 See section 2.2.4. for a full exposition of Norval's account of political grammar change/aspect-change and the formation of democratic subjectivities.

horizons delimiting what is possible in any given context” (Norval 2006, p. 231), democratic subjectivity refers to our sense of agency as democrats. Hence, the two are intimately connected but not one and the same. The assumption of a democratic subjectivity is *one way* in which political grammar changes. However, given the democratic nature of a-legal space - the centrality of democratic language and claims in these spaces - this is perhaps the most relevant kind of political grammar change to explore.

As a starting point, it is clear that supporting the activation of new democratic subjectivities in the wider Venezuelan public was central to what organisers hoped to achieve. As highlighted in section 4.3 (‘organiser aims and objectives’), the referendum was intended to create a space for political expression which was not otherwise available. Moreover, the act of political self-expression was expected to have formative and transformative effects. As one organiser explained:

the people demonstrated in that referendum that it was possible to act like the state, to have the capacity to act, if they were organised, like the actual state on certain things...because the people started to realise that yes it was possible (Albornos 2012)

Norval’s (2006) account of democratic subjectivity formation and re-activation through key experiences lends theoretical weight to organisers’ sometimes lofty claims. However, organisers’ grand plans notwithstanding, did this referendum really constitute the kind of experience which could prompt an aspect-change? I consider evidence for and against in turn.

One might wonder how significant an experience participation in this event will have been for the majority of ‘voters’. What will this action have involved for most of the

several hundred thousand Venezuelans who reportedly participated? Perhaps they passed one of the makeshift polling stations on their journey to or from work, and stopped and filled out a ballot slip. Perhaps they talked about the experience with colleagues or friends and were struck by its novelty value. For many, or most, however, this will likely have been the end of it. Moreover, it is important to consider the dramatic and chaotic political context in which the referendum took place. As communication and media studies scholar, Professor Reyes reflects: “this attempt at a referendum... was far less transcendental than the other events that happened to us that year” (2012). In other words, can the experience of participating in this event really be thought to have had the qualities – the resonance, the import, the emotional impact – necessary to prompt an aspect-change? When compared with Norval’s (2006) example of the phenomenon, in which South African citizens participated in the country’s first democratic elections, the idea seems strained.

However, as Norval (ibid.) is careful to point out, the process of aspect-change is not limited to such once in a lifetime moments. Indeed, it is a central mechanism by which democratic subjectivities are formed and re-activated throughout a lifetime. Hence, all kinds of events and experiences can play a role in this process. Turning back to the referendum, its aspect-change potential depends on how the event was experienced and what it meant to participants. For many, it may have amounted to the somewhat limited (maybe even superficial) experience depicted above. Other accounts, however, are intriguing. Activist and referendum participant Juan Contreras depicts the *Radical Cause* referendum as “one of the four key events of this period”, which indicated that the old regime was ending. The referendum, he explains, “was when the people said enough!” (Interview, 2012). Hence, he frames the event as the quiet beginning of a popular uprising. Of course, his retrospective interpretation has

twenty years of hindsight shaping his memories. However, if these comments approximate something of his experience of this event at the time, for Contreras and others like him, there is good reason to consider its aspect-change potential.

Also significant in Contreras' account is his description of people who did not participate in political protest for fear of state repression. "On that day these people expressed themselves... they overcame their fear", he explains. His testimony suggests the referendum created a space in which politically inactive citizens chose to express a long-silenced anger at the government. For such individuals, the formative impact of participation is possible to imagine.

The involvement of another demographic group in the referendum is interesting to consider from the perspective of democratic subjectivity formation. In the inner-city Caracas barrio of El 23 de Enero, Contreras describes how most community activists and organisers had rejected the formal political process in Venezuela until the early 1990s:

Here in El 23, Democratic Action [one of the two hegemonic political parties at this time] always won. Or the right won. Despite being a bastion of the left. But it was because this left were 'abstencionistas' [abstained from voting] ...We didn't vote because we didn't want to legitimate that situation of electoral fraud. We didn't vote as a rejection, to not legitimate that regime of false democracy (2012).

Contreras voted for the first time in his life for Aristóbulo Istúriz, the *Radical Cause* candidate for Mayor of Caracas, in December 1992, and then for Chávez in 1998 (ibid.). It is interesting to consider the significance and meaning of participation in the informal referendum on Pérez for individuals like him. This referendum, it

would seem, constituted a new form of political engagement for the radical left 'abstencionistas' of El 23. Whilst not formally recognised, and to this extent symbolic, the event allowed participants to simulate engagement in a democratic process of the state, through which they expressed their political will as citizens. Arguably, this action held aspect-change potential. Groups who were normally engaged in clandestine activity and rejected formal politics, participated as a somewhat different kind of democratic subject. Potentially, this performance of citizenship helped create the conditions in which a shift could occur, after which subjects could engage in a new stage of discussions about the kind of alternative democratic system they wanted to build.

Another consideration, is the impact of this event on the democratic subjectivities of organisers themselves. Having explored the impact of the experience for different groups who responded to the *Radical Cause* party's call out, it is the experiences of organisers themselves which are potentially most interesting to consider from this perspective. Rodriguez was a rank and file *Radical Cause* militant in 1992. In the following exchange he describes his experience of helping to organise the referendum, based in the 'situation room' in Caracas:

RR: We had a room in a building in the east, with telephones, radio, authorised messengers,

CH: ah like a press office?

RR: No... it was a situation room. Where developments were analysed at the level of every district.

(Interview, 2012)

He goes on to describe the workings of the 'situation room', managed by around twenty or thirty activists on a rota basis, some there for two or three days without

sleep, “analysing developments” as they came in (ibid.). From Rodriguez’ account emerges a picture of the event for those most involved with organisation at the grassroots level. His response to the suggestion that the room was a ‘press office’ is particularly interesting. It is clear that this event was more than a media stunt for those involved. Rodriguez and his companions enacted a process of monitoring a real referendum and afterwards one can imagine they felt that a real referendum had been pulled off. Affecting a change in their own consciousness was not a stated objective: organisers aimed to interpellate and mobilise the public. However, interestingly, this may have been a significant outcome.

One might object that the preceding analysis invests too much power in the transformative potential of a single fleeting experience. Indeed, no matter how exceptional or significant an experience for particular groups, this referendum was just one of countless actions in which organisers engaged, and in which members of the public participated. However, as Norval (2006, p. 250) explains:

...the dislocation [the experience prompting the aspect-change] need not take the form of a ‘great event’. More often than not, it will take the form of a multitude of different practices, which, when taken together, makes possible a different way of looking at things.

When understood in this way, the question to ask is not did the referendum – or other a-legal spaces – constitute a single transcendental event which triggered the adoption of new democratic subjectivities. But rather, amongst the multitude of different practices in which organisers and participants engaged during this period, did it offer anything unique? Did it create a space in which a different kind of experience was facilitated? And was this likely to have contributed to a shift in



the democratic subjectivities with which subjects identified? The accounts of some organisers and participants provide support for this, at least for the particular constituencies who engaged with this event.

To conclude this section: the aspect-change potential of this referendum and other a-legal spaces will vary significantly, dependent ultimately on what engagement in the event entailed for participants and how they constructed the experience. In some instances, the referendum created a space for unusual kinds of democratic engagement, such as for Caracas residents normally silenced by fear of government repression, radical activists who rejected the formal democratic system, and organisers who synthesised the experience of organising a binding recall referendum on the president. For these groups there is reason to believe that the event contributed to the adoption of a new sense of democratic agency which provided “a different way of looking at things” (Norval 2006, p. 250). Whilst the nature and meaning of a-legal initiatives vary, they create a space in which publics are encouraged to question the hegemonic order and enact how it might be improved. This form holds significant potential for the formation and re-activation of democratic subjectivities, and the corresponding shifts in political grammar that these new subjectivities entail.

## 4.5. Conclusions

The *Radical Cause* party's referendum on President Pérez was an attempt by the party to capitalise on the political and social crisis and the president's unpopularity, and create opportunities for change within a rigid political system. Organisers' accounts of their objectives illustrate the various different ways in which this tactic was expected to function. It was intended to 'demonstrate' opposition to the government; create opportunities for people 'to express themselves'; and most ambiguously: create a 'way out of the crisis'. The discussion in 4.3 facilitates a deeper understanding of how the a-legal space tactic might be hoped to achieve such ends.

I have drawn on the referendum to develop a deeper account of a-legal space as a political strategy. The initiatives which make use of this space share much with Lindahl's conception of a-legal behaviours and situations, hence I have suggested that they be understood as a variant of the behaviour Lindahl denominates as a-legal. However, as a particular variant of a broader phenomenon they have a number of distinguishing characteristics. Firstly, in deliberately emulating an institutional process, which represents a different legal and political order, they do more than "fleetingly... intimate" another way of ordering (Lindahl 2013, p. 1). So it was necessary to delineate how this activity differs from the act of merely 'intimating' another order. I have suggested that they be understood as attempts to *legitimate* and begin to institutionalise another order, and I have shown how the *Radical Cause* party's referendum on Pérez supports this interpretation.

The second significant way in which peoples' tribunals, citizens' debt audits, informal referenda and other a-legal initiatives differ from the behaviours and scenarios

described by Lindahl is that they are, broadly speaking, *lawful*. In Lindahl's examples - such as French anti-capitalist protesters conducting an 'autoréduction', or the Brazilian landless movement occupying disused lands, or the homeless vagrant demanding a restaurant meal - the questioning and the transgression of legal boundaries is immediately apparent. And indeed it is central. It is only through questioning the boundaries within a legal order that the limits (or the fault lines) can be revealed, and alternative ways of ordering become apparent. In other words, boundary transgression is the *modus operandi* of a-legality, in Lindahl's account. This poses a problem: if a-legal initiatives, such as the referendum and peoples' tribunals, don't break or even question legal rules, should they really be seen as belonging to the same category of behaviour as Lindahl describes? I argue that they should and use the *Radical Cause* referendum to support this claim. Interestingly, organisers described the importance that participants had to 'break the rules!' Acting outside of the legally recognised provisions and procedures of the existing system was felt to be legally transgressive, in a way not dissimilar to actually breaking the law. Hence these initiatives might be understood to disrupt the legal order through a different channel: they are engaged in a different kind of boundary transgression. They do not question what is lawful as opposed to illegal (at least not primarily), but rather what is legally sanctioned and institutionalised, as opposed to unrecognised. This account allows us to explain how these a-legal initiatives belong to Lindahl's broader category of a-legality, whilst accounting for how they differ. It also addresses a gap in Lindahl's account of legal boundaries, and provides a complexified picture of a-legal challenges to the legal order.

In the third section I considered the weak/strong a-legality split, and the limitation this places on the use of a-legal space as a political strategy. I suggested that theories

of political grammar change might be used to account for radical discursive change without a ruptural break. This offers a possible way forward. One way in which political grammars change, which is particularly pertinent to the present study, is through the creation of new democratic subjectivities. So in the final section I explored the idea that a-legal space might be useful for the emergence and formation of new democratic subjectivities, through looking at how informants described their experience of the referendum. Drawing on the accounts of referendum organisers and participants I argued that this experience may have played such a function, prompting an aspect-change and the activation of new democratic subjectivities, if only within particular communities and sub-cultural groups.

## Chapter 5: The International Tribunal on Climate Justice, Bolivia

In October, 2009, a preliminary hearing of the *International Tribunal on Climate Justice* took place in the city of Cochabamba, Bolivia. Seven cases were heard in which communities, civil associations and workers' movements from across Latin America accused national governments, transnational corporations and international organisations such as the Inter-American Development Bank and the EU of committing human rights violations, as a result of climate change. The organisers cited the 1967 Russell Tribunal, the Permanent Peoples' Tribunal, and Latin American based peoples' tribunals on debt and water rights, as their inspiration. Acknowledging that they had "not been entrusted with the task by any formally constituted legal authority", but had "assumed responsibility in the name of mankind and in defence of civilisation and Mother Earth". Whilst not binding, it was explained, the tribunal sought "ethical, moral and political implications", and to "construct the necessary force to implore governments and multilateral entities to assume their responsibilities in the framework of equity and climate justice" (Fundación Solón 2009b, p. 27)

In this chapter I draw on interviews with organisers, publicity materials and secondary sources to explore this event and its implications for a broader theory of a-legal space. In section 5.1 I provide details of the event, including the cases heard and the organisations who initiated it. In section 5.2 I turn to a discussion of how organisers articulate what they were trying to achieve through this tribunal. In section 5.3 I use the case to test and develop the broader theory of a-legal space. I consider three ways in which this theory might be criticised and consider the

implications for the International Tribunal on Climate Justice and the use of a-legal space more generally.

## **5.1 An account of the case**

### **5.1.1. Background and Context**

The preliminary hearing of the *International Tribunal on Climate Justice* (hereafter the 'climate tribunal' or the 'tribunal') was organised to immediately precede the United Nations COP meeting in Copenhagen in December 2009. There, the final report of the jury's findings was distributed at civil society and formal negotiating spaces, and organisers spoke at civil society events about the tribunal and its findings (Peredo Beltrán 2010).

Over the course of that year, organisations involved with the preliminary hearing of the climate tribunal continued to participate in the Bolivian movement for creation of a binding tribunal on climate justice. At the next UN COP meeting in December 2010 in Cancun the tribunal organisers held a meeting for global civil society to discuss the campaign for a binding tribunal and the outcome of the preliminary hearing held in October 2009. Organisers have since continued to participate in the global movement for a binding tribunal and the wider climate justice movement. However, the present study takes as its focus the events of the 2009 Preliminary hearing held in Cochabamba. This is in part for practical reasons: it was during this period that I had access to organisers. Also, however, the October 2009 hearing was the most visible of the tribunal's events to date, about which various publicity materials were produced.

### 5.1.2. The Tribunal Organisers and interview participants

Various organisations contributed to the creation of this event. The two most important actors were Bolivian NGO, the *Solon Foundation* (Fundación Solón) and the *Bolivian Platform on Climate Change* (also referred to as 'the Platform'). The latter is an umbrella organisation established in 2008 with a remit to coordinate Bolivian civil society action on climate change. Members of the Platform include NGOs, community organisations, and the country's five main indigenous and peasant social movements. *The Platform's* role with the climate tribunal of 2009 was to connect the various groups involved. It provided the network and organisational structure to support organisation of the event (José 2010). Despite *the Platform's* centrality, however, the organisation responsible for carrying out most of the key organisational work was the *Solon Foundation*. This Bolivian NGO, which carries out research and campaigns, and organises events “directed at the anti-neoliberal struggle” (Fundación Solón 2009a), was the driving force behind the climate tribunal, leading its organisation and producing and publishing the publicity materials associated with the event. The first three interview participants include the director and programme officer of *Solon Foundation*, Elizabeth Peredo and Alexandra Flores, and the director of the *Platform*, Maria Teresa José. The next interview participant, Martin Vilela, was from *Sustainable Water* a Bolivian NGO which worked in collaboration with the Khapi community of La Paz to coordinate and present one of the seven cases at the 2009 hearing. Vilela was central to organising the case and was the key point of contact for the Khapi community in relation to the 2009 hearing (Vilela 2010). The final two interview participants, Walberto Baraona and Cristian Dominguez, are from the indigenous social movement CONAMAQ, and the rural workers' union CSUTCB, respectively. Neither were directly involved in organising the 2009 hearing but are key figures in the Bolivian indigenous and climate justice movements, attended the 2009 hearing

and are involved in the wider campaign for a binding tribunal on climate justice. Table 2, below, lists all interview participants, their organisational affiliation and role in the climate tribunal. Whilst this small group does not include everyone involved with the 2009 hearing it does include the three individuals who were most central to the process. The mix of participants also allows for several different perspectives, including someone involved in organising one of the cases, and two individuals from outside the key organising team who provide some insight into the construction of this event within the indigenous and campesino movements in Bolivia.

**Table 2: Interview participants, International Tribunal on Climate Justice**

<b>Interview Participant</b>	<b>Organisation</b>	<b>Role in the Tribunal</b>
Elizabeth Peredo Beltrán	<i>Solon Foundation</i> (Director)	Key organiser
Alexandra Flores	<i>Solon Foundation</i> (Programme Officer)	Key organiser
Maria Teresa José	<i>Bolivian Platform on Climate Change</i> (Director)	Key organiser
Martin Vilela	<i>Sustainable Water</i> (Communications Director)	Coordinated one of the seven cases.
Walberto Baraona	<i>National Committee of Ayllus and Markas of the Qullasuyu</i> (CONAMAQ); a national indigenous social movement	Attended 2009 hearing, active in indigenous movement and wider climate justice campaigns.
Cristian Dominguez	<i>Unified Syndical Confederation of Rural Workers of Bolivia</i> (CSUTCB); rural workers' movement.	



### 5.1.3. The cases

Seven cases were presented during the two-day hearing, where organisations and communities from across Latin America explained the impacts of climate change on their communities to the tribunal jury and audience. Organisers explain that these cases were selected for reasons of expediency: these were organisations with which the *Solon Foundation* already had established contacts, and the tribunal was organised in a limited time frame which did not allow for a lengthy selection process. However, this was not seen as a particular problem. As Alexandra Flores explains: “they could have been any, to some extent. Because these problems are happening everywhere. The cases are like symbols” (2010). What is significant, however, is the particular combination of problems touched upon by the cases. Only the first two cases focused on specific environmental impacts of climate change: melting glaciers and rising sea levels. The following three cases address the impacts of current policy solutions to climate change and the final two look at wider environmental and health problems caused by mining projects. Hence, the problem of climate change is constructed as something more than a problem of excessive levels of carbon dioxide in the atmosphere. See Appendix C for a full list of the seven cases presented at the Preliminary Hearing in 2009.

### 5.1.4. The jury

The eight members of the jury included representatives of international environmental and political campaign networks, indigenous organisations, and academics. They came from seven different countries, (six from Latin America and two from Europe), and brought expertise in a range of different areas, including debt,

environmental issues, government repression and indigenous politics. Despite their differences, however, they represent organisations which share a common discourse, which is equally exemplified in the organisations which presented the seven different cases. Central to this discourse are ideas about North/South equity, a critique of the economic system and indigenous-influenced philosophies based on establishing a balance between human activity and nature.<sup>1</sup>

## **5.2 What did organisers hope to achieve? Analysing organiser aims and objectives**

### **5.2.1. Organiser objectives**

When asked what the tribunal was intended to achieve, organisers identify a wide variety of intended positive impacts. These include 'mobilizing the public so that they will apply pressure on their governments'<sup>2</sup>; 'contributing to a jurisprudence of climate justice'<sup>3</sup>; 'providing concrete evidence of the effects of climate change and how these are threatening human (and other kinds of) rights'<sup>4</sup>; 'giving voice to the victims of climate change'<sup>5</sup>; 'providing a space to denounce those that are breaking climate agreements'<sup>6</sup>; and 'educating and raising awareness amongst the public about the link between climate change and human rights violations'<sup>7</sup>. This variety is perhaps not surprising given the multidimensional, genre-crossing nature of peoples' tribunals, which as one scholar put it are "part legal proceedings, part theatre, part publicly

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1 See Appendix B for full details of jury members and their organisational affiliations.

2 Listed by five interview participants: Elizabeth Peredo Beltrán; Alexandra Flores; Martin Vilela; Cristian Dominguez; Walberto Baraona.

3 Listed by four interview participants: Elizabeth Peredo Beltrán; Alexandra Flores; Martin Vilela; Maria Teresa José.

4 Listed by three interview participants: Elizabeth Peredo Beltrán; Alexandra Flores; Martin Vilela.

5 Listed by three interview participants: Elizabeth Peredo Beltrán; Alexandra Flores; Martin Vilela.

6 Listed by two interview participants: Alexandra Flores; Cristian Dominguez.

7 Listed by three interview participants: Elizabeth Peredo Beltrán; Alexandra Flores; Cristian Dominguez.

speaking ‘truth to power’” (Schuler 2010).

However, whilst mentioning a number of these different effects, the three key organisers interviewed were clear that the tribunal had a central overarching principal objective. As Elizabeth Peredo explains:

The main objective is to contribute towards the existence of some mechanism in society, in the world, that helps to sanction and control the failure on the part of developed countries to meet their emission reduction targets. This is the objective (2010).

The creation of a binding international tribunal on climate justice, either within the UN system or outside of it, was described as the principal objective by the representatives of *Solon Foundation* and the *Bolivian Platform on Climate Change*. And, whilst not explicitly stated as the principal objective in the accounts of other interview participants, there is an implicit recognition of the central importance of institutional and legal change. Walberto Baraona of *CONAMAQ*, for example, explains that “the most important thing is that we reach and raise consciousness in the public, so that they will then pressure governments for action” (2010), just as Martin Vilela from NGO *Sustainable Water* notes: “we are trying to rescue international legal instruments for the defence of human rights” (2010).

However, characterising the climate tribunal as narrowly directed at the attainment of specific legal changes captures only part of the picture. Apparent in my interviews with organisers and other participants was another construction of the tribunal, which suggests a different component to the struggle in which they believe they are engaged.

Cristian Dominguez, from the rural workers' union, *CSUTCB*, alludes to this when he remarks that “it is also more than just a tool” (2010). And Martin Vilela provides a fuller picture, when he explains:

So, on the one hand it [the tribunal] must demonstrate... climate justice... but also it should become like an initial plan, of a model or system of economic organisation, or development model, that addresses and corrects the history that has generated such inequality, and such consumption with no regard for natural resources (2010).

Within this discursive strand the climate tribunal is constructed in grand yet somewhat ambiguous terms, as about more than the constitution of a new international legal infrastructure. And more than a discrete campaign for particular concrete changes. As Vilela puts it, it is an “initial plan” for wider scale systemic change (*ibid.*). Much like the *Radical Cause* party’s referendum on Pérez, the tribunal is framed by organisers as one part of a broader counter-hegemonic project and as directed at the progression of this project.

Hence a dual construction of the climate tribunal emerges in the accounts of organisers and participants. On the one hand, it is understood as a “tool of the struggle”,<sup>8</sup> specifically intended to contribute to the construction of new international legal infrastructure, in the form of an international tribunal on climate change. On the other hand, it is understood as supporting the emergence of an alternative development paradigm. These parallel objectives are well captured by Dinerstein and Ferrero’s (2012) two-dimensional framework for understanding social movement

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<sup>8</sup> The tribunal is described as a “public tool” and a “tool of the struggle” by several interview participants: Alexandra Flores; Martin Vilela; Cristian Dominguez.

activity, in which they distinguish between movements' 'real policies' and 'imagined politics'. Where concrete demands to states and movement engagement in policy-making reflect the 'real policies' dimension to movement activity, their 'imagined politics' refers to the "non-institutionalised politics that 'disagree' with the realm of real policies and instead articulate new experiences that resist integration into the logic of the state" (ibid., p. 11). This less tangible realm of movement activity is evident in their "values, endeavours, proposals and democratic practices" (ibid.).

### **5.2.2. The inter-dependent, dialectical relationship of real policies and imagined politics in a-legal spaces**

How then should we make sense of the different kinds of political objectives which are articulated by interview participants? Which should be taken as primary and what is the relationship between these different kinds of objectives? The relationship between movements' real policies and their imagined politics is an interesting phenomenon. It reflects the struggle to achieve concrete gains in the medium term, whilst hoping for more fundamental change in the long term, when the two might be in contradiction. However, what is interesting about the climate tribunal is the inter-dependent and dialectical relationship between these two dimensions.

Key organisers stress the centrality of the real policy objective of supporting the creation of a binding tribunal on climate justice. However, thinking through the requirements for such a demand to be realised reveals the equally central role to be played by the dimension of imagined politics. The demand for a binding international tribunal on climate justice is dependent on strategies to widen the discursive space in order to even make sense. Within dominant discourses around climate change the

problem – whilst it may be tragic – is simply not a matter of justice or injustice. Hence nor is it a matter for legal or political action. So, for their efforts in the real policy domain to have any purchase, organisers are dependent on some discursive work, which is the remit of their imagined politics.<sup>9</sup> Moreover, whilst taking the form of a real policy demand – to the extent that it involves a specific concrete demand to states – the climate tribunal’s demand has an ambiguous status. Whilst in the real policies dimension movements talk in the language and grammar of the hegemonic discourse in order to be heard, imagined politics activities function to make a different range of real policy options possible. What is noteworthy about the climate tribunal is that the real policy demand for a binding tribunal does not involve a compromise: it does not reflect the world as it is constructed within dominant international climate policy frameworks. To this extent, the concrete demand for a binding tribunal on climate justice has a disruptive function, contesting hegemonic constructions of climate change and thereby helping to fulfil the function of imagined politics.

An interdependency and ambiguity between the dimensions of real policies and imagined politics is, arguably, a defining feature of the a-legal space strategy. Since in simulating a formal legal state-sanctioned space, in order to exemplify concrete policies and legislation which *could be* enacted, and without any constraints on what may be said in such a space, their real policy activity has an imagined politics function also.

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<sup>9</sup> This at least was true at the time of the tribunal’s preliminary hearing in 2009. In the most recent COP meeting in December 2015 the discourse of climate justice was arguably more present within mainstream debates.

### 5.2.3. The climate tribunal's imagined politics

As a final point, since this is so central to what organisers hope to achieve, it is helpful to outline the central components to the climate tribunal's imagined politics and the alternative conception of the world they hope to advance. There are several concepts which can be taken as central 'nodal points' (Laclau and Mouffe 1985) within their discourse. The first is the notion of justice, defined in terms of North-South equity. The particular crystallisation of this notion is in the idea that Northern industrialised nations owe a 'climate debt' which must be repaid to the South. This component is of course implicit in their creation of a tribunal which tries particular nations and organisations, and is explicitly articulated in the jury's recommendations' and concrete policy proposals. Audiences are advised to "demand of the governments of the industrialised Northern countries repayment of the climate and ecological debt", and the establishment of an International Fund for Climate Justice, to be managed by the UN, is recommended (Fundación Solón 2009b, p. 32).

However, climate justice is about more than legal action and reparations within this discourse. Integral also is a systematic critique of the extant economic and political system and 'development model' which is identified as the root cause of climate change. Referred to at different points as "the current economic and political system" (ibid., p. 27), "the capitalist economic system" (ibid., p. 29), "the neoliberal system" (ibid., p. 14), and the "extractivist and export-based model of development" (ibid., p. 30), there is some ambiguity as to precisely what social, political and economic formation is opposed. However, this signifier plays a crucial role in their wider discourse, as the concept to which they are united in opposition, and is "blocking the full constitution of [their] identity" (Griggs and Howarth 2000). The signifier of the

current system is constructed in opposition to the positive alternative they propose, which is an economic and political order founded on the indigenous concept of 'Living Well' ('Vivir Bien'). The Spanish term Vivir Bien emerged in the late twentieth century to refer to a concept central to Andean indigenous cultures and philosophies. The original indigenous language terms ('sumaq qamaña' in Aymara and 'sumak kawsay' in Quechua) have no direct translation, but have been variously interpreted as 'plentiful life', 'to know how to live', 'the good life', 'the sweet life', 'living well', 'harmonious life', and 'sublime life' (Systemic Alternatives 2015). Crucially, in the Bolivian context it is defined in opposition to the notion of 'living better', understood to define the capitalist ethos based on ever-increasing consumption. As Elizabeth Peredo from the *Solon Foundation* explains:

[It is the idea that] the only way to reduce the gap [between consumption levels and resources] is to end a lifestyle that is about always thinking we are going to be richer... that we are going to be healthier, fitter, more attractive, more everything. So this notion of infinite growth that is the goal of this system (2010).

Central to the concept is an emphasis on living in balance with nature and 'Mother Earth' (Flores 2010). The concept has entered the consciousness and vocabulary of the Bolivian mainstream and the media partly since the presidency of Evo Morales (the first indigenous president), who has regularly employed the discourse of Vivir Bien making it a defining feature of his public image and rhetoric. Mentioned by all interview participants without prompting, this concept plays a vital role in their discourse, connecting various different elements together.



As a fledgling hegemonic project, there are various directions in which the discourse exemplified in the *International Tribunal on Climate Justice* may develop. Efforts to bring diverse groups together under the heading of Climate Justice can be understood as moves to establish this as the empty signifier. The related Living Well, however, may emerge as the signifier with greater resonance. At the 2009 hearing and in the associated publicity materials both concepts feature as important overlapping nodal points in the discourse.

Organisers depict the tribunal as part of a broader counter-hegemonic project for 'climate justice' and 'vivir bien'. At the same time, it is understood as specifically directed at advancing the campaign for a new international legal infrastructure which can address the violations of human rights by states and corporations, as a result of climate change. These two constructions reflect their imagined politics aims and real policy aims, respectively. Despite the emphasis placed on the latter in the accounts of key organisers, an explicit intention to "change ideas about the value of life" (Dominguez 2010) is also evident throughout organiser accounts. This somewhat grander yet less clearly defined idea is well captured by the notion of an imagined politics dimension to social movement activity. And organiser accounts suggest that this dimension is central to how the purpose and function of the tribunal was conceived.

### 5.3 Implications for a theory of a-legal space

The *International Tribunal on Climate Justice* has several features which make it an interesting case through which to explore the a-legal space strategy more generally. Firstly, like other peoples' tribunals it is an 'information based' form of a-legal space. In the introductory chapter I noted a key divergence between different forms of a-legal space was whether they involved the compilation and presentation of large amounts of technical information to the public. This is central in some forms of a-legal space and is completely absent in others. What is missing from the account of a-legal space as a strategy which has been developed so far is an account of how such diverse tactics can be part of the same phenomenon. As I will argue below, this is potentially significant since information and non-information-based a-legal initiatives would appear to reflect divergent models of democracy and political change. Hence in this section I explore the climate tribunal's discursive strategy and the function of the information component in this initiative.

Next I turn to a consideration of the climate tribunal's emancipatory potential. As a peoples' tribunal, it is particularly vulnerable to two critiques which might be levied at the a-legal space strategy. The first points to the often elite-led nature of a-legal initiatives. Peoples' tribunals, dependent on high profile jury members and highly technical legal expertise, are arguably the form of a-legal space to which this most applies. The second critique wonders whether we can contest the hegemonic order through replicating the symbols, processes and language of this same order. For similar reasons to the first, the critique is particularly apt in relation to the peoples' tribunal form of a-legal space. I explore the significance of each critique to the case of

the *International Tribunal on Climate Justice*, before considering the implications for the a-legal space strategy more generally.

### **5.3.1. Differences in a-legal space and theorising the democratic contribution**

Like other information-based a-legal initiatives, the *International Tribunal on Climate Justice* involved an elaborate process of evidence gathering on the part of activists who presented each of the seven cases at the 2009 Preliminary Hearing (Vilela 2010). The jury and audience members were presented with scientific data to support claims about rising sea levels, water shortages and flood risks caused by climate change. And they were presented with careful legal arguments to illustrate how specific UN Human Rights legislation had been violated. This component to the climate tribunal contrasts with other a-legal initiatives such as unofficial referenda, Free States, or the *Aboriginal Tent Embassy*, (amongst others), in which the presentation of new information and ‘evidence’ to the public plays little or no role.<sup>10</sup> This difference is potentially significant. Arguably, it is indicative of an adherence to opposing models of democracy and political change, which would undermine the notion of a single a-legal space strategy. I elaborate on this argument below.

### **5.3.2. Theories of democracy and the transformation of public beliefs, consciousness and behaviour**

The traditional aggregative account of democracy depicts a process for the aggregation of individual preferences (c.f. Schumpeter 1942). However, critics point to the impoverished conception of human psychology and democracy in this account,

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<sup>10</sup> See Appendix D for a review of different forms of a-legal space and the relative importance of the information component.

in which preferences must be conceived as pre-formed and immovable. There can be no account of how preferences are formed in the first place, why people desire what they do, nor of the possibility for transforming preferences. In short, the model cannot capture the true complexity of human desires and behaviours. Alternative theories have sought a “deeper” account than the aggregation of preferences, of what it is for the people to rule themselves (Norval 2001, p. 587).<sup>11</sup> A belief that individual preferences are not pre-formed and immovable but have the potential for transformation is at the heart of these accounts. However, theorisation of this process of preference transformation takes radically different forms.

The most dominant alternative to the aggregative model emphasises the role of *deliberation* in the democratic process. Through engagement in processes of rational and reasoned deliberation, it is argued that individuals have the capacity to hear and understand opposing viewpoints and eventually, ideally, arrive at a consensus. Decisions arrived at through deliberation in this way have legitimacy in a way that un-deliberated decisions do not, because the process entails that alternative possible decisions have been considered and thought through. Deliberative democracy is in this way both a normative theory of democratic legitimacy (which is measured through the presence and quality of deliberation) and a prescriptive theory of how democratic processes and institutions should be structured (to include opportunities for meaningful deliberation) (c.f. Habermas 1970).

Radical democrats take a different approach. The focus is not political ‘preferences’, nor their transformation, since these are reflective of a more fundamental

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11 According to the Encyclopaedia of Democracy what deliberative, participatory and radical accounts of democracy share is a commitment to the “radicalisation and deepening” of liberal democracy (Norval 2001, p. 587).

phenomenon: the construction and transformation of 'subjectivities'.<sup>12</sup> Within the radical democratic framework, agents make sense of the world and their position in it through discourse. Agents' preferences are transformed when they adopt a new discourse and correspondingly the subjectivity(ies) this discourse enables. But agents do not adopt a new discourse through reasoned deliberation, since deliberation can take place only within and through reference to a particular discursive formation. As Derrida (2013) puts it: "there is no outside-text". In any given social context, different discourses struggle to hegemonise the discursive field and thereby define how agents construct social reality. The adoption of a new discourse is a historically contingent event which occurs when the hegemonic discourse is 'dislocated', and its contingency becomes apparent. Dislocation occurs as a result of events or new practices which cannot be accounted for within the terms of the hegemonic discourse. The 2008 financial crisis, for example, might be said to have resulted in some level of dislocation in the discourse of neoliberalism. When dislocation occurs, the hegemonic discourse is said to lose its 'grip': the thoughts and actions of social agents are no longer determined by the particularities of this discursive formation. And it is now, 'the moment of subjectivity' (Laclau 1996), in which the subject is present and must assert their agency: they must make an actual decision about what to think, say or do. Of course, with no discursive framework through which to make sense of the decision it cannot be a rational one. Described as a moment of 'radical undecidability' (ibid.), the subject's decision to think, speak or behave in a certain way is understood as an act of *identification*. The subject identifies with one of the many possible competing hegemonic projects, and the discourse it articulates. And through this act of identification, new ways of seeing and being in the world – new subjectivities – are created (Howarth and Stavrakakis 2000; Laclau and Mouffe 1985).

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12 Hence one might say that the 'unit of analysis' within radical theories of democracy is 'subjectivities', rather than 'preferences' as it is in the deliberative canon.

As Iris Marion Young (2001) points out, the theory of democracy to which one subscribes is an indicator and a determinant of political strategy. For the deliberative democrat, “the best and most appropriate way to conduct political action, to influence and make public decisions, is through public deliberation” (ibid., p. 672). Radical democrats, on the other hand, advocate a different mode of political engagement. As Young (ibid., p. 673) observes, for critics of deliberative democracy, the emphasis on deliberation is “laughable”:

powerful officials have no motive to sit down [and deliberate] ... and even if they did agree to deliberate, they would have the power unfairly to steer the course of the discussion.

These actors take a different approach:

picketing, leafleting, guerrilla theatre, large and loud street demonstrations, sit-ins, and other forms of direct action, such as boycotts. Often activists make public noise outside when deliberation is supposedly taking place on the inside. Sometimes activists invade the houses of deliberation and disrupt their business by unfurling banners, throwing stink bombs, or running and shouting through the aisles (Young 2001, p. 673).

What is interesting about the climate tribunal is the extent to which it draws on and can be understood within both frameworks. Central to the tribunal organisers' efforts to convert audiences are both deliberative and non-deliberative, disruptive components. Moreover, I argue that these components have an inter-dependent, dialectical relationship. Non-deliberative, disruptive actions are necessary to enable audiences to engage with the reasoned, deliberative arguments that are made. Whilst audience engagement with these arguments, even on a minimal level, helps bring

about a discursive shift which is best made sense of through concepts outside of the deliberative model. I turn now to a more in-depth examination of the deliberative democratic components of the climate tribunal, before considering the non-deliberative components, best captured through a radical democratic framework.

### **5.3.3. The deliberative democratic contribution of the climate tribunal**

The way that organisers describe the role of the tribunal and the various ways in which it was planned and executed closely fit the deliberative democratic model. The tribunal is depicted as playing an information giving and educational role – amongst other functions – in the accounts of most organisers. As Cristian Dominguez, from the rural workers' union, CSUTCB, comments: “It’s a collective education – a guide”. And as Martin Vilela, from *NGO Sustainable Water*, explains:

What we have done is demonstrate, a little, the evidence of the impacts of climate change, and how these impacts of climate change violate human rights - the right to life, the right to water, food, health, self-determination, culture... and other rights such as the rights of women, children, adolescents (2010).

Similarly, Elizabeth Peredo Beltrán from the *Solon Foundation* highlights their aim to provide evidence of anthropogenic climate change, particularly for Northern audiences where they perceived the consensus to be less clearly established:

This was the objective that we set ourselves, to demonstrate [the effects and cause of climate change] ... above all in the developed countries, it is necessary to demonstrate this relation. For example, a short while ago I was in New York, and there was a tornado, and

one person died...they didn't even find out... society did not find out what was really happening. So it is still necessary to provide evidence (Interview, 2010).

She adds that the target audiences are not “activists and environmentalists” but rather “the general public”, who have often not had access to the information that they sought to provide:

Because what we do not want is to work only amongst the already convinced, because between ourselves, we already know... what is important is that we reach more people. And that more people can be convinced of the relation that exists. Or rather, make the connections that have to be made, in order to understand, and be able to change the phenomenon (2010).

These comments exemplify a theme evident in all the organiser accounts: a sense that 'the facts will speak for themselves'. Implicit is a faith in the capacity of the general public, globally, to process and understand the technical information they have made available, and to draw the same inevitable conclusions: to “make the connections that have to be made” (ibid.). In these organisers’ accounts, at least, the tribunal is not framed as a way to craft a narrative or a public relations exercise but as a transparent tool for public education and awareness-raising. This account is characteristic of the deliberative democratic model, and the faith it places in the potential of ordinary people to make important and complex decisions about governance.

Also evident in organisers’ accounts and central to their faith in the potential of the tribunal as a political tool is their belief in the public’s capacity for empathy. North/South inequality and the imbalance between those responsible for climate change and those most affected is understood as a principal barrier to effective action



on climate change. However, organisers have a faith in the capacity of Northern publics to empathise with Southern communities affected by climate change, put this before their own material interests, and respond collectively to the common problem. As Elizabeth Peredo comments:

There are those that do not like the idea of the tribunal. Above all in Europe, there are those that say no... because in a way it is striking at their state of well-being, because when one does not have to pay a debt... So this is a problem. And that is a problem that we must overcome. I have much hope that we can because I believe that the climate crisis is increasingly serious... And I trust that there is a common feeling of empathy, between all, because in the end we are all in this together... and we will have to work together to respond to this problem (Interview, 2010).

This faith in the general public's rational and empathic capacities suggests an affinity with the deliberative democratic approach, and the applicability of this model to make sense of the climate tribunal's discursive strategy.

There are several possible objections to this characterisation of the climate tribunal and peoples' tribunals in general as deliberative democratic exercises. But each, as I will argue, can be readily rebuffed. Firstly, where are its actual deliberative components? There is no formalised space for discussion within the (most common) peoples' tribunal model: information is presented and audiences listen.<sup>13</sup> So how applicable is the deliberative democratic model to make sense of organiser strategy? As Goodin and Niemeyer (2003) have highlighted, there is more to deliberation than

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13 Some peoples' tribunals build in deliberative components, and create significant opportunities for active audience participation. This is how local peoples' tribunals have been characterised (Boehringer 2014). And this is somewhat like the approach of the *World Courts of Women* (2012). However, in the standard and most commonly used model the role for audience members is largely a passive one. The *International Tribunal on Climate Justice*, broadly speaking, fits into this latter, more common, category.

dialogue. Internal reflection constitutes a central component to the deliberative process. Drawing on research into a citizen's jury on Australian environmental issues they demonstrate that jurors' attitudes in fact changed more in response to the 'information' phase of proceedings, than during the 'discussion' phase, suggesting "a large degree of 'deliberation within'" (ibid., p. 627). Other deliberative scholars have highlighted the value of 'hybrid' designs in which deliberative mechanisms are combined with an extensive information provision phase. Lightbody (2014), for example, advocates the combination of deliberative fora with public hearings, as a means to enhance environmental sensitivity in deliberative decision making. These studies suggest that if publics are given access to the right technical information, and the space and time in which it can be processed, they will make environmentally and socially conscious decisions.

Drawing on this research, a persuasive case can be made for theorising the climate tribunal as the information phase in a wider deliberative process. Through prompting internal reflection in audience members and promoting environmentally and social conscious attitudes through information provision, the event contributed to deliberation at the societal level. Indeed, comments of organisers in some instances suggest this was much how the initiative was understood by those involved:

The key audience is the public. [The intention is that] ...the peoples of the world can have the criteria to make judgements, to make conclusions, and that sentences can be imposed (Dominguez 2010).

Another objection to a deliberative democracy-framing concerns the probable makeup of the climate tribunal audience. Unlike the deliberative democratic ideal,

participants and audience members do not reflect a cross-section of society or those who have a stake in the issue. They are a self-selecting group. One might object that audience members likely already understood the issues and supported the perspective of the tribunal. If, despite organisers' intentions to the contrary, the climate tribunal spoke mainly to the "already convinced" (Peredo Beltrán 2010), the deliberative function it played is less meaningful. However, this dismissal, I would argue, is too quick. Even where audiences are already broadly supportive they comprise a degree of discursive diversity and complexity, and tribunals may play a deliberative function. An experience I had whilst attending a different peoples' tribunal can help to illustrate this point. Whilst we stood together in a queue during the *Peoples' Commission on the Closure of Lewisham Hospital*, which took place in 2013 in London to address the impact of cuts and other changes to the NHS, a woman from the audience turned and remarked to me:

It's incredible isn't it?! I mean I knew all this was going on, but when you hear the details like this... it's so clear! It's really shocking isn't it? (Anon, personal communication, 2013).

Despite this woman's familiarity with and support for the Lewisham *Peoples' Commission*, it would appear that the detailed, comprehensive and rigorous information which was presented during the event indeed contributed to her knowledge, understanding and consciousness. Whilst just one example, the instance suggests the heterogeneity of peoples' tribunal audiences, in which members have varying levels of knowledge and conviction. And it supports the suggestion that such events function as the information phase in a wider deliberative process, prompting internal 'deliberation within'. Whilst not formally provided for, deliberation takes place between audience members during and after the event, with family, friends,

colleagues and others.

Another objection concerns the objectivity and impartiality of peoples' tribunals. Information is compiled and presented in order to support a particular argument, and it is rare for peoples' tribunals to include a 'defence' (Klinghoffer & Klinghoffer, 2002).<sup>14</sup> As such these events are 'biased' in a way that is quite distinct from orchestrated deliberative democracy initiatives, in which proponents of different policy solutions are given space and time. However, understood as just one space in a society-wide deliberative process, I would argue that the climate tribunal maintains a sufficient degree of objectivity to satisfy deliberative democratic requirements. The tribunal was intended to contribute to the construction of a jurisprudence of climate justice (Peredo Beltrán 2010; Flores 2010; Vilela 2010; José 2010), as Vilela puts it:

We are working for a systematization of what could be the start of an international legal system that permits a defence of human rights from the impacts of climate change (2010).

As such the tribunal adhered to certain procedures and evidential standards, in order that findings stand up to a degree of legal scrutiny (Vilela 2010).<sup>15</sup> If deliberation is envisioned at the societal level, arguably it is not necessary that every particular deliberative space includes a range of political perspectives. Also the climate tribunal's efforts to adhere to recognised legal procedures and evidential standards within the space that was created address other possible concerns about 'bias' that the deliberative theorist might have.

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<sup>14</sup> For Klinghoffer and Klinghoffer (2002) this is one of the key ways in which the peoples' tribunal model could be improved.

<sup>15</sup> This is one aspect (amongst others) which distinguishes peoples' tribunals from show trials.

Building on this characterisation of the climate tribunal as contributing to processes of deliberation at the societal level, Dryzek and Niemeyer's (2008) account of 'discursive representation' is particularly useful. Representation of people and groups is indeed central to democracy, these scholars acknowledge, but it is not the only form of representation. In fact, many representative claims are better conceived as 'discursive representation': representing the claims, beliefs and values of a particular *discourse*, rather than any particular group of individuals. They illustrate the concept with rockstar Bono's claim to represent "a lot of people [in Africa] who have no voice at all" (Bono, cited in *ibid.*, p. 481). Bono cannot sensibly be understood to represent millions of people, most of whom have no knowledge of his existence. But his claim is not entirely nonsensical. Instead he can be understood to represent a particular discourse about Africa, generally employed outside of Africa itself, often in the course of charity appeals. Dryzek and Niemeyer (*ibid.*) advocate the formal incorporation of this type of representation into international governance mechanisms, through construction of institutions such as a 'Chamber of Discourses'. Here representatives would be selected on the basis of their consistent subscription to particular discourses, so that representatives of each of society's main discourses could be brought together to deliberate policy options. Discursive representation, they argue:

can help render policy making more rational, respect individual autonomy by more fully representing diverse aspects of the self, assist in realizing the promise of deliberative democracy, and make democratic theory more applicable to a world where the consequences of decisions are felt across national boundaries (*ibid.*, p. 38).

Following this approach, *The International Tribunal on Climate justice* can be understood to represent the marginal climate justice discourse. Further work in this area suggests the particular contribution this could make to international politics and

governance. Building on Dryzek and Niemeyer's (2008) theory, Hayley Stevenson (2011) highlights the crucial role to be played by civil society actors in the representation of marginal and radical discourses. Pointing to the Latin American ALBA block of countries' claims to represent 'the peoples' during UN climate negotiations, she argues that this is best understood as discursive representation. ALBA should be seen as attempting to represent 'Green Radical' discourse, rather than any particular group of peoples. However, the failure of the ALBA block (bar Bolivia) to consistently represent this discourse at the 2010 UN COP meeting in Cancun demonstrates the limitations to representation of radical discourses by states. The pressures and constraints on states mean that they cannot well represent a discourse which challenges powerful interests. The ALBA case, argues Stevenson, "points to the potential hazards of transmitting a public discourse through a state-based instrument, even when a state appears to share that discourse" (ibid.) Following this research, it would seem that the climate tribunal makes an important contribution to democracy through representing a radical counter-hegemonic discourse which state actors cannot consistently articulate.

However, there are several limitations to the deliberative framework, both as a theory of democracy and as a way to make sense of the *International Tribunal on Climate Justice*. Critics of the deliberative model suggest that insufficient attention is paid to the distorting impact of structural inequalities on the potential for deliberation among equal participants (Young 2001). Less privileged groups face multiple often hidden obstacles to their active participation which put them at a structural disadvantage and skew the results of deliberative processes in favour of the interests of the privileged. Most significantly for the present case, it is alleged that deliberative democrats fail to address the role of hegemony and its impact on the

deliberative process. As Young (2001, p. 686) comments, in a somewhat damning critique of this gap in deliberative theory:

The theory and practice of deliberative democracy have no tools for raising the possibility that deliberations may be closed and distorted in this way. It lacks a theory of, shall we call it, ideology, as well as an account of the genealogy of discourses and their manner of helping to constitute the way individuals see themselves and their social world. For most deliberative democrats, discourse seems to be more "innocent".

This problem extends to the strand of deliberative theory most concerned with discourse, in which the focus is deliberation at the discursive level. Innovative proposals such as Dryzek and Niemeyer's (2008) 'Chamber of Discourses', certainly promise to improve the quality and depth of debate in international institutions currently dominated by variants of a neoliberal discourse. 'Green Radicalism' or 'climate justice' are rarely articulated within existing international institutions, so their presence in a Chamber of Discourses, or similar, would be meaningful and potentially have an influence on subsequent policy proposals, in the way that radical social movements can sometimes widen the terms of mainstream politics and what is considered possible. However, Dryzek and Niemeyer appear to suggest that the decisions of such a Chamber gain legitimacy through the inclusive deliberative process. Implicit is the notion of a level playing field within which the representative of each discourse will battle it out, presenting their case and arguing the pros and cons of potential policies and legislation. This fails to appreciate the structural disadvantage facing radical or counter-hegemonic discourses, and the reduced likelihood that policies they favour will gain consensus.

Within mainstream publics, particularly in the Global North, organisers of the climate

tribunal face a struggle to be heard and seriously engaged with, not encountered by proponents of more familiar and mainstream proposals for energy efficiency measures or green growth initiatives. No matter the rigour and transparency of the evidence, and the internal logic of legal and rational arguments, the climate tribunal faces a structural disadvantage, which the deliberative model does not adequately account for.

#### **5.3.4. The radical democratic contribution of the climate tribunal**

Radical democracy offers an alternative to the deliberative democratic conceptual framework, which provides theoretical tools to make sense of the structural disadvantage facing the climate tribunal. Moreover, looking at the climate tribunal through this framework reveals another dimension to the initiative which is lost within a deliberative framework. Logical legal arguments which appeal to audience capacity for rational reflection are only one way in which the climate tribunal functions as a communicative event with the potential to influence public consciousness, beliefs and behaviours. There is another non-deliberative dimension to this initiative, which constitutes a challenge to the discursive structures which render its claims invisible. In this sub-section I consider the climate tribunal from a radical democratic perspective, and show how this framework enables an appreciation of this other dimension to the climate tribunal's communicative act. However, I will argue that, like the deliberative framework, this approach also fails to *fully* capture what organisers are trying to do and how they are trying to do it.

Radical democratic theory suggests a fundamentally different task awaits organisers of the *International Tribunal on Climate Justice*, than is implied by a deliberative



democratic framework. Unlike in the deliberative democratic account, organisers must do more than articulate solid, rational arguments supported by evidence, if they are to win over hearts and minds. Radical democratic scholars interested in how individuals' beliefs and behaviours change and can *be* changed foreground a different kind of political practice or *communicational mode* to deliberation. Broadly speaking, the concern is with 'disruptive' and 'interruptive' practice(s), with the potential to disturb the hegemonic discourse and thereby create opportunities for the emergence of new discursive formations. What is interesting about the climate tribunal - and potentially peoples' tribunals in general - is its potential to fulfil this function in addition to its deliberative function.

Several different theoretical concepts from within the radical democratic canon and the broader literature concerned with the workings of hegemony are helpful to draw out the climate tribunal's non-deliberative communicative act. As a starting point, Lindahl's (2013) account of a-legality suggests that certain non-conventional, legally ambiguous behaviours can work to question extant legal boundaries and thereby reveal the limits to the legal order, and hence its contingency. In the previous chapter I elaborated on the particular nature of the boundary transgression at stake in the a-legal initiatives which are the subject of this study. Whilst Lindahl describes behaviour and situations which challenge the boundary between *lawful* and *illegal* behaviour within a given legal order, these initiatives do something a bit different. These initiatives challenge the position of the legal boundary which delineates what is *legally sanctioned and institutionalised*, and what is not. Through enacting a legal and/or institutional process of the state, which could only belong to a somewhat different legal order, a-legal initiatives question the actual institutional order. And they suggest the possibility of an alternative institutional order. The climate tribunal

can be understood in this way: through enacting a judicial process which could only be part of another legal order, it evokes this other order and reveals the contingency of the extant one.

Hence, Lindahl's (2013) theory of a-legality suggests one way in which the climate tribunal might have functioned in a non-deliberative way, to affect public consciousness. However, the precise mechanics of this process could benefit from further elaboration. The nature of the communicative act at stake is succinctly captured by the notion of 'exemplarity', which has been explored by proponents of radical democracy to help explain how new demands get onto the political agenda. From a radical democratic perspective, the question of how new political demands, new ideas and new ways of thinking emerge is both central and perplexing. As highlighted, politics is characterised within this account by a logic of hegemonic struggle: competing political projects attempt to define social reality and hegemonise the discursive field (Laclau and Mouffe 1985). The contents of the political agenda in any given context reflect the victors of these past discursive struggles. So how do new demands, not articulated by any of the discourses which characterise the social field, get a look in? Drawing on Cavell's (1990) writings on exemplarity, Norval (2012, p. 812) employs the notion of exemplars to help explain the process by which novel demands are "inscribed into the current order". Cavell (1990) explores the role of Nora in Ibsen's *A Doll's House* as an exemplar. When Nora shocks her family and friends at the end of the play by breaking convention and leaving her husband and children, she exemplified an almost unheard of moral and political choice and behaviour to the play's 19<sup>th</sup> century audiences. Nora's actions were outside of the acceptable behaviours and rules of the time, but more importantly she articulated a sense of injustice which was not then recognised as injustice. As Norval explains:

Through the example of Nora, Cavell captures the experience of a sense of injustice that is inexpressible in the terms of prevailing discourse, but where, as he puts it, misery is clearly unmistakable (1990, 112) (2012, p. 812).

Additionally, through her unfamiliar behaviour and implicit political demand, Nora forged a new path: she was “*an exemplar* of the possibility of being and acting differently” (2012, p. 819, emphasis in original). In another instance, of particular pertinence to the present study, Norval describes the path-breaking legal case of the Khulumani Support Group, a South African social movement of victims and survivors of Apartheid (Madlingozi 2015). In 2008, through the innovative invocation of an 18<sup>th</sup> century law intended to protect victims of piracy, they used the US legal system to sue fifty multinational corporations alleged to have aided and abetted the Apartheid regime, through conducting business there during the Apartheid era.<sup>16</sup> Importantly for the present study, the case is depicted as valuable regardless of its ultimate success in the courts. Win or lose, the Khulumani case functioned as an “exemplar of the possibility of being and acting differently” (2010, p. 19), through its suggestion that multinational corporations could be held responsible for their actions, wherever they take place. Exemplars like this, as with Nora:

Literally manifest for us another way of doing things. In this sense, they precisely do the work of egalitarian *inscription*: they open up a horizon of imagination in which other ways of conceiving political community could be kept alive and, importantly, could be (re)inscribed repeatedly (ibid., emphasis in original).

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16 The case was made possible through the Alien Tort Claims Act - originally intended to help foreigners seek redress for piracy, but which has been used on several occasions to hold multinational corporations responsible for human rights abuses (Norval 2009a).

Like Nora and the Khulumani, the *International Tribunal on Climate Justice* articulates a sense of injustice not fully recognised within the prevailing legal and political order. And, just like these marginalised actors, it demands a response. As Norval (2012, p. 819) puts it:

they embody claims exceeding moral discourse, they ‘put the social order as such on notice’ (Cavell, 1990, p. 109), as well as manifesting for us another way of doing things.

The study of exemplars helps to sharpen the account of a-legal disruptions to the legal order provided by Lindahl (2013). Lindahl is interested in these behaviours for their potential to ‘disrupt’ the legal order and ‘intimate’ an alternative (2013, p. 1). Understanding a-legal initiatives, and the wider category of a-legality, as attempting to constitute exemplars helps explain both moments: the disruption and the intimation of an alternative.

However, the utility of the exemplar concept for a theory of a-legal space does not end here. The *International Tribunal on Climate Justice* might be seen as an exemplar in a way which exceeds Cavell (1990) and Norval’s (2012) use of the term. In a postscript to the second edition of *The Structure of Scientific Revolutions*, Thomas Kuhn (1970, p. 186) introduced the notion of ‘exemplars’ to help clarify one sense in which he meant to employ the term ‘paradigm’, but which had been lost in the subsequent ubiquity of its application. He explained that:

(...) [b]ecause the term [paradigm] has assumed a life of its own ... I shall here substitute ‘exemplars.’ By it I mean, initially, the concrete problem-solutions that students encounter from the start of their scientific education, whether in laboratories, on examinations, or at

the ends of chapters in science texts.

For Kuhn exemplars are the 'concrete problem-solutions' through which we learn. They exceed and precede what can be explained through rules, and encapsulate a *way* of doing science. Whilst Kuhn employed exemplars to characterise a process of learning in the hard sciences, arguably the concept can be employed to other disciplines and to law in particular. The climate tribunal holds promise as an exemplar in the sense that Cavell (1990) and Norval (2012) use the term: it embodies a different way of thinking and being and articulates a claim for justice which exceeds existing moral discourse. Equally it functions as an exemplar in Kuhn's sense. Climate injustice and new legal infrastructure, specific laws, and a form of legal reasoning are presented as a concrete 'problem-solution', for lawyers, policy makers and the general public. Each of the seven cases presented during the tribunal capture different aspects to a new application of existing international Human Rights law, which illustrate a solution to the problem of climate injustice. The tribunal amounts to an effort to exemplify a new paradigm in how we understand climate change in legal terms. In the previous sub-section, I explored how the climate tribunal's use and presentation of information could be understood in deliberative terms. However, Kuhn's concept of exemplars helps explain how the careful and elaborate presentation of information to audiences might have a communicative function which is better conceived in radical democratic terms.

One problem with this account is that exemplars are limited in their ability to affect public consciousness. As Norval (2008, p. 74) reflects:

It is only once a woman responds "Go ahead" to the "Go on" that the exemplar is effective in the constitution of new modes of doing and of being: new modes of subjectivity and of acting are not only opened up but made effective (2008, p. 74).

In other words, the potential of exemplars to open up new discursive worlds is dependent in part upon those for whom these worlds are to be opened up. Indeed, this limitation to the provocative and evocative potential of a-legal behaviours was pointed out in section 2.1. For many shoppers witnessing the French protesters' autoréduction, the action was 'simply theft!' (Lindahl 2013). In many cases these strange and intriguing behaviours go unnoticed and un-remarked upon. For Norval, this highlights the importance for democratic theory of a focus which extends beyond those articulating new claims, to those within the extant order to whom these demands are directed. There is a need for a: "focus on acknowledgement and responsiveness in the face of the declaration of a dispute" (2010, p. 20). But where, then, does this leave agents seeking to promote new modes of thinking and acting such as organisers of the climate tribunal and other a-legal initiatives? If the effectiveness of exemplars is so dependent on a certain public disposition and openness, then much is beyond the control of organisers. It would seem that the potential for effective exemplars to be consciously contrived is significantly constrained.

However, here lies the particular potential of a-legal space as a mode of exemplarity. The hegemonic effects of constituted and constituent power were explored at length in chapter 2. The potential to harness these effects is one feature which makes a-legal initiatives interesting. In terms of constituting effective exemplars, capturing the hegemonic influence of law, institutions of constituted power, and of the 'constituent

will', could be crucial. Where successful in their emulation of constituted power and claims to represent the constituent will, a-legal initiatives stand to encourage audiences to take the leap and engage with the exemplar presented to them.

When explored through a radical democratic framework it is clear that the climate tribunal functions in another non-deliberative way. It exemplifies another way of doing things, which exceeds and precedes existing political vocabularies. In this manner it not only disrupts the extant order, but helps to create the availability of an alternative. Moreover, through harnessing the hegemonic effects of constituted and constituent power it elevates its own exemplar potential.

However, there are also problems with the radical democratic framework, both as a model of political change and democracy, and as a way to make sense of the climate tribunal. Of particular significance to the present study is the complaint that this account affords only a limited conception of human agency. As outlined above, the radical democratic social agent is determined by the discursive structure. Their thoughts and actions are a product of the subject positions they occupy. Only when the hegemonic discourse is dislocated does the 'subject' emerge. As Howarth and Stavrakakis (2000, p. 13) explain:

it is the 'failure' of the structure, and... of those subject positions which are part of such a structure, that 'compels' the subject to act, to assert anew its subjectivity (2000, p.13).

Yet here too only a limited conception of political agency is possible, since in this terrain of "radical undecidability" (Laclau 1996) the decision to identify with a new discursive formation is essentially arbitrary. The problem then is a too sharp

distinction between on the one hand the subject in a hegemonic context, in which their thoughts and behaviours are determined by the hegemonic discursive structure. And on the other hand, the moment of dislocation in which the subject's decision must be "radically contingent" (Laclau 2006, p. 109), and hence arbitrary. In short, there is no room left in between these two extremes for any meaningful conception of political agency.

This is particularly problematic for an account of the climate tribunal for it fails to reflect the struggle organisers describe or the task that they have set themselves. Organisers believe they are involved in the pursuit and demonstration of truth, not a particular contingent construction of reality (as the radical democratic framework would suggest). Accordingly, a belief in and appeals to public rationality and empathy play a central role in this strategy. As illustrated, their project exceeds what the deliberative democratic framework can capture. They seek to promote the development of 'vivir bien' as an alternative development paradigm and 'form of life' (Wittgenstein 2010). In persuading audiences to adopt these ideas they must do more than outline rational, legal arguments, since what is required is a discursive shift beyond existing discursive frameworks. And as I have shown, through efforts to constitute an exemplar, they attempt to do just this. However, the decision to identify with the discourse of climate justice and 'vivir bien' is not conceived as an arbitrary or even contingent decision. It is the inevitable and logical decision of an informed, educated and politically conscious citizenry. As Cristian Dominguez explains: "the Water War<sup>17</sup> has shown that the people have the power. We are giving them the tools to make the right decisions" (2010). For organisers of the climate tribunal, climate justice and 'vivir bien' are not another equally valid but contingent construction of

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17 The Bolivian Water War was a series of large scale protests in the 2000s when the protest movement successfully reversed the government's decision to privatise water services.



reality, they reflect the common good. And in their efforts to persuade audiences to identify with their project they do not envision an act of arbitrary identification, but try to appeal to their common humanity.

### **5.3.5. The democratic contribution of the climate tribunal and understanding divergences between forms of a-legal space**

In the preceding discussion, I aimed to explore how we should understand differences in the a-legal space tactic. In particular, how do we explain the centrality of information in some kinds of a-legal spaces, whilst this component is absent from others? The difference might suggest that these are not the same kinds of political projects. Information-based initiatives, as I have shown, are more readily explained by the deliberative democratic model. Whilst non-information-based a-legal initiatives cannot be understood as deliberative democratic exercises. These actions which function on a purely symbolic level are, instead, captured by the radical democratic model of democracy. However, looking at the climate tribunal, what is interesting is the applicability and the utility of both theoretical frameworks, to capture different aspects of the communicative act taking place.

So, there are two sets of questions which need answering. Firstly, how should we characterise the democratic contribution of the climate tribunal? Is this a deliberative democratic exercise, intended to educate and inform the public and thereby contribute to realisation of the common good? Or is it better conceived as a disruptive practice which can contest the hegemonic order and contribute to the emergence of a counter-hegemonic discourse? Secondly, what does this tell us about the coherence of the idea of an a-legal space strategy? Are different forms of a-legal space best

conceived through divergent models of democracy and political change? Or is there a way in which we can make sense of the differences in form?

A persuasive case can be made for the climate tribunal's contribution to deliberative democracy. Organiser accounts reflect the faith they hold in the public's capacity for empathy and rationality. And through the climate tribunal they seek to educate and inform audiences, so that they will "make the connections that have to be made" (Peredo Beltrán 2010). However, the deliberative model is fatally limited in its ability to recognise the power inequalities which disadvantage proponents of marginal and counter-hegemonic discourses such as climate justice. Actors turn to a use of a-legal space when formal legal and political channels are closed to them; they articulate claims which cannot be heard within the formal legal system. As such the deliberative framework is particularly inadequate to capture all that they are about. Moreover, I've shown that despite the deliberative components, the climate tribunal's communicative act exceeds what can be explained through this framework. Much like non-information based a-legal initiatives, the climate tribunal promises to function as an exemplar, which disrupts the hegemonic order and invokes the possibility of an alternative.

I suggest that information-based and non-information-based a-legal initiatives are indeed part of the same phenomenon and strategy, and that divergences in the form can be explained by the discursive context in which they are employed. More specifically, these divergent approaches are employed at different stages in the life cycle of a hegemonic project. Peoples' tribunals, citizens' debt audits and other information-based initiatives are more commonly employed, and most relevant, at the earlier stages in a hegemonic project, where the objective is to lay the foundations

for a new discursive project. The objective of the a-legal exercise in this context is to create a source of authority for the claims of the fledgling hegemonic project. This interpretation resonates with Jayan Nayar's (2001; 2006) account of peoples' tribunals, which are described as:

something more than an articulation of protest... [they are] about creating a different authority for judgement and action altogether, based on other 'word-worlds' of law that are authored by peoples in action (2001, p. 3 check).

Non-information-based initiatives, such as the *Aboriginal Tent Embassy*, unofficial referenda, or Free States, are utilised at a later stage in a hegemonic project. They reflect a discourse which is more developed, in which a longer 'chain of equivalence' connects different groups together, united by their common identification with an empty signifier (Laclau and Mouffe 1985; Laclau 1990). This is not to say that these non-information-based a-legal initiatives don't have a hegemony building function. Commentators on the *Aboriginal Tent Embassy*, for example, remarked upon how the Embassy functioned as a signifier which united Australia's diverse aboriginal groups (Robinson 1994). But, unlike peoples' tribunals, debt audits and other information-based initiatives, they do not involve an elaborate process of developing legal arguments, based on technical evidence, to support a wider political project. In these cases, the discourse is already well formed, and the a-legal initiative functions to reinforce this. Here too the a-legal exercise has a legitimating function, as I argued at length in chapter 4, with respect to the *Radical Cause* party's referendum on Pérez. But the structure of this legitimacy claim differs somewhat. Legitimacy claims are based more on levels of popular participation, rather than technical legal arguments supported by evidence.

By way of support, I would point to the high levels of media coverage that non-information-based a-legal initiatives have often received, in contrast with their information-based counterparts. Whilst not always the case, unofficial referenda such as the first Catalan independence referendum in Arenys de Munt, Catalonia; Zelaya's *fourth ballot box* poll, and the Colombian students' *seventh ballot*, have captured the attention of national and international media. As did the *Aboriginal Tent Embassy* (Robinson 1994). This is suggestive of a more mature hegemonic project, in which the demands of organisers make sense and have resonance with large sections of the public. Equally, these initiatives are often dependent upon high levels of participation to have any value. Unlike peoples' tribunals or debt audits, for example, without mass public participation an unofficial referendum has limited value.<sup>18</sup> This is in contrast to peoples' tribunals which have often received very limited media coverage (Klinghoffer and Klinghoffer 2002).<sup>19</sup> Klinghoffer and Klinghoffer's (2002, p. 184 - 185) account of this phenomenon is interesting:

Overall, international citizens' tribunals over the last two decades of the twentieth century have not been highly effective, as they have been too partisan, shrill, anti-American, and leftist. While often raising important issues and presenting critical evidence, their credibility generally has not been accepted by the media or public.

Putting to one side for now the question of impact, these scholars' dismissive comments make sense when we understand peoples' tribunals to be articulating a

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18 The World Referendum on Climate Change, initiated by Bolivian civil society in 2010, is one example of a referendum which failed to generate wide-scale take-up. The explanation may be that this initiative did not exemplify a well-developed hegemonic project: ideas about climate justice in 2010 (as now) were still marginal in most contexts. Which is to say this is an example of an a-legal tactic employed in the wrong context.

19 As was commented about the World Tribunal on Iraq: "almost blanket media blackout" (Medialens 2005).

counter-hegemonic discourse with limited wide-scale acceptance. Their depiction of peoples' tribunals as "shrill" (ibid.) and lacking credibility suggests that these a-legal initiatives speak in a language that is not yet well understood.

This account allows us to retain the notion of a coherent a-legal space strategy. In all instances these initiatives can be understood as a type of discursive strategy to support the development of a wider hegemonic project. Through harnessing the authority associated with law, constituted power, and the 'constituent will', these initiatives can be conceived in terms of the construction of tipping events, which will shift the range of political possibilities available. But how exactly this task is approached may vary, dependent on the discursive context.

#### **5.3.6. The elite-led critique**

As sites in which the voices of the marginalised and oppressed are elevated and afforded a new authority, it may appear that a-legal activities should be championed for their emancipatory potential. There is reason for caution, however. As Borowiak (2011, p.169) points out, civil society is: "saturated with politics and power struggles. It has its own regimes, its own accountability problems, and its own need for reflexivity." Whilst (in most cases) a-legal activities originate in civil society, the key organisers are often not the marginalised and oppressed themselves. This is perhaps most true of the peoples' tribunal format, often instigated by international NGOs and academics, and based on a somewhat elitist model with juries often comprised of Nobel Prize winners and well known intellectuals. Indeed, it could be argued that the

task of successfully mimicking domestic or international legal institutions requires financial and social capital which is a barrier to all but elite groups.

In this sub-section, therefore, I explore the relative influence and contribution of the social movements, rural communities, international environmental networks and other organisations listed as participating in the *International Tribunal on Climate Justice*. I explore which individuals and groups may have been more or less able to influence decisions and act in the planning and execution of the tribunal. And what, perhaps, does its civil society basis mask? I argue that in some ways the tribunal could be said to recreate the structural inequalities of the society within which it takes place. And that this is to some extent unavoidable and a feature of this form of resistance. However, organisers demonstrate sensitivity to this tension and a strong commitment to enabling the participation and influence of the marginalised communities worst hit by climate change.

Several components of the climate tribunal can be seen to embody the structural inequalities of power which as a political action the tribunal was designed to challenge. Firstly: the specific cases presented to the preliminary hearing of the tribunal in 2009 are interesting to consider. As the tribunal seeks to emphasise, the impacts of climate change have disproportionately affected the poor. Accordingly, each of the cases presented during the tribunal highlighted the devastating impacts of climate change on indigenous or peasant and/or poor communities across Latin America.

The Bolivian case is an interesting example. Entitled 'Denunciation of human rights abuses resulting from global warming for acts and omissions of the countries

included in Annex 1 of the UN Framework Convention on Climate Change (UNFCCC)', the case outlined the effects of climate change on the Khapi community, in La Paz, Bolivia. The Khapi are a small indigenous community of around forty-eight families, based at the foot of the Illimani glacier, approximately fifty kilometres from the city of La Paz. The community practices subsistence farming, using traditional farming techniques. The Illimani glacier is their only source of water and its shrinking in recent years due to climate change has had dramatic effects on their food security and way of life. They experience regular water shortages and droughts, as well as excessive heavy rains which destroy crops. The community can no longer produce sufficient food for their own subsistence. Young people increasingly relocate to the cities in search of work. Scientists predict that the community will be forced to relocate in the medium term due to water shortages.

The La Paz based NGO, *Sustainable Water*, has worked with the Khapi community for a number of years and was responsible for collating the information for and coordinating the case for the climate tribunal. As organiser Martin Vilela explains, the role of *Sustainable Water* in the tribunal was “to bring forward” this case. Therefore, a picture emerges in which the lives and struggles of an indigenous rural community living in extreme poverty are presented as 'the case', which is coordinated by the La Paz-based, highly educated, largely middle class, white NGO workers, subsequently to be presented for judgement by a panel of judges from across the continent and world. A power imbalance between participating groups seems unavoidable.

Organisers, however, demonstrate a strong commitment to enabling the Khapi community to remain central to the process. Martin Vilela of *Sustainable Water* explains:

I assumed a role between the work of the community and preparing the case... because, of course, it's not that we went to make the case – they [the Khapi community] had to be involved, and through their testimony they were able to demonstrate and verify that these violations exist. And basically to construct the foundations [of climate justice jurisprudence] (2010).

However, the extent to which members of the community were indeed able to participate in and influence construction of the case is unclear, whilst it *is* clear that the tribunal is premised on use of an exclusionary form of knowledge. As Vilela comments:

What we have done is demonstrate a little what are the impacts of climate change and how these impacts threaten human rights... the right to life, the right to water, food, health, self-determination, culture, food sovereignty, and others such as the rights of women, of children and adolescents.

Compilation of this case evidently required a knowledge and understanding of existing human rights legislation, and some understanding of the requirements of legal evidence and legal reasoning. Whilst the Khapi community members may have contributed to the process, anyone without expert knowledge could have played only a secondary role. Arguably, the decision to present the impact of climate change on the lives of the Khapi community in the language of law comes at the expense of (most) community members' ability to lead the process.

Perhaps, however, this may be recognised as one trade-off to be made, in exchange for the hegemonic and legitimating potential of law. One fruitful way of



understanding the dynamic, I suggest, is through Jayan Nayar's concept of 'activist legality' (2001). In his analysis of peoples' tribunals and their contribution to a 'Peoples' Law' Nayar acknowledges that peoples' tribunals cannot be described as initiatives of the subaltern, and neither therefore are they a form of 'subaltern legality'. However, he suggests they be understood to play a kind of interlocutory role, between the oppressed and powerless that they seek to represent, and the dominant institutions of power. Peoples' tribunals thereby exemplify an 'activist legality', whose role is to translate the voices of the subaltern into a language which can be understood, and has authority, in wider contexts. Such a characterisation of the climate tribunal finds support in the comments of organisers, such as Alexandra Flores' (Solon Foundation) explanation that: "we started to look for tools in order to be able to make justice accessible to communities" (2010).

However, there are tensions to such a dynamic, as are inherent to any interlocutory act. In describing their plans for the next session of the Tribunal (then planned to take place in 2012) Flores explains their intention to construct a jury which "will better attract the attention of the press, because the first hearing of the tribunal did not have much coverage in the press" (2010). She adds:

There is this preoccupation, that we want to establish a jury... a little more... not objective, but with more social credibility shall we say, with more scientists, Nobel prize winners... (Ibid.).

When compared with the Jury of the 2009 Preliminary Hearing, her comments are revealing of a tension at the heart of such initiatives. The 2009 jury was made up of representatives of significant social and indigenous movements and international

environmental networks. Members included indigenous leaders, from the *National Association of Rural and Indigenous Women of Chile* and the *Coordinating Committee of Andean Indigenous Organisations*; representatives from politically orientated NGOs including *Jubilee South*, *Friends of the Earth* and the Holland-based *Transnational Institute*; and social movements such as the *Mothers of Plaza de Mayo*, amongst others. Despite the variety in their backgrounds, these jury members share a common counter-hegemonic discourse, and can be expected to have significant 'social credibility' – as Alexandra Flores puts it (ibid.) – with the range of movements and other actors associated with the campaign for climate justice in Bolivia, and globally. Yet organisers, evidently, feel a pressure to recruit a different demographic, including “more scientists, Nobel prize winners” (Flores 2010) to strengthen their social credibility of a different kind; or with a different audience. This is an inherent tension in the peoples' tribunal model, where organisers strive for mainstream acceptance and media coverage, through the use of particular kinds of elites, who almost standardly do not belong to the communities which are affected by the injustice under examination, nor have any connection with their particular historical struggles.

However, in the case of the climate tribunal, organisers demonstrate an acute sensitivity to this tension, and describe their intentions to achieve a balance. As Alexandra comments, about the requirements of a jury for the climate tribunal: “They must be credible, but at the same time have 'feeling' with civil society” (Interview, 2010). Expanding on the need to achieve a balance between mainstream credibility and civil society demands she can be interpreted as encapsulating the 'activist legality' strategy, its philosophical basis and inherent tensions:

When you talk of justice, I think that you always have to be on the side of those that have the greatest need, rather than those that don't shall we say... The Tribunal works in this sense, trying to reach this "objectivity" in quotation marks, in a jury that is a little more shall we say, independent, ... for example scientists, well known people, academics, but at the same time to not lose the social side of the Tribunal, because this is what the organisations demand, even in Cochabamba [the alternative climate change summit], the indigenous people in the Climate Tribunal working group at the conference were saying 'it cannot be that people judge us who don't live our reality'.

Within a framework of activist legality there will be varying degrees to which the subaltern subjects of an intervention are able to influence and hold to account the activist interlocutors. In addition, there will be varying degrees of crossover between the subaltern subjects and activist agents. Where there is evidence of limited accountability and limited crossover, the 'elite-led critique' of peoples' tribunals presents a more serious challenge. In the case of the climate tribunal, however, there is evidence of accountability, subject/activist crossover, and effective discursive representation.

### **5.3.7. The Foucauldian Critique**

In 1972, for a special issue of Sartre's magazine *Les Temps Modernes*, Michel Foucault and the leader of French Maoist group *Gauche Prolétarienne*, debated the nature of 'popular justice'. Both Sartre and the *Gauche Prolétarienne* had become enthusiastic supporters of peoples' tribunals, after they had initiated one in the French mining town of Lens two years earlier. In Lens sixteen miners had been killed in a mine explosion, yet despite evidence of countless safety violations the local judiciary had failed to press charges against the company. The Lens tribunal found the mining

company guilty of murder, and that it “intentionally chose output over safety, which is to say, the production of things over people's lives” (Sartre quoted in Wolin 2010, p. 29). In 1972 the *Gauche Prolétarienne (GP)* were planning their next peoples' tribunal which would address allegations of police brutality. However, Foucault expressed deep misgivings about the peoples' tribunal tactic. He questioned whether popular justice - “acts of justice by the people” - can be organised in the form of a court. For Foucault, the court is not “the natural expression of popular justice”, but rather “its first deformation” (1972, p. 1 - 2). He points to the role of the court in sustaining the class structure, through “dragging along with it the ideology of bourgeois justice” (ibid., p. 27). Moreover, he argues, efforts to reclaim the form of the court are destined to recreate the same oppressive structures:

Can we not see the embryonic, albeit fragile form of state apparatus reappearing here? The possibility of class oppression? Is not the setting up of a neutral institution standing between the people and its enemies, capable of establishing the dividing line between the true and the false, the guilty and the innocent, the just and the unjust, is this not a way of resisting popular justice? (Ibid., pg. 2).

In the wider literature addressing law and resistance, the complex and paradoxical impacts of legal strategies for resistance are a recurring theme (Lazarus-Black and Hirsch 1994). Scholars interested in the use of law as a tool for social justice emphasise the ambiguous nature of law's effects in the struggles of subordinated peoples (ibid.; Merry 2000). As Lazarus-Black and Hirsch (1994, p. 4) explain:

Law governs through paradoxical forms and practices which curb certain injustices as they create others... ideologies and practices in and around legal arenas reproduce hierarchies

even as they constitute new social groups and categories that, in turn, transform law's meaning and application.

For some this is to sacrifice too much. In her seminal book, *Feminism and the Power of Law*, feminist legal scholar Carol Smart (1989) argued that law is a product of, and works to sustain, the patriarchal system. As such, "in accepting law's terms in order to challenge law, feminism always concedes too much" (ibid., p. 5). Moreover, building on Foucault's analysis of scientific discourse, Smart argues that law functions in much the same problematic way. Through its claim to truth and objectivity, law disqualifies other forms of knowledge in general, and feminism in particular. Smart advocated that feminists abandon legal strategies altogether and seek out 'non-legal strategies' for resistance.

The arguments of Foucault (1972) and Smart (1989) encapsulate what is perhaps the most serious challenge to the utility of a-legal space as a political strategy. As I have shown in earlier chapters, actors turn to the use of a-legal space in response to the closure of the formal system. They make political demands which cannot be heard within the formal legal or parliamentary system, and the turn to a-legal space is an attempt to create an opening, in which they will be heard. However, if, as these theorists would suggest, the use of the legal and state form will inevitably recreate hegemonic conceptual categories and frameworks, these initiatives might do more to reinforce than to contest and subvert the prevailing legal and political order. In this sub-section I discuss the significance of this 'Foucauldian critique' to the use of a-legal space generally and the *International Tribunal on Climate Justice* in particular. I argue that whilst it indeed captures the paradoxical nature of this strategy and gives reason for caution, the Foucauldian critique is too totalistic. There is more room to contest

the hegemonic order within a-legal spaces than in formal legal spaces, which this critique does not account for.

Firstly, it is helpful to untangle the somewhat different claims which comprise this broader critique. Two distinct, though related, claims can be identified. The first suggests that these initiatives will reinforce *legal hegemony*: the power and authority of the law at the expense of other kinds of knowledge and practice. In the case of less narrowly *legal* initiatives, such as unofficial referenda, debt audits or the *Aboriginal Tent Embassy*, the analogous charge is that these initiatives reinforce the hegemony of the state and state processes more generally. In either case, the result is to undermine voices, practices, and knowledge which emanate from outside of the state or the discourse of law. This claim is hard to deny: the a-legal space strategy is based on an appeal to the authority and legitimacy of law and the institutions and processes of the state. Hence, these initiatives reify and reinforce the hegemonic status of law and the state, per se. The second strand to the Foucauldian critique is that through speaking in the language of law, and emulating institutions of the state, a-legal initiatives will inevitably recreate dominant categories and systems of meaning, and thereby reinforce hegemonic structures more generally (be it patriarchy, neoliberalism, colonialism, or otherwise). This second claim is the more problematic, since it suggests the ultimate futility of the a-legal space strategy. However, as I will seek to show, this argument fails to appreciate the freedom to creatively employ law and experiment with visions of the state, made possible within a-legal spaces.

The *Peoples' International Tribunal, Hawai'i*, which tried the USA for the takeover of Hawai'i, resource appropriation and cultural destruction (Merry 1996), exemplifies

particularly well the plural, bottom up and counter-hegemonic law which is sometimes developed in these spaces. The jury's verdict states that the tribunal "refuses... to define law in a formalistic or colonialist manner", and instead is "guided by five mutually reinforcing conceptions of law" (cited in *ibid.*, p. 77). These include indigenous Hawaiian law; UN Declarations; the US Constitution and US Law; the 1976 Algiers Declaration on the Rights and Duties of Peoples; and "the inherent law of Humanity", defined as "a higher law based on the search for justice in the relation among persons and peoples and their nations" and "a law establishing the conditions for harmony between human activity and nature" (Interim Report 2 – 4, cited in *ibid.*, p. 77).

Other peoples' tribunals are founded on a similarly radical and counter-hegemonic conception of law. As Byrnes (2012) notes, peoples' tribunals have at different times drawn on "two strands of legal authority" including nation state law and "the law of the peoples": "a body of law which claims its validity from outside the Westphalian system in the sovereignty of peoples that exists independently of that system". The principle legal instrument within this tradition is the 1976 Universal Declaration on the Rights and Duties of Peoples (the Algiers Declaration). The Algiers Declaration was drafted by a gathering of jurists and political leaders in 1976, initiated by Italian legislator Lelio Basso, who went on to found the Permanent Peoples' Tribunal, with the objective to "more fully elaborate and legitimise the concept of peoples' rights" (McCaughan 1989, p. 2). Peoples' rights are intended to complement Human Rights, which are conceived in terms of the rights of the individual (*ibid.*). The Algiers' Declaration asserts the rights of peoples to existence and political self-determination, and to control over their resources, economic system, culture and environment. It also calls for the protection of liberation movements. The Algiers declaration is not

‘official’ international law: it has never been sanctioned by an inter-governmental body (Stavenhagen 2012).<sup>20</sup> But it has had some influence on mainstream international law (ibid.) and has become an important document within the peoples’ tribunal tradition, the Permanent Peoples’ Tribunal takes the Algiers’ Declaration at its ‘conceptual basis’ (Lelio and Lisli Basso Foundation 2014).

These peoples’ tribunals have not engaged in an unselective recreation of the dominant legal order. As Merry (1996, p. 68) puts it, in her discussion of the *Peoples’ International Tribunal, Hawai’i*:

The law they mobilize is not simply the law of the state or the United Nations but an appropriated notion of law that joins indigenous concepts with state and global law. Thus, although they talk rights, reparations, and claims--the language of law--they construct a new law out of the pieces of the old. Like the English spoken in Africa, the colonial law imposed by the West is developing its own cadences and vocabulary. It is becoming a vernacular law rather than transnational imperial law.

The Foucauldian critique is pertinent to these initiatives. Whilst employing a “vernacular law” (ibid.), they may simultaneously use and re-affirm oppressive legal categories and arguments. But this should be examined on a case by case basis. Outright dismissal of the form ignores the potential for contestation of legal categories exemplified in pluralist initiatives such as the *Peoples’ International Tribunal, Hawai’i*.

However, not all a-legal initiatives take this radical pluralist approach. As I highlighted in chapter 1, peoples’ tribunals and other a-legal initiatives have varied in

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<sup>20</sup> To this extent the Algiers Declaration itself might be understood as an a-legal space/initiative.



the extent to which they attempt to adhere to official legal forms and processes. In stark contrast to the Hawaiian tribunal, some initiatives have employed a narrow and conservative use of hegemonic legal tools. One example is the *Women's Court of Canada*, a feminist judgement writing project for which a collective of feminist academics and lawyers re-write key rulings of the Supreme Court of Canada which are perceived to have denied women justice. Unlike the plural application of law in some peoples' tribunals, this court's re-written feminist judgements draw only on the equality clause in section 15 of the Canadian Charter of Rights and Freedoms (Hunter 2012).

The more conservative approach exemplified in some initiatives is not, however, necessarily more vulnerable to the Foucauldian critique. I would argue that here too a closer analysis of specific cases is required. Organisers of the Women's Court of Canada explained that they sought to show: "how a more developed substantive equality analysis could be incorporated into the interpretation and application of section 15 of the Charter" (ibid., p. 3 – 4). Reflecting that a successor project might be "bolder and more visionary", and "try to envision a very different legal system from the existing one", organisers explain their intention in this instance was to show that their judicial decisions were ones that could have been made by the Supreme Court of Canada, at the time they were made (Majury 2006). Hence the objective was to contest and expand dominant forms of legal *reasoning*, (rather than promote alternative legal tools or concepts). The subversive and emancipatory value of their efforts is not, I would argue, lost through their conservative use of existing legal tools however imperfect these may be. In short: the freedom of the a-legal form allows for discursive work that could not be done in the formal legal arena, and to which the Foucauldian critique fails to give due credit.

What approach, then, did the *International Tribunal on Climate Justice* take in their struggle to articulate and promote climate justice, through use of the a-legal form? Did they, like the Hawaiian tribunal, attempt to promote a counter-hegemonic law based on a plurality of legal traditions and philosophical frameworks? Or, did they, like the *Women's Court of Canada*, opt to operate within the confines of hegemonic state or international law but strive to demonstrate the potential for its progressive and egalitarian application? And, in either case, how does it fare in light of the Foucauldian critique? Viewed through this framework, the climate tribunal is an interesting case.

On the one hand, the climate tribunal exemplifies a conservative strategy based on the application of hegemonic legal tools. Several organisers emphasised the importance that only “formally recognised” legal instruments were employed by the tribunal (Vilela 2010; Flores 2010). And indeed the jury's final report is centred on an extensive list of the specific UN treaties which are judged to have been violated by climate change.<sup>21</sup> There is one reference to indigenous legal traditions in the jury's final report, in ‘General Observation 5’, where it notes:

Application of an extractivist and export-based development model - perpetuated by governments and transnational corporations - is provoking systemic and permanent

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21 In their list, the International Covenant on Economic, Social and Cultural Rights (1976) (ICESCR) and General Comments of the Committee on Economic, Social and Cultural Rights are together cited five times. The International Covenant on Civil and Political Rights (1976) (ICCPR) is cited four times. The Universal Declaration of Human Rights (1948) is cited three times. Together these three documents constitute what is known as the International Bill of Human Rights, meaning that this instrument is drawn on a total of twelve times in the jury's report, and constitutes almost the whole first page of jury observations. The American Declaration of Rights and Duties of Man (1948) – a product of the Organization of American States, rather than the UN - is also cited in two places. But in both instances, it is supported by reference to UN treaties (UNDHR and the ICCPR) which are also deemed to have been violated (Fundación Solón 2009b).

conflicts with collective rights, poor use of territory, and violation of the rights of nature. Also with Traditional Law based on indigenous ancestral knowledge and wisdom about management of all that is material and spiritual, with which compliance guarantees balance with the Pachamama and the permanence of life (Fundación Solón 2009b, p. 30).

So the violation of indigenous law receives a mention, but as a supplementary point. It does not constitute a jury 'General Observation' in its own right, let alone provide a basis to the jury's findings. There is no detail provided as to which indigenous legal system(s) they refer, or to the contents of the indigenous laws in question. This omission in the context of a climate tribunal, in which some of the worst-impacted victims include indigenous communities, is noteworthy. Arguably this reinforces a dismissal of indigenous law as 'not really law'. Equally conspicuous by their absence are references to the Algiers Declaration, or already existing earth rights legislation such as Ecuador's Rights of Nature, ratified in their 2008 Constitution. Neither is there any reference to the growing movement for Mother Earth Rights, which was gaining momentum in Bolivia by late 2009.

The climate tribunal's conservative application of mainly hegemonic legal tools likely reflects a similar strategy to the *Women's Court of Canada*, who sought to show how different legal rulings were possible and correct, within existing recognised legal frameworks. It was perhaps the product of a utilitarian calculation: they sought to challenge climate injustice through law, not promote legal pluralism, regardless of whether organisers themselves advocated a more pluralist conception of law. The aim was to show that existing uncontroversial legal norms had been violated, and hence function as a source of authority for those demanding state action on climate change.

However, there is evidence of something else going on in the jury's final report. The use of UN Human Rights Law as a basis to the tribunal's findings is juxtaposed with radical political demands which challenge the economic and political order. 'General Observation 1', at the start of the jury's report, assumes the appearance of a key message and functions to frame the rest of the report. It is here that the jury defines the problem that is to be addressed:

The capitalist economic system has generated the climate change that we are now living and impedes a rapid and effective response to its impacts. International agreements on trade, finance and investments are driving the expansion of industries with intensive use of fossil fuels, other natural resources, such as the expansion of agriculture and industrial farming (including monocrops). These activities release large quantities of carbon and contribute to the destruction of forests that regulate the climate (Fundación Solón 2009b, p. 29).

The release of carbon dioxide is carefully framed as a product of the capitalist economic system. Understood through Kuhn's (1970) exemplar framework (discussed above), they have constructed the 'problem' part, of the "concrete problem-solution". And throughout the rest of the report they illustrate how existing UN Human Rights law can be applied to solve this problem. Hence, alongside and indeed through the careful application of internationally recognised, uncontentious legal instruments and concepts, there is something else going on. The 'problem-solution' constructed by the tribunal invokes a different legal order which, in Lindahl's terms, has an entirely different "normative point" (2013, p. 73) to the extant neoliberal international legal order. The careful use of UN Human Rights law, at the expense of indigenous law, peoples' law instruments such as the Algiers Declaration,

or earth rights legislation, should be understood as a strategic choice. The aim is to normalise their radical political analysis through drawing on the hegemonic power of Human Rights law. And their capacity to create an effective exemplar of this other legal order depends on successfully harnessing this hegemonic power.

Various novel legal concepts, with significant implications, are introduced, including 'climate debt', Earth Rights, and Crimes Against Nature. But they are presented as following logically from existing norms and concepts. The second General Observation, for example, notes that:

considering the undeniable fact that climate change affects and will affect billions of people, systematically violating their Civil, Cultural, Economic, and Political Rights, we can define climate change as a Crime Against Humanity (Fundación Solón 2009b, p. 26).

Then, presented as an additional observation which merely builds on the first, they continue:

In the same way, for their gravity and systematicity, we consider that the crimes against the rights of nature constitute what can be called a 'Crime Against Nature' (ibid.).

The new category of Crime Against Nature, constructed as analogous to the already accepted notion of Crime Against Humanity, entails a radically different conception of rights, and the kinds of things which can be protected through rights. But the implication here is that it represents a logical extension of existing legal concepts and categories. This is what Duncan Kennedy (2008) calls "legal 'work'". Kennedy has argued against the positivist legal theory of Hart and Kelsen, according to which there is an area of law which is fixed, and determinate, the 'core', in contrast

to the ‘penumbra’, in which law is indeterminate. In fact, argues Kennedy (ibid.) part of the work of the judge or legal scholar is to ‘work’ the legal materials and to define what belongs in the ‘core’ and what belongs in the ‘penumbra’. In other words, the act of legal interpretation is itself an ideologically motivated and contingent process; neither neutral nor objective. The climate tribunal jurists can be seen to have carefully presented significant new conceptual categories as within the domain of settled law. The impression created is one of logical, methodical exercise, instead of an appeal for a radical conceptual shift in legal frameworks.

## 5.4. Conclusion

The *International Tribunal on Climate Justice* provided a space in which representatives of social movements, community groups, and civil society from across Latin America came together to articulate how aspects of the economic and political system – as they see it – are devastating their lives. An analysis of the groups and individuals who participated through presenting cases, serving on the jury, or organising the event reveals an emerging common discourse structured around the key signifiers of climate justice and ‘Living Well’, and defined in opposition to the extant neoliberal order. The tribunal can be understood as narrowly intended to advance the case for new legal infrastructure to address climate change, but this captures only part of the picture. Organiser accounts suggest it was also understood as an expression of and intended to advance their broader counter-hegemonic project.

In section 5.3 I explored the strategy by which they attempted to promote their wider counter-hegemonic project and alternative ‘form of life’ (Wittgenstein 2010). This

analysis has significant implications for a theory of a-legal space, since it relates to the difference between information-based and non-information-based a-legal initiatives. If it transpired that the climate tribunal was best understood through a deliberative democratic framework, we would have to question the coherence of a single a-legal space strategy. However, I have shown that the deliberative framework – whilst indeed capturing key components to what took place – is ultimately inadequate to make sense of the task facing organisers of the *International Tribunal on Climate Justice*. Instead, understanding the tribunal as attempting to create an exemplar can capture both the deliberative and non-deliberative communicative modes in which organisers have engaged. Complex legal arguments, supported by evidence, are better understood as attempts to create a ‘problem-solution’: an exemplar in the Kuhnian sense, rather than through a deliberative democratic lens. Different forms of a-legal space should indeed be understood as part of the same phenomenon and same broad strategy, but reflect the different stages in a hegemonic project. The construction of new ‘problem-solutions’ is necessary in the earlier stages of a political project. In contrast, initiatives such as a-legal referenda which allow for the affirmation or negation of a single statement (‘Should we convene a constituent assembly’; ‘Should Catalonia secede from Spain?’ ‘Should Carlos Andrés Pérez continue governing?’) take place at a later stage, and reflect an already well constructed antagonistic frontier (Laclau 2005).

Finally, I considered two critiques of the a-legal space strategy which question its emancipatory potential. Critics of this approach might point, firstly, to the elite-led nature of these initiatives. Secondly, they might question the extent to which one can hope to contest and subvert the extant legal and political order, and exemplify an alternative, through a strategy based on replicating elements of this order. The two

critiques and my responses to them are ultimately connected. I argued that the *International Tribunal on Climate Justice*, like peoples' tribunals in general, is indeed vulnerable to this critique. The decision to speak in the language of law comes at the expense of the ability of the most marginalised groups to lead the process. However, those leading this process, their motivations, and their desire to transform the system are all a part of the matter. For organisers of the climate tribunal, creating a space for the voices of those most affected by climate change was central. To this extent the tribunal exemplifies what Nayar calls 'activist legality' (2001): it is an interlocutory space which is intended to "make justice accessible to communities" (Flores 2010). Here we can see the relevance to the Foucauldian critique. As Nayar explains, the aim of activist legality is:

to subvert the languages and symbols that are recognised by the dominant so that the cause of the subaltern within specific contexts of liberational and resistance endeavours may be served (2001).

An analysis of the climate tribunal's use of law reveals their careful project to create an exemplar of a fundamentally different legal response to climate change. Whilst they speak in the language of UN Human Rights law, the legal order which is invoked is based on the philosophy of 'vivir bien' (living well) and would institutionalise the rights of Mother Earth. In short, it has what Lindahl (2013) would call an entirely different 'normative point' to the dominant international legal order.



## Conclusions

Inspired by the *Radical Cause* party's unofficial and unauthorised referendum on President Pérez, Marta Harnecker posits the existence of another kind of legal space: a "whole other arena" for political action, distinct from the legal and the illegal (2007, p.138). My interviews with the referendum organisers echo this characterisation of what took place. As one *ex-Radical Cause* leader explains: "It was an insurrectionary exercise, from a non-violent route" (Uzcategui 2012) and as another puts it "we wanted to break the *constitutional*, democratically" (Trincado 2012). Their comments, and Harnecker's argument, can be best understood in context. The *Radical Cause* party was a response to a particular historical moment: founded by an ex-guerrilla leader and others who recognised the failure of the armed struggle yet sought to transcend the limitations of Venezuela's 'pacted' democracy, in which power had alternated between two ideologically similar hegemonic political parties since the start of the modern democratic period in 1958. For Harnecker, this referendum offered an alternative to the reform/revolution dichotomy which had defined left strategy in earlier decades. But did the *Radical Cause* party's referendum transcend something more than a historical dichotomy? The aim of this project has been to explore this idea, and the transferability and the utility of a-legal space as a political strategy. In this concluding chapter I will draw together the insights and conclusions of earlier chapters and consider the consequences for a theory of a-legal space. Five research questions were identified in the introduction as guiding this project:

1. Can we sustain the notion of a-legal space as an ontologically distinct category of action which transcends the dichotomy between the legal and the illegal?
2. Why do actors adopt this approach and what do they hope to achieve?

3. By what mechanism might this tactic function to bring about social or political change?
4. When has this approach been successful and what factors may influence its impact?
5. How do different forms of a-legal space differ and to what extent do they really constitute a common tactic?

These questions, which I discuss in turn, provide the structure for the main part of the discussion. I then turn to the theoretical and practical implications of this research, before concluding with a discussion of the gaps in this project and avenues for future research. I consider the ontological status of a-legal space first, before turning to questions 2 to 5 which address its functional value.

### **The ontological status of a-legal space**

The problem with Harnecker's argument is that institutional politics and illegal insurrectionary activity is not a real dichotomy into which all action must fit. The *Radical Cause* referendum did "not fit into the above dichotomy" (Harnecker 2007, p.112), but in this it was no different to the new social movements which emerged across Latin America in the 1990s. Hence, the elusive notion of an ambiguous other legal space appears to be misleading.

However, I have used Hans Lindahl's (2013) theory of a-legality and legal order to show how the referendum and initiatives like it indeed constitute an ontologically distinctive legal category of action. As a starting point, I have argued that there are –

as Harnecker suggests – many initiatives around the world which take this form. These include other unofficial, unauthorised referenda but also peoples’ tribunals, citizens’ debt audits, citizens’ monitoring projects and other forms. Despite the variety of political, historical and cultural contexts in which they have taken place these activities share certain common characteristics, which distinguish them from other forms of contentious politics. Firstly, they assume a quasi-legal, quasi-institutional form, emulating the symbols, processes and language of formal institutions of constituted power. Secondly, they do so without any state-sanctioned official basis, or – where organised by state or sub-state actors – the initiative exceeds any recognized basis in state law. (President Zelaya’s planned *fourth ballot box* poll is one example of the latter kind). Finally, they are framed as a response to institutional or democratic failure, and as embodying an alternative. Building on this empirical observation, I have shown how these initiatives fit into Lindahl’s (2013) category of a-legality.

For Lindahl (ibid), certain strange and non-conventional behaviours can be characterised as a-legal because they question and contest the way in which a legal order divides the legal and the illegal. These behaviours resist classification as either legal or illegal within a given legal order, and hence appear as *a-legal*, because they invoke another legal order through appearing as if regulated by this other order. Hence, the crucial contribution from Lindahl is the suggestion that a-legality is a *relational* phenomenon: behaviours or situations are a-legal *with respect to a particular legal order* because they challenge how this order draws the boundary between the legal and the illegal. Like the behaviours and situations Lindahl describes, peoples’ tribunals, unofficial referenda and other a-legal initiatives can be characterised as a-legal because they reject the way in which the extant legal order

defines the legal and the illegal. A-legal initiatives challenge a given extant legal order, and they behave as if in accordance with another legal and/or political order, and thereby invoke this other order.

Of course, these initiatives are not quite the same as the behaviours and scenarios which typify a-legality for Lindahl. The first most significant difference is that Lindahl's examples, such as land occupations and insurrection, are legally contentious and provocative, if not explicitly illegal, in terms of the extant order. In contrast, there is often no suggestion that a-legal initiatives have broken the law. They may be accompanied by explicitly illegal activity, or be used to justify it, but these initiatives are in general *lawful*. This is significant because in Lindahl's account the transgression of legal boundaries is central. It is only through questioning and challenging extant legal boundaries that we can reveal the limits of a legal order. Just as one cannot speak directly about what lies outside the extant discursive structures, one cannot speak of what lies outside the extant legal order. Through questioning how a legal order draws the boundaries between the legal and the illegal, a-legal behaviours suggest that there are ways of behaving which exceed existing legal categories and thereby reveal the contingency of the extant order and the possibility for alternative ordering. So, if a-legal initiatives are often unambiguously lawful, how can they hope to challenge the extant legal order and reveal its limits?

The answer is that a-legal initiatives challenge the legal order through a different channel: they transgress a different kind of legal boundary. They contest not what is lawful but what is legally sanctioned, recognized and institutionalized. Through enacting an institutional process which *could only* belong to a different legal, political, or cultural order, they challenge the institutions of the extant order and the values

and conceptual frameworks on which these institutions are based. This account allows us to explain how a-legal initiatives belong to the same category of behaviour as Lindahl's a-legality, whilst also recognising how they are different. Hence, I have suggested that a-legal initiatives constitute a politically motivated and self-conscious variant or sub-category of the broader phenomenon of a-legality which Lindahl describes.

A second feature which distinguishes these initiatives from the broader phenomenon of a-legality concerns their relationship to the alternative order which is invoked. Lindahl describes a subtly evocative phenomenon whereby actors, behaving in a way which does not make sense within the extant legal order, serve to disrupt this legal order and “intimate” an alternative order (2013, p. 1). The process in which a-legal initiatives engage goes somewhat further than this: through carefully enacting an institutional process which exemplifies another order they spell out this other order. And as I have shown through an analysis of specific case studies, organisers attempt to legitimate and begin to institutionalise elements of this other order. Lindahl notes that the French *autoréduction* protesters attempted to “interpellate” shoppers, through engaging them in conversations about what they were doing (*ibid*, p. 35). For a-legal initiatives, efforts at interpellation are much more central. Organisers engage and implicate the public in the initiative, whilst trying to build links with existing institutional structures, so as to institutionalise what they are doing. To sum up: a-legal initiatives should be seen as a variant or sub-category of the broader phenomenon of a-legality as it is characterised by Lindahl, but which have two distinctive features which distinguish them from the wider category of a-legality.

### **The functional value of a-legal space**

So why do actors adopt this approach and what do they hope to achieve? The scholarly literature on peoples' tribunals – the most researched form of a-legal space – provides an important starting point for exploring this question. However, I criticised one dominant account within this literature. Liberal scholars such as Klinghoffer and Klinghoffer (2002, p.5) characterise peoples' tribunals as a “corrective mechanism”, which can increase accountability where “powerful countries are shielded from sanctions under international law”. The problem with this influential account is that it fails to recognise the systemic critique at the heart of these initiatives. It also renders them in many cases without value, since on the whole peoples' tribunals fail to trigger legal action within the formal system. A more useful way forward is offered by scholars such as Jayan Nayar (2006; 2003; 2001) and Sally Engle Merry (1996) who have understood peoples' tribunals as a form of discursive struggle, and recognised the constitutive function they might have. As Merry (*ibid*, p.79) puts it: peoples' tribunals have “accepted the symbolic power of law” and involve “the appropriation and redeployment of law as a basis for imagining a new social order”. Building on these scholars I suggest an alternative to Klinghoffer and Klinghoffer (2002). Peoples' tribunals and other a-legal initiatives are the response of actors who, facing the closure of the formal system, attempt to exemplify an alternative. However, the peoples' tribunal or other a-legal space is a means to an end, not an end in itself. The hope is that through creating this exemplar, they will create an opening for change within the formal legal system.

Focusing on the use of a-legal space in Latin America has offered support for this interpretation. The occurrence of a-legal tactics across the continent has correlated

with important shifts in Latin American politics associated with the so-called ‘pink tide’. Specifically, the tactic is a reflection of and one part of a wider turn to a new kind of constitutionalism by governments and civil society across Latin America. New Latin American constitutionalism is characterised as a democratic form of constitutional regime, in which there is an “opening” in the constituted order, “for constituent power to manifest” (Colón-Ríos 2012, p. 103). The new Latin American constitutionalist regimes encompass mechanisms for the creation of a constituent assembly to be triggered ‘from below’, for example by the collection of signatures from a certain percentage of citizens. However, in the absence of formal provisions for an ‘opening’, actors turn to the use of a-legal space in an attempt to create one. The use of a-legal referenda at critical moments in the struggle for a constituent assembly in both Colombia and Honduras provide support for this claim, and I argue, for the idea that this is how all a-legal tactics should be conceived. They are attempts to create an ‘opening’ for a new political project, where none exists within the formal system.

But why should organisers place hope in this tactic as a route to constitutional transformation? In other words: by what mechanism might this tactic function to bring about social or political change? In chapter 2 I developed a conceptual framework through which to understand the relationship between a-legal space and political or social change, which I tested and developed in the subsequent case study chapters. I argued that a-legal initiatives have the potential to create ‘tipping events’ (Wood 2006; Hausknost 2011): dislocatory events which function to rupture the political grammar and thereby shift the range of political possibilities available. This argument draws on the significant body of literature which emphasises the hegemonic function of law, within which we can find support for the claim that

expressions of both constituted power and constituent power have hegemonic effects. Building on this, I suggested that events which are understood as expressions of constituted power or constituent power – from court rulings to referendum results to wide scale rioting – have a particular potential to result in tipping events which reshape the political grammar. Having proposed this structural connection between political grammar and constituted and constituent power, the potential for a-legal space as a tool to bring about change becomes clearer. A defining feature of a-legal initiatives is their somewhat paradoxical relationship to the oppositional concepts of constituted and constituent power. On the one hand, they emulate the form, processes, and symbols of existing institutions of constituted power, evidently in an effort to establish legitimacy through adherence to these recognised norms. On the other hand, organisers claim to be an expression of the ‘constituent will’, and claim legitimacy on these grounds. The hypothesis is that where a-legal initiatives successfully gain association with both constituted and constituent power they have a unique potential to harness the hegemonic influence of both. In these instances, they promise to create tipping events which shift the political grammar, and result in a new range of political possibilities.

In summary: I argue that there is a structural connection between political grammar, and events which are associated with constituted power or constituent power (at least in some kinds of societies). And a-legal space allows actors to exploit this connection to shift what is deemed possible. Support for this theory comes from the first case study I explored: the Colombian student movements’ *seventh ballot*, in which millions of Colombians inserted an unofficial, unauthorised additional ballot paper in the ballot box in support of the creation of a constituent assembly. Crucially, after this event both Colombian President Barco and the Colombian Supreme Court



took actions which were previously considered impossible, but now were possible and perhaps even necessary. That the *seventh ballot* had constituted a tipping event which changed the political grammar is one way to explain this course of events.

The fourth research question asks when these initiatives are successful and what factors might influence success. Assessing impact is difficult, for several reasons (Goodin and Tilly 2006). However, I will start with the Colombian and Honduran cases since they were selected on the basis of their seemingly extraordinary impact. As a first point, both cases can be understood to support the theory of a-legal space which has been developed. If a-legal space functions as a way to shift the political grammar and thereby create new opportunities for change through harnessing the hegemonic effects of both constituted and constituent power, then initiatives will have impact when they do both well. The *seventh ballot* was particularly successful in establishing an association with both constituted and constituent power. Firstly, the initiative not only emulated the form of an official referendum of the state, but took place literally within and through the formal congressional and regional elections. Voters expressed their support for the *seventh ballot* and the proposed constituent assembly at the same time as they exercised their right to vote as citizens. Hence, the event successfully merged an a-legal space with an official, legal space, arguably enhancing its association with constituted power. At the same time, it generated mass participation, and the statements of the Supreme Court and President Barco clearly illustrate it was accepted as reflecting the constituent will. One way to account for its impact is its success in gaining association with constituted and constituent power.

The Honduran case is more difficult to assess given it was eventually prevented from taking place. However, arguably any a-legal initiative led by a president will have a

strong association with constituted power, regardless of the initiative's lack of official status or binding implications. The Honduran Congress presumably feared the event would generate wide scale participation, and perhaps appear as the 'constituent will'. The drastic actions taken to prevent the poll taking place are testament to its perceived potential influence on Honduran politics.

The impact of the Venezuelan *Radical Cause* party's referendum is harder to gauge. The limited public recall and almost total absence of the event in scholarly and popular accounts of the period suggest that the *Radical Cause* did not create a tipping event which radically shifted Venezuelan political grammar. However, the accounts of organisers and participants in the event in some cases suggest a significant and transformative experience, after which new ways of behaving and thinking were possible. As participant Juan Contreras notes of people who did not normally engage in political activity for fear of government repression: "That day the people expressed themselves" (Interview, 2012). And as General Secretary of the *Radical Cause*, and coordinator of the referendum, Pablo Medina explains, "that the immense majority of the referendum rejected Carlos Andrés Pérez...was a political argument", which when submitting evidence against Pérez on corruption charges, functioned to "support this constitutional action" (Interview, 2012). The Venezuelan case points to the need for a more nuanced account of political grammar. Like discourse, the phenomenon can be conceived as layered and heterogeneous within any societal context. Hence tipping events which shift the political grammar might be experienced by only some social groups rather than only at the macro, whole societal level.

In chapter 5 I addressed one significant objection to the notion of an a-legal space political strategy. One key difference between different forms of a-legal space is in the

centrality of gathering and presenting new information and ‘evidence’ to the public. In some initiatives this forms a central component to their activities and in others this component is entirely absent.<sup>22</sup> This difference is significant because, arguably, it is indicative of an adherence to opposing models of democracy and political change, which would undermine the notion of a single a-legal space strategy. Peoples’ tribunals and other information-based initiatives appear in many ways like a deliberative democratic exercise, where the objective is to inform and educate the public so as to enable more informed contributions to policy making from civil society. In contrast, non-information-based initiatives cannot be said to fulfil this function. Instead they are better conceived through a radical democratic framework. Hence perhaps these initiatives reflect fundamentally different approaches to working for political change?

However, my analysis of the climate tribunal and the approach that was taken to influence public consciousness, beliefs, and behaviour, suggests otherwise. The Bolivian climate tribunal’s use of complex legal arguments, supported by evidence, can indeed be understood in deliberative democratic terms; but it might be better understood in a way which exceeds the deliberative democratic framework. The tribunal functioned as an ‘exemplar’ in a Kuhnian sense, creating a concrete ‘problem-solution’, in which climate injustice is the problem and a particular application of UN Human Rights Law grounded in an anti-capitalist political analysis is the solution. On this basis, information and non-information-based a-legal initiatives can be understood within the same broad theoretical framework of radical democracy (with some caveats, as discussed in chapter 5). The difference in approach can be explained

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<sup>22</sup> See Appendix D for the relevance and centrality of information and ‘evidence’ in different forms of a-legal space.

through the discursive context in which they are employed. Information-based initiatives are more relevant and more useful at the earlier stages in a hegemonic project, where the objective is to create the foundations to a new discursive formation and help establish a source of authority for the project. However non-information-based initiatives are suitable at the later stages in a hegemonic project, where a discourse is already well formed. Hence, returning to the question of assessing impact, the question for the climate tribunal and other information-based initiatives is perhaps different to the question posed to the first three case studies. Perhaps we should not ask, 'did they create a tipping event which shifted the political grammar?' But instead, how effective were they at creating an exemplar for the possibility of being and thinking differently, which at some later stage may be adopted more widely? Within this framework, the climate tribunal created a powerful exemplar of climate justice.

### ***Theoretical and practical implications***

This project has various theoretical implications. Firstly, I hope to have made a convincing case for how we should understand this previously un-theorised tactic which is employed by civil society, social movements, and sometimes state and sub-state actors, with increasing regularity. Secondly, the concept of a-legal space makes a useful contribution to contemporary debates on new Latin American constitutionalism. As I have shown, a-legal space has been used at critical moments in the struggle to convene a constituent assembly in both Colombia and Honduras, suggesting the concept fills a gap in scholarly accounts of how constitutional transformation sometimes comes about. In most countries, outside of Latin America's

ALBA block, governments are not interested in adopting a new more democratic form of constitutional regime in which mechanisms are created for the periodic exercise of constituent power. A-legal space offers one way to understand how actors sometimes attempt to create such an opening in the formal constituted order, in the absence of formal mechanisms.

Thirdly, the project contributes to the study of a-legality and a-legal challenges to the legal order which Hans Lindahl (2013) has initiated. Specifically, I hope to have shed some light on how those consciously seeking to challenge and transform aspects of the extant legal and political order make use of the a-legal category of action. Also, through positing another way in which legal boundaries can be transgressed, the project suggests a complexified account of a-legality and how it can disrupt the legal order. A-legality can question not only the kind of behaviours which are allowed (lawful), but the those which are advocated (legally recognised, sanctioned and institutionalised) within a given legal order. A-legality of this other kind, not considered by Lindahl, is not only part of the picture, it allows for a more empowered form of resistance. Examples of politically motivated a-legal behaviour, in Lindahl's framework, which include the Brazillian Landless Movement (MST) and the French protestors' conducting an *autoréduction* (amongst others) appear in many ways as a form of self-defence. Whilst they may 'intimate' another possible order, their primary function is to resist negative consequences of the extant political and legal order. A-legal initiatives, on the other hand, have greater propositional potential, allowing actors to imagine and prefigure a better way of ordering society altogether. The French *autoréduction* protestors, for example, don't ultimately seek a political and legal system in which the poor receive free handouts from supermarkets of luxury goods. They seek a society in which luxury is shared and available to all, regardless of

wealth, and indeed where the question of whether the poor should have foie gras would not arise. With the autoréduction they question and resist the existing capitalist legal order. But if they organised an a-legal initiative, they would imagine, articulate and begin to legitimate some alternative way of organising society. This is not to suggest that either approach is better or more useful, but an appreciation of both types of a-legal challenge is necessary for a full picture of how the a-legal might be a useful political tool.

In addition to these theoretical implications I hope for the project to be of practical use to those who are attempting to make use of a-legal space as a strategy for political change. Though far from offering a step by step guide, this project provides a framework through which to understand how and why this tactic might be effective. It suggests when and for what discursive purpose different kinds of a-legal spaces are appropriate, and it offers some insight into how to capture the potential of this strategy. As just one example, organisers might explore how they can merge an a-legal initiative with existing, official legal spaces, as was so successful in the case of the *seventh ballot*.

### ***Future research***

This project is intended as a preliminary investigation into the use of a-legal space as political strategy. There are several notable gaps, which present avenues for future research. Firstly, I have been limited by time and resources to a study of four case studies, only two in-depth, and only two forms of a-legal space: the tribunal and the referendum forms. Future research could explore how different kinds of a-legal space

have been used, and the extent to which these fit within the framework which has been developed in this thesis. Of particular value would be research into the use of Citizens' Debt Audits which are being employed with increasing frequency by civil society groups, and sometimes governments, to challenge allegedly illegal and illegitimate national debts owed to foreign funders.

Another gap in this project is an in-depth consideration of the other ways that a-legal spaces differ. The role and centrality of the information component is a key difference, and as I have shown, a significant one. However, there are other potentially important ways in which different forms of a-legal space and different instances of a particular form diverge. One example is the mode of participation available to participants and the wider public. Whilst some peoples' tribunals allow audience members to play a key role in shaping the agenda, in others the audience plays a mainly passive role. Referenda enable and necessitate a more active (though not deliberative) form of participation. These differences will affect the potential for the formation and type of new democratic subjectivities which are created.

Leading on from this, one phenomenon I would have liked to explore in more depth is the use of a-legal space by actors in positions of constituted power. Whilst President Zelaya's planned poll failed, in other instances Latin American governments have used the a-legal approach to great effect. In 2008, for example, the Ecuadorian government defaulted on their Global Bonds debts, citing the report of the *Public Debt Audit Commission* which had found "illegality and illegitimacy" in Ecuador's foreign debt records (quoted in Faiola 2008). The *Public Debt Audit Commission* was made up of Ecuadorian civil society organisations, but with the official support and funding of the Ecuadorian government (ibid.). The government of President Zelaya and his

planned *fourth ballot box* initiative, by contrast, had limited active civil society and social movement support prior to the coup. Arguably this was a contributing factor in Zelaya's failure to successfully use an a-legal referendum to shift the political grammar in Honduras. Investigation of initiatives such as these will offer an interesting contribution to research into the precarious relationship between states and social movements in Latin America, which is so central to contemporary debates.



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# Appendices

## Appendix A

### Newspaper Coverage of Radical Cause Referendum 1992



**ANDRES GALDO**

Yo, que sé, en carne propia, lo que es perder una hija y oír cómo el propio presidente de la República afirma, campanadamente, que no la asesinaron sino que se suicidó, comprendo la tragedia que vive el periodista Alirio Bolívar al oír, al mismo presidente, decir que "no hay ni un solo estudiante herido de bala en el país" mientras él, Alirio Bolívar, jefe de prensa del propio partido de Pérez, está enterrando a un hijo estudiante que ha sido muerto por la policía en una manifestación de protesta. Desde este modesto rincón le envío un mensaje de condolencia y solidaridad a mi amigo Alirio. Como consuelo solamente puedo recordarle, unas palabras que brotan de la vieja sabiduría eterna: "Todo llega, todo pasa, todo se olvida". ¿Por qué extraños mecanismos mentales el presidente Pérez, se lanza a decir que no hay estudiantes heridos de bala, que la policía no dispara, que las

protestas son mínimas? Y digo mecanismos mentales porque quiero creer que hay algo de eso. ¿O no? Cómo decir que no hay heridos ni muertos, cuando todo el mundo sabe que están ahí, que los hay, que son muchos? ¿Cómo negar las evidencias? ¿Y cómo hacerlo si en el mismo momento en que está haciendo esas afirmaciones el propio CEN de su partido está tomando el acuerdo de pedirle al ministro del Interior que se investigue cómo fue que el hijo de Alirio Bolívar, jefe de prensa de AD, fue muerto en una manifestación? Por supuesto, no hay respuestas para estas preguntas. El único que podría darlas sería Pérez y él, ya se sabe, no suele hacerlo. ¿Hacia dónde va este hombre con esa conducta delirante? ¿Hacia dónde va el país con un comandante en jefe como éste? Nada es verdad ni mentira, todo es según el color del cristal con que lo mira el presidente. La cie-

guita no fue violada. Lorenna se cumple el primer muerto y el asesino sigue vivo y para castigarlo hay que de Alirio no ha sido manifestación. Las protestas es un intrigante. Caldera que me contradicen son u na antes de su renuncia, xon, acosado por la realidad un tremendo empujón, a su propio jefe día de tratar de decirle algo que todo su país contem- cuenta ahora en el mism de Nixon. Aunque, tal vez, ¿No les parece?

La mayoría determinante del cuerpo considero "absolutamente ofensivo" el comunicado de la Causa R, en especial porque forma parte de una campaña para desacreditar a las instituciones y pretendido utilizar al CSE para un referéndum que simple y llanamente no está dentro de la Ley, ni amparado por la Constitución ni por la Ley Orgánica del Poder Municipal, que son las únicas que lo contemplan.

Esa decisión del CSE obedeció a una votación de seis de sus miembros contra tres, siendo estos últimos los representantes de la Causa R, José Lara del MAS, Iván Esquerre

## Lo considera "absolutamente ofensivo" CSE rechazó remitido de Causa R

El Consejo Supremo Electoral en su sesión ordinaria de ayer, acordó rechazar el remitido de la Causa R, en el cual hacen imputaciones al organismo electoral a propósito del referéndum convocado por esa organización política el pasado viernes once de los corrientes.

Al hacer entrega del proyecto a Luis Enrique Oberto, el ministro Párrera recordó que para ese asunto concreto el Gobierno ya tomó la decisión de crear una división especial de la Policía Técnica Judicial, denominada División Anticorrupción, que se integrará con profesionales altamente calificados en materia de investigación.

Según Párrera se trata de una refu-

lidos que permitiera sacar de otros países ciudadanos que hayan cometido delitos en esa nación.

—Yo no creo que sea así exactamente la decisión de la Corte de Estados Unidos, desde luego podría interpretarse también que de lo que se trata es de superar los trámites para la extradición, pero siempre para lograr que alguien que viva en un país y haya cometido un delito en Estados Unidos, sea detenido. Tendría eso que ser objeto de un tratamiento especial con el gobierno donde sea huepado el indiciado. Nunca se trataría de operaciones de contenido, como las que se practican en algunos casos.





"ULTIMAS NOTICIAS" 18

CARACAS, VIERNES 12 DE JUNIO DE 1992

INFORMACION NACIONAL

INFOR

Ayer hubo colas frente a los puestos de votación

## Hoy se Conocen Resultados del Referéndum de Causa R

POR MIRIAM MORILLO

"Más es la gente que ha llamado a la oficina de la Causa R por el referéndum, que la que ha llamado para el Consejo Supremo Electoral para preguntar por la inscripción para las elecciones de diciembre".

Así lo afirmó el representante de la Causa R en el CSE, José Lira, quien se manifestó sorprendido por la decisión adoptada ayer por la directiva del máximo organismo electoral del país, de prohibir a esta organización política utilizar sus oficinas en el organismo como centro de dirección y ejecución del referéndum convocado para ayer jueves.

El CSE tenía programa

de realizar ayer una sesión extraordinaria para tratar lo relativo a los circuitos electorales, la cual fue cancelada, y en su lugar se celebró otra sesión donde no estuvieron presentes los representantes del MAS, Iván Esquerre, de Copel, Freddy Delgado Daño, quien fue llamado de urgencia al Comité Nacional de su partido; y el de la Causa R, José Lira.

De esta sesión extraordinaria surgió un comunicado del CSE, donde se destaca que ha sido práctica de este organismo no usar los locales de este organismo, ni los de Caracas ni los del interior, para actividad que son propias de los partidos políticos; por lo que, al considerar que la Causa R estaba utilizando sus oficinas en el

CSE como centro de dirección y ejecución de una iniciativa política privativa de ese partido (el referéndum), decidió que este partido se abstuviera de continuar realizando esa actividad en los locales del CSE.

Al respecto, señaló José Lira que fue sorprendido porque esta reunión se celebró a sus espaldas, lo que calificó de arbitrariedad porque el CSE estaba en conocimiento de este referéndum desde hace tiempo, por lo que si quería aclarar la situación, "El CSE tiene bastante recursos para sacar un remitido y decir que no estaba auspicando el referéndum, sino que sólo lo estaba haciendo la Causa R con Raúl Matos Azócar, con el MIN, con el MAS, con los



La gente acudió masivamente a votar en el referéndum convocado por la Causa R. (Foto: Pedro Velásquez).

que están en el referéndum 1 pero no se puede tomar una medida de este tipo que es política para impedir el acceso de unas tarjetas de votación a la sede del organismo, y decomisarias".

Señaló José Lira que el presidente del CSE, Pedro

Morales Paul se le acercó para decirle que estaba preocupado porque Piñera lo había llamado diciéndole que parecía que el CSE estaba haciendo un referéndum, "y yo le expliqué que solamente a la oficina de la Causa R la gente llama para preguntar

por el referéndum y entonces, mal pueden andar una resolución inspirada por Antonio José Urbina, que es el padre de la criatura, conjuntamente con Ezequiel Zamora, para dar ese comunicado", y se pregunta por qué no lo llamaron a discutir dicho comunicado.

## Periodistas de Caracas Marcharán Para Protestar Agresión Policial

POR DESIRÉE SANTOS AMARAL

El Colegio Nacional de Periodistas y el Sindicato Nacional de Trabajadores de la Prensa, realizarán la próxima semana asambleas en cada centro de trabajo con miras a llevar a cabo acciones de protesta contra las agresiones a sus afiliados por parte de los cuerpos policiales.

La directiva del CNP-DF que encabeza Francisco Solórzano, manifestó ayer una vez más, su condena

a las acciones que contra los periodistas ha ejercido la Policía Metropolitana que el pasado miércoles en evidente ataque a los trabajadores de la Prensa agredió a diez reporteros ocasionando serios daños a sus personas y equipos de trabajo, durante los sucesos ocurridos durante el allanamiento a la Técnica Industrial de San Martín en la avenida Morán.

El CNP-DF considera que tales medidas no buscan otra cosa que impedir el libre acceso de los pe-

riodistas a las fuentes y coartar el derecho del pueblo a estar debida y oportunamente informado de la grave situación que atraviesa el país producto de las protestas populares.

El CNP-DF se ha declarado en emergencia y prepara, para la próxima semana, una marcha de periodistas para entregar a la Fiscalía General de la República la denuncia de las agresiones que también serán elevadas a organismos de defensa de los derechos humanos.

"En un acuerdo nacional deben participar todos los sectores"

## Una Salida Pacífica y Humana Pide la Iglesia Para la Crisis

La Iglesia se propone hacer un pronunciamiento oficial sobre la crisis y el acuerdo nacional.

Por Miriam Morillo.

La próxima semana se hará pública la posición o decisión de la Iglesia venezolana, ante los planteamientos que le vienen formulando diversos sectores de la vida nacional en relación a la búsqueda de caminos que permita una salida lo más pacífica y humana a la crisis que vive el país y donde se incluya un acuerdo nacional.

El anuncio lo hizo el secretario general de la Conferencia Episcopal Venezolana, Monseñor Mario Moronta, Obispo Auxiliar de Caracas, quien recibió en su oficina del Palacio Arzobispal al presidente de AD, Humberto Celli, quien le hizo una serie de planteamientos sobre la situación que vive el país.

Señaló Monseñor Moronta que en esta reunión, en la que también participó Monseñor Diego Padrón, Obispo Auxiliar de Caracas; se dialogó y se intercambiaron ideas en función de un acuerdo nacional, propuesta que no sólo ha sido hecha por Humberto Celli sino por diversos sectores de la vida nacional que se lo han venido planteando a los representantes de la Iglesia en el transcurso de esta semana.

En ese sentido, dijo Monseñor Moronta que aún la posibilidad de este acuerdo nacional está en fase de conversaciones y de estudios y que

para que éste se dé, en primer lugar se deben abrir espacios de diálogo y luego, para que sea realmente un acuerdo nacional, debe ser un proceso donde participen todas las fuerzas vivas del país, sin excepción de ningún tipo, buscando una metodología de una adecuada participación.

Al respecto, destacó que cualquiera que sea la propuesta, la solución o el proceso que se inicie o se continúe, tiene que tener como centro de interés la persona humana, la persona del venezolano o la venezolana. Porque no se trata aquí de buscar una salida que favorezca a un grupo sea político, sea religioso, sea militar o sea de cualquier índole. Se trata precisamente de buscar una salida donde se ejerza lo que debe ser característico de toda democracia, la participación de todos los ciudadanos, de acuerdo a la circunstancia de cada uno.

Dijo Monseñor Moronta que actualmente se están recibiendo a las instituciones que quieren expresar sus puntos de vista a la Iglesia, la cual tiene la obligación de escucharlos, y para la semana próxima se llevará a cabo una reunión del Comité de Presidencia de la Conferencia Episcopal Venezolana, donde expondrá los resultados de estos encuentros con los diversos sectores del país, y a su debido momento se hará pública cuál es la posición o la decisión de la Iglesia en torno a esta propuesta del gran acuerdo nacional.

## Propone Dotar de Equipos a PTJ de Chacao y El Llanito

Mientras que los cuerpos policiales claman por mayores recursos presupuestarios para combatir eficazmente a la delincuencia, el gobierno otorga millones en caprichosos viajes al exterior, sólo con el ánimo de "demostrar" al mundo que aquí las cosas están marchando bien.

Así lo expresó el dirigente socialcristiano y concejal del Municipio Sucre, Raúl Bermúdez, tras advertir que el hampa se ha apoderado de la ciudad y que con nuestras propias vidas hoy estamos pagando la falta de previsión, evidenciada en los recuadros presupuestales asignados por el Ejecutivo Nacional a las or-

ganizaciones policiales sobre las cuales pesa la grave responsabilidad de garantizar la seguridad de bienes y personas.

"Es lamentable que esto ocurra en el país añado Bermúdez, por ello soy partidario de que los municipios asuman la responsabilidad que el gobierno central le ha costado tanto ejercer, asignando recursos a los entes policiales que operan en sus respectivas localidades.

Por ejemplo, dijo, he propuesto que el Concejo Municipal de Sucre realice aportes económicos y equipos de la más alta tecnología policial a la PTJ de El Llanito y de Cha-

cao, por ser estas comisarías aliadas fundamentales en la lucha contra la delincuencia en el municipio Sucre, pero que evidentemente no cuentan con las asignaciones presupuestarias que requiere tan complicada y ardua labor.

Afirma Gilberto Granado

## Jefatura Civil de San José no Reprime la Protesta de los Vecinos

Por WILLIAM OJEDA

Jamás la Jefatura Civil de la parroquia San José utilizará instrumentos alguno para reprimir a la comunidad o coartar su legítimo derecho a la protesta, expresó en forma enfática Gilberto Granado, jefe civil de la parroquia San José, al defenderse de las acusaciones de violento que le hicieron ayer los vecinos del barrio Los Cujitos.

"Al contrario, nosotros nos hemos dedicado a mantener estrecho contacto y a estimular y ayudar a las asociaciones vecinales".

En la Jefatura Civil de San José, continuó Gilberto Granado, mantenemos contacto permanente con la comunidad, aún consciente de la cantidad de problemas que le aquejan.

Granado se mostró sorprendido ante las acusaciones que hicieron algunos vecinos del barrio Los Cujitos de la parroquia San José, quienes lo tildaron de agresivo, porque él trabaja a "puertas abiertas", además agregó, la agresividad y la violencia no es su estilo y que todo el mundo sabe que él es un hombre pacífico.

"Pasa también que los intereses políticos quieren aprovechar las calamidades de la gente para hacer su trabajo en función de intereses particulares, así que nada es casual, todo tiene su matiz político".





A partir del 4 de Febrero, se evidenció ante el país la falta de legitimidad de los poderes públicos: Presidencia de la República, Congreso y Poder Judicial.

Como solución a la crisis, han sido planteadas varias propuestas que tienen en común el no contar con la participación popular. En efecto, la renuncia del Presidente, la creación de una Constituyente y el recorte del período por la vía del Congreso, son salidas de cogollos.

La Causa R, insiste en que no es posible resolver la crisis sin la participación popular; por ello ha propuesto el Referéndum, para que el pueblo decida si Carlos Andrés Pérez debe continuar o no en la Presidencia de la República.

La Revocatoria del mandato de C.A.P., por decisión de la voluntad popular, implicaría también legitimar mediante elecciones a los representantes al Congreso y una nueva composición de la Corte Suprema de Justicia.

Los partidos en el Congreso, hábilmente, han desvirtuado el profundo sentido democrático de la propuesta del Referéndum que hace la Causa R, planteando un Referéndum distinto que evade el cuestionamiento popular del actual mandato de C.A.P. y se limita a una consulta de aprobación en bloque de una Reforma Constitucional ya cocinada de antemano por estos partidos.

# la causa R

Jueves 11 de Junio, Día Nacional por el  
**REFERENDUM**  
una salida pacífica y democrática ante la crisis

Ello significa que se pretende obligar al Ciudadano a aprobar con un sí el paquete de los sesenta y tantos artículos reformados en la Constitución de la República, sin que pueda decidir sobre cada uno de los aspectos fundamentales.

Con respecto a la revocatoria del mandato, han hecho lo imposible por burlar la legítima aspiración popular de revocarle el mandato al Presidente Pérez, al negar su aplicación para este período y posponerla para después de 1993.

Además, han establecido la barrera del requisito de las firmas de un 15% de los electores (lo que representa 1.500.000 firmas) para la convocatoria del referéndum.

La clase política no quiere aceptar que la permanencia de Carlos Andrés Pérez, apoyado por Eduardo Fernández, agrava la crisis actual y acentúa el profundo deterioro económico, político y social del país, aún cuando todo el mundo está consciente de la pérdida total de apoyo popular del Presidente.

Ante esta situación, La Causa R, conjuntamente con algunas comunidades y grupos de vecinos, han venido realizando el Referéndum, para que el pueblo maneje esta salida.

Para darle mayor fuerza a nuestra propuesta, estamos llamando para el Jueves 11 de Junio, a un Día Nacional por el Referéndum, como medida de presión popular para que el Congreso se pronuncie por una fórmula como ésta.

Invitamos a las comunidades, Gremios, Asociaciones de Vecinos, a sumarse a esta jornada, organizando en su sector el Referéndum de acuerdo al siguiente:

## INSTRUCTIVO

- 1.- Determine, lugar y hora para la realización del Referéndum y notifíquelo a la Oficina de La Causa R en el C.S.E.
- 2.- Elabore una urna electoral para lo cual puede utilizar cajas de cartón.
- 3.- La tarjeta de Referéndum debe contener la siguiente pregunta:

¿ Está Ud. de acuerdo con que el Presidente Carlos Andrés Pérez siga gobernando ?  
SÍ ☐ NO ☐

- 4.- Finalizado el acto de votación proceda al conteo público de los resultados especificando cuantos SÍ, cuantos NO y cuantos votos nulos fueron depositados.

- 5.- Levante un Acta con los resultados y envíelos a la Oficina de La Causa R en el Consejo Supremo Electoral, Centro Simón Bolívar, Mezzanina, Caracas, y comuníquelo telefónicamente, a los números 42-11-04 y 483-32-02.

- 6.- Los resultados nacionales serán dados a conocer a la opinión pública por la prensa Nacional.

- 7.- Cualquier información adicional comunicarse con los teléfonos antes mencionados.

¡ TU DECIDES !

¿ Está Ud. de acuerdo con que el Presidente Carlos Andrés Pérez siga gobernando ?  
SÍ ☐ NO ☒



por un gobierno diferente

**REFERENDUM**  
¡ para que el pueblo decida !



"ULTIMAS NOTICIAS" 20

CARACAS, SABADO 13 DE JUNIO DE 1992

INFORMACION NACION

Según el ensayo de Referéndum

# La Voluntad Popular es que se Vaya CAP

Por Miriam Morillo

"A todas luces, este Referéndum dejó de ser un ensayo para pasar a ser la voluntad popular expresada por la gente que pide a gritos que se vaya Carlos Andrés Pérez."

Así lo manifestó el representante de la Causa R en el Consejo Supremo Electoral, José Lira, al referirse a los resultados de la consulta popular o referéndum celebrado el pasado jueves a manera de ensayo, sobre la permanencia o no de Carlos Andrés Pérez al frente de la Primera Magistratura nacional.

Afirmó José Lira que este referéndum fue todo un éxito y que sobrepasó todas las expectativas creadas, debido a que las asociaciones de vecinos, juntas vecinales, premios y la gente en general participó por propia iniciativa, incluso en urbanizaciones y hasta en el Ministerio de Hacienda, ellos mismos se

encargaron de solicitar las tarjetas de votación y organización todo hasta los escrutinios, "enviándonos luego los resultados; así que "nada más alejado de una manipulación de parte nuestra, porque se trató participación espontánea de la gente, incluso en sitios como Chacaito y Plaza Caracas votaron políticos uniformados, con el argumento de que ellos están cansados de la situación que existe, de esta permanente situación de violencia, donde ellos tienen que jugar el papel de reprimilla".

Asimismo, dijo que en todo el país, no sólo en la población urbana, sino en sitios alejados como poblaciones fronterizas la gente votó; y "en Puerto Ayacucho hubo más votantes que en las elecciones municipales, y en la UCV también más votantes que en las elecciones estudiantiles, sólo por poner dos ejemplos".

Pese a que en muchos sitios se produjeron disturbios, la gente respondió y

quiere señalar esto no es un triunfo solamente de la Causa R, sino de todos los que participaron en este referéndum, sectores sin los cuales no hubiera sido posible llevar a cabo esta consulta popular, donde hubo participación de individualidades como Luis Raúl Matos Azócar, Gonzalo Pérez Hernández y el MAS".

## RESULTADOS PARCIALES

Al respecto, informó José Lira que los resultados de este referéndum, de manera parcial, hasta las 5 de la tarde de ayer eran los siguientes:

Por el SÍ (que se quede CAP) 36.079 votos, para un 10%; Por el NO (que se

vaya CAP) 316.100 votos, para un 89%; y en votos nulos, 3.415, para un 1% con un total de 355.594 votos a nivel nacional.

Anunció José Lira que los resultados totales del referéndum se darán a conocer hoy sábado, a las 10 de la mañana en la oficina de la Causa R en el CSE.

Agregó José Lira que este Referéndum no se trata de una travesura política, como lo han calificado algunos dirigentes adecos, sino de una actividad bastante seria y comprometida de la gente y que a su vez compromete al CSE y al Congreso a tomar en cuenta esa voluntad de la gente, por lo que los resultados serán dados a conocer tanto al Congreso, como al CSE, así como a la OEA y a las embajadas acreditadas en el país.

## Crédito Adicional por 11 Mil 193 Millones Distribuyó el CNU

Con el voto salvado del estudiante que representa

a las Universidades Experimentales, el Consejo Nacional de Universidades extraordinario celebrado ayer aprobó la solicitud de reformulación presupuestaria para 1992, formulada por las universidades nacionales que establecieron que el crédito adicional de 11 mil 193 millones 632 mil 650 bolívares, 2 mil 244 millones 643 mil 824 bolívares serán para la Universidad Central de Venezuela.

Este dinero permitirá a las universidades según explicó el Ministro de Educación, Pedro Augusto Beauprethuy a su salida del CNU, cumplir sus compromisos laborales con el personal administrativo y obrero así como las insuficiencias presupuestarias de 1991.

El resto será distribuido entre las universidades: Lisandro Alvarado, Simón Bolívar, Simón Rodríguez, Experimental del Táchira, Ezequiel Zamora, Nacional Abierta, Experimental

## Afirma el MDP La Crisis Demanda Soluciones Urgentes

POR WILLIAM OJEDA

Las diversas soluciones y salidas a la crisis actual que sacude a nuestro país deben ser de carácter popular y realizarse en forma urgente, así lo declara Nicolás González, miembro de la Dirección Nacional del MDP.

"Para lograr convertirse en una fuerza influyente, las masas populares necesitan organizarse e identificarse con un programa y un plan de lucha que contemple las más sentidas necesidades de la gente de menos recursos".

Sin temer a las posibles represalias que pueda tomar el despacho del ministro Piñeru, González afirmó que "para que el movimiento popular logre identificarse con el programa de los revolucionarios, las masas y el movimiento popular deben constituirse en poder alternativo con amplia participación, pero también con eficaz forma de dirección".

"El Movimiento por la Democracia Popular llama a organizar la Asamblea Popular, donde participe el mayor número posible de obreros, estudiantes, amas de casa, vecinos y otros.

González prosiguió diciendo que estamos en una situación cada día más conflictiva ante el umbral de grandes enfrentamientos por la transformación social. La unidad de los venezolanos en un frente común por la renuncia del Presidente Carlos Andrés Pérez, concluyó.

GRA  
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## En el Municipio Sucre

### Urge Desengavetar Proyecto de Ordenanza Para Vender Terrenos Municipales a Vecinos

Por Darsy Alvarado Desde el pasado mes de noviembre la fracción de concejales del MAS en el Municipio Sucre, han venido haciendo grandes esfuerzos para lograr la aprobación de la Ordenanza sobre la venta de terrenos municipales, de esa jurisdicción, a los vecinos que por años los han ocupado, pero inexplicablemente tantos los concejales de AD como los de Copei han decidido engavetar el anteproyecto y se niegan a darle los dos discusiones finales a dicha Ordenanza.

Así lo expresó el concejal masista Osir Velásquez quien afirma que se pretende mantener a los habitantes de los barrios engañados con la falsa pretensión de mantener a los habitantes de los barrios engañados con la falsa promesa de vender las parcelas a bajos precios y utilizar esta propuesta como parte del paquete demagógico que estos concejales vienen presentando en los diferentes circuitos electorales. "Creo que en las actuales circunstancias en

que se encuentra este problema los vecinos del Municipio Sucre deben exigir a los representantes de AD y Copei que cumplan con su trabajo, ya que para poder otorgar los títulos de propiedad de las parcelas municipales, debe estar aprobada previamente la ordenanza propuesta por el MAS a la Cámara Edificia, por tal razón los integrantes de la fracción del MAS

iniciaremos una campaña a las comunidades para desengavetar este valioso instrumento jurídico que permitirá el mejoramiento de la calidad de vida de nuestros barrios.

Por último Velásquez emplazó a los concejales de AD y Copei para que no den la espalda al pueblo que los eligió y sumen sus votos a los del MAS para aprobar dicha Ordenanza.

## Irregularidades Administrativas en el Concejo de Caracas Revela Informe de la Contraloría

POR WILLIAM OJEDA

Irregularidades por concepto de gastos de representación cargos a concejales suplentes, dietas y jubilaciones en el Concejo Municipal de Caracas que alcanzan la cifra de 300 mil bolívares mensuales, revela el Informe 1991 del Contralor General de la República presentado al Congreso Nacional.

Según el informe mencionado el vicepresidente de la Cámara Municipal, Darío Vivas, cobró 45 mil bolívares mensuales por gastos de representación, lo cual es ilegal de acuerdo a lo dispuesto en el artículo 56 de la Ley Orgánica de Régimen Municipal, donde se establece que los concejales no devengarán sueldo y sólo percibirán dietas por asistencia a las sesiones.

También se revela que se contrataron a 6

concejales suplentes como asesores de la Cámara Municipal percibiendo por tal concepto la cantidad de 456 mil bolívares y además 4 de ellos cobraron 70 mil bolívares en dietas por asistencia a sesiones de Cámara, lo cual choca con lo establecido en el artículo 87 de la Ley Orgánica Municipal.

Quince funcionarios fueron jubilados sin reunir los requisitos exigidos en la Ley del Estatuto sobre Régimen de Jubilaciones y Pensiones de los Funcionarios y Empleados de la Administración Pública Nacional.

Y en el año 1990 se concedió jubilación a 7 empleados de la Oficina Metropolitana de Planeamiento Urbano, que ha despertado múltiples sospechas y actualmente se estudia la procedencia legal de tal otorgamiento por parte de la municipalidad.

Francisco de Miranda, Experimental Rómulo Gallegos, Experimental Guayana, Experimental Rafael María Baralt, Experimental Libertador y Experimental Porticiosa Antonio José de Sucre.

Los recursos incluidos en esta reformulación presupuestaria permitirán financiar los convenios con FAPUV, FENATESV, y FENASOESV que alcanzan la suma de 9.578.957.598,00 bolívares y que cubren incrementos de sueldos y salarios y mejoras socioeconómicas.

Se utilizarán 193.632.650,00 bolívares para cubrir las obligaciones generadas por el incremento del salario mínimo y aumento en el bono de transporte, 2.421.032.402 bolívares serán para financiar las insuficiencias en los gastos de funcionamiento, servicios médicos estudiantiles, incremento de ayudas en efectivo y programas académicos.

A continuación sigue la distribución presupuestaria:

Universidad Centro Occidental "Lisandro Alvarado"	Bs. 518.230.233,00
Universidad Simón Bolívar	Bs. 525.129.704,00
Universidad Nacional Experimental "Simón Rodríguez"	Bs. 229.678.144,00
Universidad Nacional Experimental del Táchira	Bs. 172.604.378,00
Universidad Nacional Experimental de Los Llanos Occidentales "Ezequiel Zamora"	Bs. 233.979.310,00



Hoy se conocerán cifras en resto del país

## 92,32% de los Caraqueños Dijo NO al Presidente Pérez

Referéndum de la "Causa R" evidenció malestar de los venezolanos y exige salida de CAP

POR IRIS VILLASMI

El 92,32 por ciento de los caraqueños encuestados ayer por la Causa R, mediante un Referéndum que realizaron en todo el país, desea que el Presidente Carlos Andrés Pérez no continúe en el Poder. Mientras que el 6,94 desea que continúe.

A la hora de escribir esta información se habían escuchado los votos de 80 mesas ubicadas en diferentes sitios de la ciudad capital y en todas, según los números captados por el diputado Aristóbulo Istúriz en la Sala Plena del Parque Central, de manera abrumadora se pronunciaban por la salida del gobierno de CAP.

De 80 mesas escrutadas, solo del área metropolitana de Caracas, se obtuvieron 162 mil 226 votos válidos y 1.202 (0,74%) nulos. De los válidos, 149 mil 771 (92,32%) votó porque CAP salga del gobierno, y 11 mil 253 (6,54%) dijeron que se quedara.



El gobernador de Bolívar, Andrés Velásquez, cuando se dirige a la militancia de su partido en Parque Central. (Foto: Blasco).

El escrutinio de los votos contó con la asistencia del gobernador del estado Bolívar, Andrés Velásquez, quien denunció que gente de Acción Democrática y Copei en Upatá, trataron de impedir que el referéndum se efectuara normalmente. Por Copei mencionó al diputado Rodríguez Luna y de AD a

Jesús Ríos y Marcos Sarcos.

Istúriz afirmó que los resultados obtenidos fueron producto de una jornada extraordinaria.

### DOBLEMENTE TRAIADORES

Por su parte, el gobernador de Bolívar, llamó a Copei doblemente traidor, porque traicionó al país al aceptar ir al gobierno y luego traiciona a Pérez al dejarlo solo. Las dos decisiones, son condenables en este momento.

Fue enfático al señalar que el referéndum realizado es el hecho político de más trascendencia después del 4 de febrero.

Resaltó que los golpes de pecho, la rasgadura de las vestiduras, los anuncios de la Constituyente, los anuncios del Referéndum las recomendaciones del Consejo Consultivo y el cambio de dos gabinetes en igual número de semanas, hizo pensar a algún lluso que con eso se podía devolver la fe al pueblo de Venezuela.



La antesala del auditorio de la Sala Plena de Parque Central, sirvió a los militantes de la Causa R, para escrutir votos. (Foto: Blasco).



El diputado Aristóbulo Istúriz, revisa los cómputos que le entregaron militantes de la Causa R, con los cuales alimentan el computador que también se observa en la gráfica de Blasco. (Foto: Blasco).

## Acuartelamiento Militar y Muerto Distinguido (Ej.) en Maracay

POR RAFAEL LUNA NOGUERA

Acuartelamiento militar a consecuencia de la situación de violencia imperante en Maracay y muerte de un distinguido del Ejército, presuntamente suicidio, fue el resultado de los acontecimientos que la noche de ayer mantenía el caso en la ciudad.

Se informó que las autoridades militares decidieron acuartelar a sus tropas en virtud de la incertidumbre que hoy padecen todos los residentes de esta importante ciudad venezolana. Asimismo se dijo que como medida preventiva previa a la alusión del Presidente de la República pautada para el medio día de hoy y de acuerdo a la salida del gabinete por parte de la tolda verde, los militares permanecen en expectativa por lo que pueda suceder.

Por otro lado, se supo extraoficialmente que el distinguido del Ejército, Alexander Montesinos (19), quien en vida perteneciera al Cuartel Pihango, ubicado en la avenida Godoy con calle Sucre, se quitó la vida cercanas las seis y treinta minutos de la noche con una pistola 9 mm.

## Piñerúa Ordaz recibió Informe del Contralor No Desaprovecharé Este Documento Para Actuar en Asambleas y Concejos

Luis Piñerúa Ordaz, Ministro del Interior, luego de recibir de manos del Contralor General, José Ramón Medina, el informe anual contenido de las presuntas irregularidades administrativas en el manejo de los recursos públicos, enfatizó que no desaprovechará la oportunidad para actuar en el caso referido al desorden administrativo presente en buena parte de las asambleas legislativas y los concejos municipales del país.

La iniciativa del Contralor General, quien consignó ayer su informe tanto a la Fiscalía General como al MPJ, fue saludada por el Ministro porque se trata de los tres organismos que in-

teractúan en el frente contra la corrupción.

En este sentido, el Contralor Medina recordó que desde hace tres meses, tanto Luis Piñerúa Ordaz, como Ramón Escovar Salom, acudieron a la Contraloría General con el fin de constituir un equipo institucional para enfrentar la corrupción administrativa, y desde entonces, han mantenido un estrecho contacto para agilizar las denuncias que han sido consignadas ante esos organismos. Tras establecer la circunstancia que les une, Piñerúa Ordaz agradeció la distinción que me hace el señor Contralor, sin que éste sea su deber, porque este documento es consignado ante el Con-

greso y por consigna al Presidente de la República.

Como se recuerda, agregó Piñerúa Ordaz, tengo tres comisiones asesoras: una de lucha contra la corrupción, otra de asesoría jurídica y la antidelinictiva. Las tres integradas por muy reputados profesionales que cumplen esa función ad honorem. Este documento de la Contraloría General será analizado por ellos y espero que de su análisis surjan las sugerencias que me permitan analizar las gestiones que puedan corresponder a este ministerio, para que las observaciones que formula el señor Contralor sean debidamente consideradas.

## Trabajadores del INOS Reclamarán al Congreso Respeto a su Dignidad

ERNESTO L. RODRIGUEZ

Casi diez mil trabajadores del INOS en todo el país se harán representar con sus compañeros de Caracas ante el Congreso de la República, a fin de solicitar una posición definitiva de su situación legal en cuanto a sus derechos sociales como trabajadores, en virtud de que algunos parlamentarios han cuestionado sus reivindicaciones.

Sostienen que ellos cobran porque han trabajado a tiempo completo durante muchos años y todo aumento salarial lo han obte-

nido por Ley especial, por decreto y por contratación colectiva a medida que la moneda se ha ido devaluando y el poder adquisitivo se ha deteriorado con el alto costo de la vida. Afirman que en ningún caso han obtenido beneficios de manera arbitraria ni han tenido poder para aumentarse el sueldo ejecutivamente, ni han sido unos privilegiados, porque no es precisamente la característica de los trabajadores en Venezuela.

La semana próxima manifestarán ante el Congreso y una comisión de tra-

hadores que por años han prestado servicios al Instituto Nacional de Obras Sanitarias y al Acueducto Metropolitano, solicitarán audiencia con las directivas parlamentarias, esperando que algunos de sus miembros en representación del Parlamento les atienda a fin de dejar claro una serie de denuncias de senadores y diputados que pretenden presentarles ante el resto del país como beneficiarios dudosos de prestaciones sociales por más de diez mil millones de bolívares. Algunos de ellos han trabajado treinta años al servicio del INOS.



INFORMACION NACIONAL

CARACAS, MIERCOLES 10 DE JUNIO DE 1992

"ULTIMAS NOTICIAS" 11

**MICROCAD INDUSTRIAL, C.A. SOLICITA JEFE DE TALLER MECANICO**

**Requisitos:**  
- T.S.E. mención: Mecánica, Bachiller, mención: Máquinas/ Herramientas y/o experiencia comprobable en cargos similares.  
- Capacidad para relacionarse y supervisión de personal.  
- Disponibilidad para trabajar en horarios rotativos.

**SUPERVISOR DE CONTROL DE CALIDAD**

**Requisitos:**  
- Bachiller mención: Mecánica y/o experiencia comprobable en cargos similares.  
- Disponibilidad para trabajar en horarios rotativos.

**DIBUJANTE**

**Requisitos:**  
- Bachiller. - Experiencia en Diseño Mecánico y conocimientos de computación.  
La empresa ofrece paquete remunerativo de acuerdo a conocimientos y experiencia, buen ambiente de trabajo, estabilidad laboral y otros beneficios. Informar y presentarse con referencias laborales en: Liliografía Escudé, Calle E, Soledad Norte, P.O. Industrial Marino.

**AVISO**

LA CAJA CENTRAL DE AHORROS Y PREVISION SOCIAL DE LOS OBREROS DEL INSTITUTO NACIONAL DE OBRAS SANITARIAS "CAPSOSINOS"

**HACE SABER:**

Que en fecha abril 14, 1992, falleció en la Parroquia "El Carmen", Municipio Bolívar del Edo. Anzoátegui, El Ciudadano:

**GILBERTO PALMA**

(Q.E.P.D.)

Se le participa a la ciudadana: MARITZA QUERECUTO, en su condición de única beneficiaria de la póliza de seguro de vida colectivo que mantenía vigente con nosotros el finado, que debe acudir a la sede de esta asociación, situada en la Avenida Este 2, Edificio Morelos, Local 6, Los Caobos. Teléfonos: 575.41.92 - 575.47.94. Caracas, para tratar asunto que le concierne.

La Junta Directiva  
Firma legible

Caracas, 6 de junio de 1992

**REFRIGERACION COFRO, C.A.**

Solicita

**A.- PULIDORES DE PRIMERA (1)**

Con experiencia en la manufactura de muebles en acero inoxidable

**B.- ENSAMBLADORES (2)**

Con experiencia en la armadura de muebles en acero inoxidable

**Requisitos:**

- Constancias de empleos anteriores

**Dirección:** Av. José Ángel Lamas, Esquina Placer a Guaita N° 8, Parroquia San Juan. (Diagonal a la Clínica de la Policía Metropolitana).  
Previo cita. Telfs.: 462.73.07 - 462.35.15

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Avenida Andrés Bello, Entre 3a. y 4a. Transv.  
Guajacipuro Instituto Leonardo Da Vinci  
Teléfonos: 573.10.08 - 573.54.16

**AHORA EL NEGOCION**

**ABIERTO LOS DOMINGOS**

**GRANDES DESCUENTOS!**

**...EN ROPA NACIONAL E IMPORTADA**

**Y DE LAS MAS AFAMADAS MARCAS!**

**PALO VERDE**  
CENTRO COMERCIAL PALO VERDE - NIVEL 3  
(AL LADO DE LA ESTACION DEL METRO DE PALO VERDE)

**SAN MARTIN**  
AL LADO DEL HOSPITAL MILITAR  
(POR LA ESTACION DEL METRO DE MATERNIDAD)

## Salinas de Gortari y Gaviria se Reúnen Mañana con CAP en Maiquetía

POR MIRIAM MORILLO

Los presidentes de México, Colombia y Venezuela, Carlos Salinas de Gortari, César Gaviria y Carlos Andrés Pérez, respectivamente, se reúnen mañana jueves, a las 11:00 de la mañana, en el Aeropuerto Internacional "Simón Bolívar" de Maiquetía.

Según información emanada de la Oficina de Prensa de la Cancillería, en este encuentro los presidentes de México, Colombia y Venezuela tendrán agendas abiertas, pero entre los temas a tratar podría estar la evaluación a los grupos de trabajo, con el fin de revisar la agenda del Grupo de los Tres.

Dicho grupo, creado en marzo de 1989, ha venido trabajando inintermitentemente a través de 10 comisiones, entre las que destacan Energía, Comercio, Transporte Marítimo y Aéreo, Telecomunicaciones, Turismo, Cultura, Finanzas, Cooperación con Centroamérica y el Caribe y Medio Ambiente.

El Grupo de Energía ha acordado avanzar en lo que se refiere a la complementación en el suministro de carbón, hidroelectricidad, gas e interconexión eléctrica. En lo relativo a comercio, se han echado las

bases para conformar un acuerdo de libre comercio.

En el área del Transporte se ha decidido liberar la reserva de carga general y a granel para las empresas navieras de los tres países, quedando por definir lo que se refiere a la liberación del transporte de petróleo y sus derivados. En transporte aéreo se revisarán los acuerdos bilaterales entre los tres países con el objeto de liberizar aranceles y aumentar la frecuencia de vuelos.

La Comisión para la Cooperación con Centroamérica y el Caribe prepara la posición conjunta para las reuniones del diálogo con San José y otras series de acciones tanto política como económica en beneficio de esta subregión.

Por su parte, la Comisión del Medio Ambiente busca establecer posiciones conjuntas con miras a la Cumbre Mundial sobre el Medio Ambiente y Desarrollo que se realiza en Río de Janeiro, Brasil. Igualmente, entre sus objetivos está la elaboración de programas de cooperación ambiental con Centroamérica y el Caribe.

# REFERENDUM

## TELEGRAMA PUBLICO

Señores

Carlos Andrés Pérez  
y Eduardo Fernández  
Palacio de Miraflores.

COMO ES DE SU CONOCIMIENTO, EL JUEVES 11 DEL PRESENTE MES DE JUNIO SE REALIZARA EN TODO EL PAIS EL DIA NACIONAL POR EL REFERENDUM, PARA QUE EL PUEBLO DECIDA SI ESTA DE ACUERDO O NO CON QUE EL PRESIDENTE PEREZ CONTINUE SU MANDATO.

EL REFERENDUM, QUE ES LA SALIDA PACIFICA, DEMOCRATICA Y LEGAL A LA CRISIS, CUENTA CON EL APOYO DE UN GRUPO PARLAMENTARIO DE DIFERENTES AFILIACIONES POLITICAS Y DE OTROS SECTORES DE LA VIDA NACIONAL. DEBIDO A LAS EXPECTATIVAS QUE HA GENERADO EN LA POBLACION, LES INVITAMOS A QUE ENVIEEN SUS PROPIOS TESTIGOS PARA EL PROCESO DE VOTACION Y ESCRUTINIO EN LOS DIFERENTES CENTROS DE VOTACION Y MAS CONCRETAMENTE, A LA SALA 6 DE PARQUE CENTRAL DONDE SE EFECTUARA EL CONTEO FINAL.

PABLO MEDINA  
SEC. GENERAL DE LA CAUSA R

## Appendix B

### Jury members, the International Tribunal on Climate Justice

Jury member	Organisational affiliations, relevant credentials
Brid Brenna, Holland	Coordinator of the Alternative Regionalisms Programme for the <i>Transnational Institute</i> (Dutch NGO/Research institute)
Nora Cortiñas, Argentina	Founder of <i>Mothers of Plaza de Mayo</i> , a social movement which campaigns for justice for Argentina's disappeared people. She is also a university professor and has carried out many studies into the connections between the military dictatorship, corrupt foreign debt and economic crisis in Argentina.
Beverly Keene, Argentina	Coordinator of the <i>Jubilee South International Network</i> (Debt focused campaigning network).
Tom Kucharz, Spain	Member of the secretariat of <i>Ecologistas en Acción</i> , a Spanish environmental NGO and movement, and from 'Who owes who?' a Spanish campaign for the "abolition of foreign debt and return of the ecological debt" (Quien debe a Quien?, 2015).
Alicia Muñoz, Chile	President of the <i>National Association of Rural and Indigenous Women</i> and representative of the international peasants movement <i>La Via Campesina</i> .
Ricardo Arnaldo Navarro Pineda, El Salvador	Former head of <i>Friends of the Earth International</i> (FOEI), and co-founder of environmental NGO <i>Salvadorian Institute for Appropriate Technology</i> .
Miguel Palacin Quispe, Peru	General Coordinator of the <i>Coordinating Committee of Andean Indigenous Organisations</i> ( <i>Coordinadora Andina de Organizaciones Indígenas – CAOI</i> ).
Professor Joseph Henry Vogel, Puerto Rico	Economist, University of Puerto Rico and the <i>Latin American Faculty of Social Sciences</i> (FLASCO – Ecuador). The latter is an international organisation which was founded at the UNESCO conference of 1956, with a remit to develop a space for reflection which would drive the development of Latin American societies.

(Fundación Solón 2009b)

## Appendix C

### Cases presented at the International Tribunal on Climate Justice Preliminary Hearing, October 2009, Cochabamba, Bolivia

Name of case	Claimant	Accused	Details
"Denunciation of human rights abuses resulting from global warming for acts and omissions of the countries included in Annex 1 of the UN Framework Convention on Climate Change (UNFCCC)"	The Khapi community, La Paz, Bolivia.	Annex 1 countries in UNFCCC	The Khapi are an indigenous Aymaran community of forty eight families, based at the foot of the Illimani glacier, in the La Paz region of Bolivia. The community practise subsistence farming and the Illimani is their only source of water. Jury and audience members heard how the rapid shrinkage of the Illimani glacier represents an existential threat to the Khapi. Whilst in the short term water levels have increased, scientists have warned that extreme water shortages are imminent. The community already experience weather extremes including droughts and heavy rains which destroy crops, and now struggle to provide sufficient food for their own subsistence. Young people are increasingly forced to relocate to the cities in search of work, and older members talk of their sense and fear that they are losing their culture and way of life.
"Victims of climate change and the negligence of the Salvadorean State, in impoverished communities of the northern zone of Jiquilisco municipality"	<i>Association of United Communities of the Bajo Lempa</i> , (ACUDESBAL); community organisation, El Salvador.	Salvadorean State	The case sought to show the impact of rising sea levels, as well as flooding and droughts, on the low lying communities in the Lower Lempa River region, in El Salvador (Fundación Sólon, 2009). Only small increases in sea level have already led to significant loss of land in this region, reducing the amount of farmable land on which the mainly impoverished communities have to depend on (Independent, 2012)
"'FACE PROFADOR', claim against the Dutch Foundation <i>Forest Absorbing Carbon Emissions</i> "	Acción Ecológica; NGO, Ecuador.	The Dutch Foundation: <i>FACE PROFADOR</i>	PROFADOR is an Ecuadorian private company established by the Dutch Foundation FACE, with the aim of establishing forest plantations for the capture of

and others”			carbon dioxide. Acción Ecológica sought to highlight the negative impacts of the initiative on local communities and the country's primary ecosystem, including displacement of community activities, negative environmental impacts on the soil and loss of water retention, and overall increases in carbon released as a result of the plantation. The claimants sought to demonstrate - as was argued in their in-depth earlier report on the subject - that such impacts “make the project FACE PROFAFOR an absurd idea... that only succeeds in diverting financial and political resources from restructuring the use and generation of energy” (Acción Ecológica 2005, p. 43).
“The climactic impacts caused by the Initiative for the Regional Integration of South America (IIRSA)”	Bolivian NGO, <i>Bridge between Cultures Foundation</i> .	The three members of the Technical Coordination of IIRSA; the Inter-American Development Bank, the Andean Corporation of Fomento and FONPLATA	This case addressed the culpability of the three members of the Technical Coordination of the Initiative for the Regional Integration of South America: the Inter-American Development Bank, the Andean Corporation of Fomento and FONPLATA, in addition to other financial entities such as the Brazilian Development Bank, the European Union and Santander Bank (Fundación Sólón, 2009).
“Violation of Human Rights, Environmental Rights, Cultural Rights and Workers Rights, by the implementation of the false solution to climate change, the agrofuel – sugar cane ethanol, in the area of Valle del Río Cauca” *	Sugar Cane Workers of Cauca, Colombia	The Colombian government	Sugar cane workers of Cauca had been involved in a number of large scale strikes in the years preceding the climate tribunal's preliminary hearing, including a strike of 32,000 workers in September 2008 (Corteros.Blogspot, 2008). The sugar industry workers of the Cauca region in Colombia are employed indirectly as outsourced workers by the thirteen large ethanol plants and sugar mills, and do not enjoy basic labour rights (IPS, 2008). Workers tend to work between twelve and sixteen hour days, with one day off per month, highly dangerous conditions, and poverty wages (ibid.). The following statement from the United Workers' Federation of

			Colombia encapsulates the case against ethanol production, in this context: “Ethanol production in the region, as it currently stands, responds to a demand from the countries of the North, who need to solve their power shortage, and who could not care less if local oligopolies profit from the expansion of sugarcane single-crop agriculture at the obvious expense of workers, indigenous communities, farmers, consumers, the environment and food sovereignty” (United Workers' Federation of Colombia, cited in Iglesias & Pedraza, 2008).
“Children with excess lead in their blood in Cerro de Pasco, Peru, due to gases and other polluting elements”	<i>Civil Association Centre for Popular Labour Culture, (the Labour Centre)</i> , a non-profit civil association, Peru.	Volcan Mining Company, SA, and the Peruvian State	Case number six addressed a different dimension through looking at the devastating health impacts of mining projects.
“DOE RUN PERU”	<i>CooperAccion</i> ; Non-profit organisation, Peru	Doe Run Peru and the Peruvian government	This case was made against the government of Peru and the company Doe Run Peru, which melts and refines metals, for pollution in the Junin Region of Peru

(Fundación Solón 2009b)

\* It is noteworthy that the Colombian representative from the Association of Sugar Cane Producers, Sr. José Oney Valencia Llanos, who was due to present the Colombian case to the tribunal, was unable to attend the event. Sr. Valencia Llanos was detained by Colombian security forces upon boarding the plane to Bolivia, and prevented from leaving the country (Fundación Solón 2009b, p. 29).

## Appendix D

### The role of information in different kinds of a-legal space

Type of a-legal space	Specific cases	The retrieval, compilation and presentation of information to the public is central to the project	Details
Peoples' Tribunals	The Russell Tribunal on Vietnam	✓	Accounts of the tribunal describe how the panellists (and the members of the audience) heard extensive evidence, in the form of reports, video footage and witness testimony, which had been compiled by the specially established legal, historical and scientific commissions of the tribunal (Duffet, 1970). Data that 'filled many trunks and file cabinets' was collated and analysed by the various special commissions (Shoenman, quoted in Duffet, 1970, p.10). This included information from the tribunal's various fact finding missions in Vietnam, including North Vietnam where the western media were refused access. (ibid.).
Peoples' Commissions	The High Pay Commission	✓	The commission ran for one year, from November 2010 to November 2011, publishing several reports and a set of recommendations for companies and the government. Recommendations

			<p>were based on extensive interviews with company directors, and information submitted by the public. The commissioners were independent and made the recommendations on the basis of research compiled by the researchers for the commission (Deborah Hargreaves, The High Pay Commission, Interview, 2013; Neal Lawson, Compass, 2013)</p>
	Lewisham Peoples' Commission of Inquiry into the closure of Lewisham Hospital	✓	<p>The Commission heard from 47 witnesses, who were questioned by barristers, in front of a panel of legal lawyers and an audience of four hundred people (SaveLewisham Hospital, 2013<sup>23</sup>).</p>
Feminist Judgement Writing Projects	The Canadian Courts of Women	✓	<p>Feminist legal scholars re-write judgements of the Canadian Supreme Court to illustrate the potential for a different reading of equality legislation.</p>
Civil society debt audits	Public Debt Audit Commission, Ecuador	✓	<p>The Ecuadorian Public Debt Audit Commission was organised by a cross section of Ecuadorian civil society organisations with the support of the Ecuadorian government. Extensive information was gathered on the country's debt, participating groups then carried out an assessment of which parts of the debt were legitimate. The process was carefully documented and made publicly available (CADTM, 2011).</p>

23 <http://www.savelewishamhospital.com/wp-content/uploads/2013/11/Lewisham-Commission-reportb.pdf>



Quasi-institutional monitoring projects	The Police Monitoring Unit, Manchester City Council	✓	Members of the public were invited to report experiences of police misconduct to the Unit. Articles in the weekly <i>Police Watch</i> magazine documented incidents of police racism, violence, and lack of follow up on gender-based violence, which were reported by members of the public. These experiences went largely unreported in the mainstream media.
Popular referenda	Catalan Independence Referenda	X	Independence referenda took place across Catalonia in 2009.
	<i>Radical Cause</i> referendum on President Pérez	X	
Unofficial embassy (not recognised by other states)	The Aboriginal Tent Embassy	X	Organisers can be understood to have created a space in which arguments not heard in mainstream debates or media were articulated. In many instances these will have included particular historical and other facts, intended to support organisers' claims. However, there was no large scale nor systematic effort to gather information, and present it to the public or some purportedly impartial third party 'jury' or panel.
Free States	Keele Free State	X	Like the Aboriginal Tent Embassy, organisers used the space that they had created to articulate marginal and counter-hegemonic ideas and critiques of the Thatcher government. But no systematic efforts at information gathering, organisation and presentation took place.

## Appendix E

### **Advice to neighbourhood associations and other civil society groups who wanted to participate in the referendum, published in the press in the fortnight before the referendum was due to take place**

Participants were advised to;

- “1. determine the place and time in which the referendum will be carried out, and notify the Radical Cause office at the Supreme Electoral Commission.
2. Set up a ballot box, which can be made out of a cardboard box.
3. The Referendum ballot paper should contain the following question: 'Are you in agreement that President Carlos Andrés Pérez continue governing? Yes/ No'
4. When the voting period has been finished, come to the public count of the results, and specify how many 'yes', how many 'No' and how many null votes were deposited.
5. Draw up the certificate of the results, and send it to the Radical Cause Office in the Supreme Electoral Commission. Centro Simón Bolívar, Mezzanina, Caracas, and communicate them via telephone to the numbers 42-11-04 and 483-32-02.
6. The national results will be made known to the public via the national press.
7. Any additional information please communicate via the numbers listed above”

(The Radical Cause, *Ultimás Noticias*, June 1<sup>st</sup> 1992, p. 9)

## Appendix F

### **The Honduran National Front of Popular Resistance for a Constituent Assembly**

The profound cultural and social significance of the National Front of Popular Resistance and the struggle for a constituent assembly are explained by Rafael Murillo Selva, a well-known Honduran playwright:

“the eruption of the National Front of Popular Resistance is the most relevant cultural event of our supposed republican life, only comparable to Francisco Morazán’s struggle to keep Central America united (in the 19th Century)...The emergence and formation of the Resistance Front in all corners of Honduras is like a high intensity earthquake that leaves no structure standing. This earthquake has broken the ideological apparatus that has shaped our values, belief systems, and customs. Our codes are changing. In this sense, resisting is change, and change involves transforming ourselves deep inside...We have acquired a new sense of everything, of doing politics, practising religion, education, work, family, sex, love, art, science, sports, communication...We are building nothing less but a counterhegemonic culture! Bertha Caceres, a leader of the Civic Council of Popular and Indigenous Organizations (COPINH) sums it up in a sentence. She says: ‘the coup created the Resistance Front and the Resistance Front has changed our way of life... the coup has allowed Hondurans for the first time to feel a sense of belonging and enabled us to draw our own path (to the future). We have rationally and emotionally become aware of our historical being and are now more able to connect to other processes occurring in the region. Appropriating our history gives us a sense of a higher purpose in life that goes beyond our personal lives. This explains why the murders of hundreds of resistance members have not caused fear, instead they have served to reenergize and keep the struggle going.” (Cited in Mendoza 2012).