

THE RECOGNITION OF DIVERSITY IN THE NEW BOLIVIAN CONSTITUTION: RELIANCE ON TRADITIONAL PERSPECTIVES AND RESPECT OF INTERNATIONAL LAW

ARTICLE

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I. Introduction

The Bolivian constitutional reform of 2005 was the beginning of a political process that led to the redefinition of national identity in the new constitution. Ancestral values and traditions, as well as internationally recognized standards concerning the rights of indigenous people, have been incorporated in this reform and have modified and strengthened the respect for diversity in this new constitution.

Bolivia now defines itself as a “pluricultural state” that explicitly recognizes, for the first time, all the ethnical and indigenous minorities that had been historically marginalized. It recognizes 36 indigenous languages as national languages, in addition to Spanish, and it places the indigenous jurisdiction on the same hierarchical level as the ordinary jurisdiction.

This recognition has important implications. Particularly, the acknowledgment of the legal pluralism and the recognition of the indigenous jurisdiction on an equal

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rank to ordinary jurisdiction, entails that Bolivia now represents a multiplicity of different nations, each with its own legislative and jurisdictional competence. The equal ranking of these two jurisdictions represents an immense challenge of coordination and cohesion for the state. Also, there are several legal aspects that deserve a more critical analysis, such as the respect of certain international human rights standards in this indigenous jurisdiction. Nonetheless, this constitutional development has been crucial for a successful transformation of the state and society. The fact that the new constitution recognizes concrete collective rights of the indigenous population is an important step to overcome their historical discrimination in a state that had not been able or willing to adapt its structures and mechanisms to the plural reality of the country.

Consequently, Bolivia's inclusion and recognition of its pluricultural identity in the national constitution has diffused, at least to some extent, historical grievances and conflicts between the traditionally powerful and the historically marginalized. For this reason, the Bolivian constitutional reform process should be studied, critically analyzed, and possibly replicated by other pluricultural societies. To that end, this paper attempts to provide an overview of the history, substance, and sources of law used to redefine Bolivia as a pluricultural state.

II. Historical Background

A. A History of Exclusion and Social Conflicts

For centuries, Bolivia has been known for its vast cultural and ethnic diversity. However, its colonial and republican history has been marked by the continuous reproduction of inequality, political, social and economic exclusion along ethnic lines and the systematic exploitation of the indigenous population. From the violent colonial conquest of Bolivia, the "civilization" of the indigenous people dominated the relationship between the native population and the Spanish conquerors. Later, during the fights for independence and the early stages of the Bolivian republic, the creole and mestizo elite of the country embraced the concept of a nation state. On the one hand, in Bolivia, as in many post-colonial societies, the concept of nationalism has served as instrument for nation-building through the process of independence and the birth of the new republic. On the other hand, however, it led to a politic of assimilation and the forced elimination of all references to ethnicity from the public discourse, building on the republican concept of a "citizen".¹

Republican forms of citizenship are underpinned by a belief in individual "affiliation" to the state rather than attachment to a cultural, ethnical or linguistic

¹ Mariano Aguirre, Isabel Moreno, *Bolivia: the challenges to state reform*, 3 (2006).

group. In a country with such a wide indigenous majority as Bolivia, this assimilation implicit in such a framing of citizenship was equal to what could be referred to as a cultural genocide, which led to the hidden discrimination of this demographic group. As Linera states, during the republic, “one [was] born as citizen or indio”.² Thus, as Mariano and Aguirre argue, “nationalism has been a force for unity as well as of difference”³ in the history of Bolivian state formation.

As a consequence, indigenous people have been marginalized and discriminated throughout the colonial and republican era. These patterns of discrimination become even more palpable in the political sphere, where the indigenous population has suffered systematic exclusion. Up until 1956, for example, “indios” were not eligible to vote.⁴ Even after gaining the right to vote, political representation has been limited to voting for representatives of the white, mestizo, Spanish-speaking elite, but not for representatives of their own social and ethnic group.

Only since the second half of the 20th century, have the indigenous population gained more power within social and institutional spaces. Important changes were achieved through the constitutional reform of 1994. Influenced by the International Labor Organization’s Convention concerning Indigenous and Tribal Peoples in Independent Countries (also called ILO Convention 169 or Indigenous and Tribal Peoples Convention) and its ratification by Bolivia in 1991, the 1994 Constitution for the first time defined Bolivia as a multi-ethnic state and recognized certain collective rights of the indigenous population.⁵ However, some scholars state that “these formal gains have not had a real impact on the conditions of the people” as many of these newly included constitutional guarantees have never been concretized in implementing laws or public policies.⁶ As the formal recognition of indigenous people’s rights in the 1994 Constitution has never achieved a true effect, neither on the legal, nor on a everyday level, in practice the historic discrimination of the indigenous population continued. Also, the collective mindset of Bolivia’s society was deeply characterized by those patterns of exclusion, provoking an increased feeling of frustration among the excluded part of the society and growing social and political tensions.

This historic discrimination and marginalization of the indigenous population has led to a fairly conflictive social life in Bolivia that has increased even more since 2000. In 2000 and 2003, intense outbreaks of social discontent exposed these underlying tensions within the state. The governance crisis created by the ‘gas

² Alvaro García Linera, *Estado multinacional: una propuesta democrática y pluralista para la extinción de la exclusión de las naciones indias*, 15 (2005).

³ Mariano Aguirre, Isabel Moreno, *Bolivia: the challenges to state reform* in *Open Democracy*, 3 available at: http://www.opendemocracy.net/democracy-protest/bolivia_reform_3908.jsp (2009).

⁴ Law No. 3464 - 1956.

⁵ Constitution of the Republic of Bolivia from 1994, Art. 171.

⁶ María Teresa Zegada, cited in: Mariano Aguirre, Isabel Moreno, *Bolivia: the challenges to state reform*, *Open Democracy*, 3 (2009)

war⁷ in October 2003 revealed a complex mixture of conflicts with social, cultural, political, and institutional dimensions, which had been previously neglected. The multiplication of demands that the state was unable to satisfy led to an erosion of the institutional stability of the state and a loss of its credibility.⁸ Among these latent conflicts, were the social and political exclusion and discrimination of wide parts of Bolivia's society, particularly the indigenous population. The list of social and political demands that accompanied the popular uprising later was called the 'October agenda'. A central request of this agenda was a profound constitutional reform, including an improvement of the situation of the indigenous population and an expansion of the political participation of the society.

B. The Path Towards a Constituent Assembly

The context of public dissatisfaction and widespread protest against the government and the ruling elite favored the 'revalorization' of the indigenous population. The most prominent example of this development is certainly the massive electoral victory of Evo Morales and his movement 'Movement towards Socialism' (MAS) in the 2005 elections. Morales came to power with 53.7 percent of all votes in an election with 85 percent of participation.⁹ He is the first president to have been elected with an absolute majority since the re-installation of democracy in 1982, after the end of the dictatorship of General Banzer.¹⁰ Morales' movement prominently took up the claims for more participation and social and ethnic inclusion of wide segments of the population and adopted as his own the people's claim for a profound reform of Bolivia's constitution.¹¹

The desire to rewrite Bolivia's social pact through a constituent assembly had been expressed since the early 1990's, but the ruling parties had never really acceded to this claim. Even though the demand for constitutional reform was revitalized by the social movements during protests in 2003 and formed one of the key promises of the 'October agenda'¹², interim president Carlos Mesa¹³, supported this request

⁷ Announcements of tax increases lead to violent riots in February 2003, followed by the controversial decision of President Gonzalo Sánchez de Lozada to sell gas to Chile, led to the so-called 'gas war' in October 2003. Although issues primarily related to the government's economic policy led to the violent protests they exposed the detachment of the political elite from the population and revealed also the deep frustration of wide parts of the population with the ruling elite.

⁸ Carlos Cordero Carraffa, *Nueva Constitución, nuevo gobierno, nuevo Estado*, in: *Miradas a la nueva Constitución*, La Paz (2009).

⁹ Corte Nacional Electoral (CNE), Boletín Estadístico, no. 7, 8 (La Paz: CNE, November 2007).

¹⁰ *Id.*

¹¹ John Whitelegg, *Bolivia: new constitution, new definition*, Open Democracy, 2 available at: <http://www.opendemocracy.net/article/bolivia-new-constitution-new-definition> (2009).

¹² John Crabtree, *Bolivia's political ferment: revolution and recall*, Open Democracy available at: <http://www.opendemocracy.net/article/bolivia-s-political-ferment-revolution-and-recall> (2008).

¹³ Mesa took over the government after Sánchez de Lozada had fled the country in the middle of the "octubre negro" in 2003.

only half-heartedly. After Mesa's resignation, Eduardo Rodríguez Veltzé initiated the political transition, organized the general elections and approved the law that served as a basis for the creation of the constituent assembly.

The Bolivian constituent assembly served as a mechanism for finding solutions to the underlying conflicts that had almost plunged Bolivia into a civil war. Even though cultural and ethnic divisions were not the only, or even principle, dynamics driving conflicts such as Cochabamba's 'water war' in 2000 and the 'gas war' in 2003, structural discrimination and inequality within the population were certainly at the root of the popular dissatisfaction with the state and the political elites. This constituent assembly was intended to redraw Bolivia's political design by strengthening the participation of civil society; in particular, those groups of the society that had been traditionally excluded from political life, and initiated a process of redefinition of Bolivia's national identity.¹⁴ Evo Morales, as Bolivia's first indigenous head of state, was exceptionally identified with the drive towards building a more inclusive society.¹⁵

III. Central Elements of the New Constitution

The new Constitution¹⁶ was approved by referendum on January 25th 2009. Among the most important - and also most controversial - elements of the new constitution were the promise to increase the (collective) rights of Bolivia's majority indigenous population, as well as to strengthen the mechanisms of political participation and improve the processes of decision-making from which the Bolivian society, and particularly the indigenous population, had been long excluded.¹⁷

Two of the most important changes relate to the cultural 'refoundation' of the Bolivian state and the subsequent reorganization of political institutions in the Constitution, namely, the recognition of the indigenous languages as official languages and the introduction of the indigenous jurisdiction in Bolivia. Both changes were inspired in part by provisions of relevant international legal documents, such as the International Labor Organization Indigenous and Tribal Peoples Convention and the United Nations Declaration on the Rights of Indigenous Peoples. These two documents constitute central elements of the contemporary international normative framework for the promotion and protection of the rights of indigenous and tribal peoples. They have been crucial in shaping national laws and policies regarding indigenous and tribal peoples worldwide.

Only two years after its adoption by the 76th Conference of the International Labor Organization, Bolivia was one of the first countries that ratified the Convention 169.

¹⁴ John Whitelegg, *supra* n. 12.

¹⁵ John Crabtree, *supra* n. 13.

¹⁶ Constitution of the Republic of Bolivia from 21 October 2008, as approved on 25 January 2009 and proclaimed on 7 February 2009 available at: <http://www.presidencia.gob.bo/documentos/publicaciones/constitucion.pdf>.

¹⁷ John Whitelegg, *supra* n. 12.

Also, it was one of the first that incorporated Convention 169 into the national legislation through Law Nr. 1257 of June 11th, 1991. Since then, the Convention 169 has had a remarkable influence on the Bolivian legal system, including certain aspects of the 1994 constitutional reform concerning the rights of the indigenous people.¹⁸ Also, the UN Declaration on the Rights of Indigenous Peoples is part of Bolivia's national legal framework, having been adopted by Law Nr. 3760 on November 7th, 2007. Both international texts have been influential for the Bolivian constitutional reform of 2005 and have been included substantively in the new Constitution.

The new Bolivian Constitution finally endorses the multicultural and plurinational character of the society and the state and has strengthened the rights of the indigenous population. Concretely, there has been an official recognition and numbering of the 36 different indigenous languages in addition to Spanish, and the introduction of the 'indigenous native peasant jurisdiction' at the same hierarchical level as the 'ordinary jurisdiction'. These two important examples will be discussed in greater detail below, as they represent two of the most relevant elements of the new constitutional recognition and respect for Bolivia's cultural and ethnical diversity.

A. The Recognition of Indigenous Languages as Official Languages

One of the important novelties of the new Constitution is the recognition of thirty-six indigenous languages as official state languages. After the ratification of ILO Convention 169 in 1991, the previous Constitution of 1995 already recognized four national languages, among them three indigenous languages. The Constitution of 2009 expands the level of recognition of Bolivia's linguistic diversity. In this sense, Article 5.1 of the Constitution enumerates the thirty-six indigenous languages that are now equal to Spanish as official languages of the Bolivian state.¹⁹

By this same logic, Article 5.2 regulates the use of the official languages, strengthening the role of the indigenous languages in official communications. It states that the plurinational (central) government and the departmental governments have to use at least two of the official languages in their administration. Of these, one has to be Spanish and the other should be chosen by duly taking into account the

¹⁸ Carlos Villaroel Sandoval, *La aplicación en Bolivia del Convenio 169 sobre los pueblos indígenas y tribales en países interdependientes de la OIT*, 196.

¹⁹ Constitution of the Republic of Bolivia from 21 October 2008, as approved on 25 January 2009 and proclaimed on 7 February 2009, Art. 5.1: "Son idiomas oficiales del Estado el castellano y todos los idiomas de las naciones y pueblos indígena originario campesinos, que son el aymara, araña, baure, bésiro, canichana, cavineño, cayubaba, chácobo, chimán, ese ejja, guaraní, guarasu'we, guarayu, itonama, leco, machajuyai-kallawaya, machineri, maropa, mojeñotrinitario, mojeño-ignaciano, moré, mosetén, movima, pacawara, puquina, quechua, sirionó, tacana, tapiete, toromona, uru-chipaya, weenhayek, yaminawa, yuki, yuracaré y zamuco".

“convenience, circumstances, necessity, and preferences” of the local population in the relevant territory.²⁰

This mandate is also contained in the UN Declaration, in Article 13:

1. *Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their [...], languages, [...]*
2. *States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.*²¹

A corollary of this official recognition of Bolivia’s plurilingual reality is the definition of certain collective rights of the indigenous population concerning the use of their native languages. In this sense, Article 30.2., lit. 12 of the constitution states that “in the framework of the unity of the state and in accordance with the constitution” indigenous native and peasant peoples shall enjoy the right to an “intracultural, intercultural, and plurilingual education in the entire educational system”.²²

Also, Convention 169 outlines the right of children belonging to indigenous peoples to have access to an education of and in their original language and the duty of states to preserve and promote the development and practice of the indigenous languages. In this sense, Article 28 states the following:

1. *Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective.*
2. *Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.*

²⁰ *Id.*, Art. 5.2: “El Gobierno plurinacional y los gobiernos departamentales deben utilizar al menos dos idiomas oficiales. Uno de ellos debe ser el castellano, y el otro se decidirá tomando en cuenta el uso, la conveniencia, las circunstancias, las necesidades y preferencias de la población en su totalidad o del territorio en cuestión. Los demás gobiernos autónomos deben utilizar los idiomas propios de su territorio, y uno de ellos debe ser el castellano.”

²¹ United Nations Declaration on the Rights of Indigenous Peoples, art. 13 available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_es.pdf.

²² Constitution of the Republic of Bolivia from 21 October 2008, as approved on 25 January 2009 and proclaimed on 7 February 2009, Art. 30.2., lit. 12: “En el marco de la unidad del Estado y de acuerdo con esta Constitución las naciones y pueblos indígena originario campesinos gozan de los siguientes derechos: [...] 12. A una educación intracultural, intercultural y plurilingüe en todo el sistema educativo.”

*3. Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.*²³

Also, the UN Declaration refers to the right of indigenous people to enjoy education in their own languages and the correlating duties of states. Article 14 states that:

- 1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.*
- 2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.*
- 3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.*²⁴

Although the constitutional recognition of this cultural and linguistic diversity and the official recognition of the 36 indigenous languages in the Bolivian Constitution are important steps towards a genuine pluralism, this mandate requires a series of steps for its concrete implementation. For example, the aforementioned right to a plurilingual education can only be guaranteed if there are sufficient teachers able to speak these indigenous languages. This, however, is mostly not the case. Also, the obligation of the central and the departmental governments to use at least two of the official languages in their administration presents a challenge with which the government has mostly not been able to comply.

However, according to the 2011 annual report submitted to the UN by Bolivia's government concerning the rights of the indigenous peoples,²⁵ the government is taking steps to improve the communication between public servants and the indigenous populations. In this sense, the Bolivian government has created a program of intercultural and bilingual education that includes those indigenous languages recognized in the Constitution as official languages, so that servants in the public administration will be able to better communicate with those groups in the future.

²³ Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169), art. 28 available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C169.

²⁴ UN Declaration, Art. 14.

²⁵ Report on indigenous peoples presented by the Bolivian Government to the UN in January 2011 "Informe del Gobierno del Estado Plurinacional de Bolivia sobre los Pueblos Indígenas, 4 available at: http://www.un.org/esa/socdev/unpfi/documents/session_10_Bolivia.pdf (2011).

B. The Introduction of the ‘Indigenous Native Peasant Jurisdiction’

Another crucial modification in the new legal order is certainly the introduction of ‘indigenous native peasant jurisdiction’ at the same hierarchical level as ‘ordinary jurisdiction’. Since colonialism, legal pluralism has been a reality in many countries of Latin America. In many cases, colonial and early republican authorities have accepted the existence of indigenous and native jurisdictions parallel to the ordinary state authorities. Often, this was due to the (at least implicit) acknowledgement that the indigenous jurisdiction was more efficient and more capable of resolving legal disputes between the members of a certain community, particularly in rural areas where the official state institutions and its ‘ordinary jurisdiction’ were absent. However, this ‘indigenous jurisdiction’ was recognized only in a secondary relation to the ‘ordinary jurisdiction’. Indigenous and native authorities and their jurisdiction were tolerated only concerning ‘smaller’ cases and were hierarchically inferior to the ordinary jurisdiction. The official recognition of legal pluralism is a recent phenomenon that reflects the increasing constitutional recognition of the social and cultural diversity of many of the Latin American countries.

However, the Bolivian vision of a full-fledged recognition of indigenous jurisdiction on the same hierarchical level as ordinary jurisdiction is a novelty, even in this Latin American context and certainly one of the most important innovations of this Constitution. As we have already seen, Article 1 defines Bolivia as founded on its cultural, linguistic, political, as well as legal diversity and pluralism.²⁶ On the one hand, this phrase refers to “diversity” as a matter of fact (in Spanish “pluralidad”), and on the other hand to “pluralism” as a political mandate (in Spanish “pluralismo”) requiring concrete policies for its implementation.²⁷ The different elements of Bolivia’s diversity and pluralism that are enumerated in Article 1 are referred to again in other constitutional articles, embedding the rights that correlate to this list.

As aforementioned, Article 2 translates this recognition of the (factual) diversity and (programmatic) pluralism to a more institutional level of state organization concerning the rights of the indigenous population. It recognizes the right of the indigenous native peasant nations and peoples to “their self-determination within the framework of the unity of the State”, including “their right to autonomy, self-governance, their culture, the recognition of their institutions”.²⁸

Article 30.2 enumerates the concrete corollaries of these collective rights and recognizes in an extensive list of rights, among others, the right of indigenous

²⁶ Constitution of the Republic of Bolivia from 21 October 2008, as approved on 25 January 2009 and proclaimed on 7 February 2009, Art. 1.

²⁷ *El Pluralismo en el texto oficial de la Nueva Constitución Política del Estado*, en Konrad Adenauer Stiftung, *Pensar este tiempo: Pluralismo jurídico*, 47 (La Paz, 2010).

²⁸ Constitution of the Republic of Bolivia from 21 October 2008, as approved on 25 January 2009 and proclaimed on 7 February 2009, Art. 2.

peoples to “have their own institutions be recognized as part of the general state structure” and to have “the application of their own political, legal and economic systems, according to their ‘cosmovision’”:²⁹

Article 178.1 finally shapes the competence of the indigenous people to administer justice in the new Bolivian Constitution. It underlines the relevance of legal pluralism in the new Bolivian Constitution by stating that the state’s faculty to adjudicate emanates of the Bolivian people and is based on certain principles, among others, “legal pluralism, interculturality [...] and social harmony”.³⁰

This recognition of indigenous jurisdictions is also contained in the international legal norms related to indigenous peoples we have been analyzing: the ILO Convention 169 and the UN Declaration. However, the Bolivian recognition reaches far beyond the general mandate of these documents.

Concretely, the UN Declaration states in Article 20 that: “1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions [...]”.³¹ Also, Convention 169 refers to the right of indigenous peoples to maintain and develop their political, economic and social, or even judicial systems or institutions. Article 8.2 states that:

*2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.*³²

Also Article 9 refers to the right of indigenous people to administer justice:

*“1. To the extent compatible with the national legal system and internationally recognised human rights (emphasis added), the methods customarily practiced by the peoples concerned for dealing with offences committed by their members shall be respected”.*³³

The Bolivian vision of a full-fledged recognition of indigenous jurisdiction on the same hierarchical level as ordinary jurisdiction is a novelty and goes beyond

²⁹ *Id.*, Art. 30.2 lit. 5 and 14: “En el marco de la unidad del Estado y de acuerdo con esta Constitución las naciones y pueblos indígena originario campesinos gozan de los siguientes derechos: [...] 5. A que sus instituciones sean parte de la estructura general del Estado. [...], 14. Al ejercicio de sus sistemas políticos, jurídicos y económicos acorde a su cosmovisión.

³⁰ *Id.* Art. 178.1: “La potestad de impartir justicia emana del pueblo boliviano y se sustenta en los principios de independencia, imparcialidad, seguridad jurídica, publicidad, probidad, celeridad, gratuidad, pluralismo jurídico, interculturalidad, equidad, servicio a la sociedad, participación ciudadana, armonía social y respeto a los derechos”.

³¹ UN Declaration, Art. 20.

³² ILO Convention 169, Art. 8.2.

³³ *Id.*, Art. 9.

the recognition granted in the relevant international legal documents. To a great extent, this constitutional recognition represents a greater translation of the social and cultural pluralism of Bolivian society into the political sphere. This is certainly an important step in overcoming the historical discrimination against indigenous peoples. Nevertheless, as will be discussed in the next section, there is concern that the new constitution will swing the pendulum in the opposite direction, creating a sort of reverse discrimination, and that this constitutional recognition of indigenous jurisdiction may also create serious conflicts with Bolivia's international human rights obligations.

IV. Critical Review of these Constitutional Changes

An often criticized aspect of Bolivia's constitutional and political process is the risk that this development might turn into a reversed discrimination and the elevation of a new category of "people" over another part of the population. Also, some are concerned about conflict of laws issues that are the result of the fact that Bolivia is now a 'plurinational state' with a multiplicity of different nations, each with its own legislative and jurisdictional competence. The equal ranking of these two jurisdictions is an immense challenge of coordination and cohesion for the state, while reflecting the wish of a genuine recognition of Bolivia's plural reality. Different authorities, based on different legislation will now be able to adjudicate over social, political and economic conflicts. This could affect the unity of the state, if no clear and objective criteria for competence and mechanisms of coordination are established.

An additional problem is the lack of clarification concerning crucial aspects of the constitutional recognition of the indigenous jurisdiction. This lack of clarity leads to a general ambiguity concerning the application of this collective right in practice. For example, does the Constitution state an autonomous competence of indigenous people to administer justice or does it allow only a subsidiary use of indigenous customary law? If it states an autonomous competence, what are its boundaries and is this competence limited in some way? These are important aspects that still require precision.

Another important implication is related to the conflicts that may arise between the exercise of indigenous jurisdiction and Bolivia's national or international human rights obligations. In this sense, Article 8.2 of the ILO Convention 169 establishes the condition that indigenous peoples have the right to retain their own customs and institutions "where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights".³⁴ In the same way, Article 9 of the ILO Convention 169 limits the use of the methods customarily practiced by the peoples concerned for dealing with

³⁴ ILO Convention 169, Art. 8.2.

offences committed by their members “to the extent compatible with the national legal system and internationally recognised human rights”.³⁵ A similar limitation lacks in the normative of the new Bolivian Constitution. On the one hand, one can disapprove these limitations as being contradictory and against the aim and purpose of the recognition of legal pluralism itself.³⁶ They raise the question concerning ‘whose’ are these internationally recognized human rights, and if this limitation does not impose ‘western’ and ‘foreign values’ on the indigenous people again. On the other hand, some of the practices that exist in the context of the indigenous jurisdiction have been criticized for violating certain human rights and, particularly, women’s rights standards.³⁷

Finally, there has been a misunderstanding of this indigenous jurisdiction in a sense that it would allow people to take matters into their own hands. As the principle of legal pluralism has been recognized in the Constitution, but details have not been yet clarified, there have been several incidents of ‘self-justice’. In some cases the population has interpreted the constitutional recognition of indigenous jurisdiction in a sense that would include such acts. There have been several cases of lynching, a practice that in isolated cases had certainly existed before the new Constitution, but that now is often wrongly interpreted as if it is allowed.

A pending challenge of Bolivia’s legislation is to clarify that ‘self-justice’ is not allowed under indigenous justice and to make sure that even this concept requires certain rules and procedures to be respected.³⁸ Hence the recognition of indigenous jurisdiction has led to the creation of certain areas of the country where the ordinary jurisdiction has little or no influence. The clear definition and delimitation of indigenous jurisdiction, as well as a good coordination with ordinary jurisdiction, are important outstanding challenges for a successful implementation.

Many of the concerns mentioned here have finally been defined in the long awaited coordinating law, the “Ley de Deslinde Jurisdiccional”.³⁹ While the first four articles repeat the basic principles under which the legal pluralism in Bolivia should be organized, Article 5 clarifies important questions, such as the respect of fundamental human rights, woman’s rights and the guarantee of the rights to life.⁴⁰

It states that “all constitutionally recognized jurisdictions respect, promote and guarantee the right to life, and the other fundamental rights and guarantees recognized by the constitution, [...] the enjoyment of the rights of women, their participation, decision and presence [...] both for the equal and just access to positions, as well as for the control, decision and participation in the

³⁵ *Id.*, Art. 9.

³⁶ Carlos Villaroel Sandoval, *supra* n.19, pág. 207.

³⁷ Susanne Käss, Hendrik Bleese, *Unruhiges Bolivien*, Länderbericht KAS, 4 (La Paz, 2010).

³⁸ *Id.*

³⁹ It has been adopted as Ley 073 on December 29th, 2010.

⁴⁰ Ley 073 – 2010, Art. 5: “Artículo 5. RESPETO A LOS DERECHOS FUNDAMENTALES Y GARANTÍAS CONSTITUCIONALES”.

administration of justice”.⁴¹ It furthermore establishes that “all constitutionally recognized jurisdictions prohibit and sanction any form of violence against children, adolescents and women” and declares illegal “any conciliation in this matter”.⁴² Finally, it defines clearly that “lynching is a human rights violation that is prohibited in any jurisdiction and will be prevented and sanctioned by the state”.⁴³

Also Articles 7 through 11 attempt to delimit the scope and competence of the indigenous jurisdiction. However, in some aspects, the articles fall short to define the cases on the limits of its competence.

Even if the Coordinating Law is a crucial step for a better understanding and functioning of the indigenous jurisdiction, its application in practice has still to be proven. Some studies have shown that the importance of this law is more symbolic, as many controversial aspects cannot be truly reconciled.⁴⁴ According to Velasco,⁴⁵ the Coordinating Law has, in practice, confirmed the supremacy of the ordinary over the indigenous jurisdiction and has made the contradictions of the constitutional text even more apparent.

Former President Eduardo Rodríguez Veltzé asserts that the concurrence of multiple ‘cosmovisions’, different cultures and various uses and practices represents an enormous challenge for an effective and harmonious coexistence of the cultural and legal diversity of the country. According to him, this coexistence has to be based on a genuine pluralism, aimed at enhancing the communication, exchange and coordination of the different systems on the basis of common or shared principles and standards.⁴⁶

V. Conclusion

The 2009 Bolivian constitutional reform and its recognition of linguistic pluralism and of indigenous jurisdiction have helped consolidate a unified, inclusive, yet diverse, definition of the Bolivian nation. The new Bolivian Constitution has

⁴¹ *Id.*, Art. 5.1: “Todas las jurisdicciones reconocidas constitucionalmente, respetan promueven y garantizan el derecho a la vida, y los demás derechos y garantías reconocidos por la Constitución Política del Estado”, and Art. 5.2: “Todas las jurisdicciones reconocidas constitucionalmente respetan y garantizan el ejercicio de los derechos de las mujeres, su participación, decisión, presencia y permanencia, tanto en el acceso igualitario y justo a los cargos como en el control, decisión y participación en la administración de justicia”.

⁴² *Id.*, Art. 5.4: “Todas las jurisdicciones reconocidas constitucionalmente, prohíben y sancionan toda forma de violencia contra niñas, niños, adolescentes y mujeres. Es ilegal cualquier conciliación respecto de este tema”.

⁴³ *Id.*, Art. 5.5: “El linchamiento es una violación a los Derechos Humanos, no está permitido en ninguna jurisdicción y debe ser prevenido y sancionado por el Estado Plurinacional”.

⁴⁴ See study by Pedro Velasco, *Ley de Deslinde Jurisdiccional, ¿avances o retrocesos en la aplicación de la justicia indígena?* available at: <http://www.jornadanet.com/n.php?a=87505-1>.

⁴⁵ *Id.*

⁴⁶ Eduardo Rodríguez Veltzé, Presentación, 12.

been crucial for a successful transformation of the state and society. It has helped incorporate those indigenous peoples whose languages and legal customs had been historically excluded and delegitimized. The fact that the new Constitution recognizes concrete collective rights of the indigenous population is an important step to overcome the historical discrimination of this formerly marginalized group of the Bolivian society. Nevertheless, these constitutional changes have also raised unanswered questions and unresolved conflict of law issues. While the constitutional reform was inspired in part by traditional indigenous sources of law as well as international norms on human rights, it also places both sources of law in stark contrast. Bolivia is still struggling to define ways to resolve these tensions. The way Bolivia addresses this conflict will serve as an example for other multicultural, plurilingual and plurilegal societies.