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# Administration of Indigenous Justice.

## Limits and Scope of Indigenous Legal Systems Based on the Plural Control of Constitutionality of the Plurinational Constitutional Court of Bolivia

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Master's Programme in Human Rights and  
Democratisation in Latin America and the Caribbean



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ADMINISTRATION OF INDIGENOUS JUSTICE.  
LIMITS AND SCOPE OF INDIGENOUS LEGAL SYSTEMS  
BASED ON THE PLURAL CONTROL  
OF CONSTITUTIONALITY OF THE PLURINATIONAL  
CONSTITUTIONAL COURT OF BOLIVIA

ABSTRACT

*This paper offers an analysis of the essential aspects of the collective human right to the administration of justice of the Native Indigenous Peoples and Nations in the Plurinational State of Bolivia, based on the role of the Plurinational Constitutional Court. Bolivia's constitutional reform of 2009 led to the implementation of a new State model designed in the light of pluralism, interculturality and decolonisation, the guiding criteria from which the Native Indigenous Campesino Nations and Peoples are recognised the right to administer their own justice, with the sine qua non of respecting the fundamental rights established in the Political Constitution of the State and the Constitutionality Block (which ensures the validity of the international corpus jure of Human Rights). Based on the above, our research focuses on the application of the Plural Control of Constitutionality of the Plurinational Constitutional Court, understood as a new paradigm in the light of comparative law establishing the scope and limits of the administration of indigenous justice.*

KEYWORDS

*Native Indigenous Campesino Nations and Peoples - Plurinational Constitutional Court - Administration of native indigenous campesino justice.*

LIST OF ABBREVIATIONS

Art(s).	Article(s).
Convention C169	Convention C169 of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries of 1989 ratified by Bolivia with Law 1257 of July 11, 1991.
ADRIP	American Declaration of the Rights of Indigenous Peoples
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples, elevated to Law 3760 of November 72007.
CCL	Constitutional Court Law No 1836 of April 1, 1998.
CPC	Constitutional Procedural Code Law No. 0254 of July 05, 2012.
ERL	Electoral Regime Law No. 026 of June 30, 2010.
IACHR	Inter-American Commission on Human Rights
IHRL	International Human Rights Law.
ILO	International Labour Organisation.
LJD	Law of Jurisdictional Demarcation.
LPCC	Law of the Plurinational Constitutional Court No. 027 of July 6, 2010.
NICNPs	Native Indigenous Campesino Nations and Peoples.
PCC	Plurinational Constitutional Court of Bolivia.
PCD	Plurinational Constitutional Declaration.
PCJ	Plurinational Constitutional Judgment.
PCP	Political Constitution of the Plurinational State of Bolivia of February 7, 2009.
SD	Supreme Decree.



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## INTRODUCTION

The right to identity of all human beings lies in respecting their social life. So that they are represented as they are, without altering or distorting their personal truth and external behaviour in specific circumstances such as religious, political, social and legal among others. We can thus affirm that the right to cultural identity is the right of all people and human communities to have their authentic reality respected in the various expressions of human activity (knowledge, beliefs, arts, morality, laws, uses and customs) in their relationship with other groups. This is how cultural diversity is not generated in isolation but in a way that relates to others, so that it is not a fixed, isolated, untouched reality, but a process developing on a constant basis. In addition, this forces the deployment of a double sphere of individual and collective legal protections so as not to fall into extremes: neither absolute individual rights (opposed to cultural diversity), which would cause atomisation, nor the rejection of difference, which would bring about cultural domination and exclusion of the weaker populations.

The Plurinational State of Bolivia encompasses a rich cultural diversity with dissimilar manifestations; its maximum expression are the Native Indigenous Campesino Nations and Peoples (hereinafter, NICNPs). According to the 2012 Census, there are currently 10,059,856 people living in Bolivia, of which 4,199,977 identify with some of the NICNPs;<sup>1</sup> the same populations that historically have been considered

<sup>1</sup> According to the National Statistics Institute-INE (2015), Major Nations or Peoples are: Aymara (1,598,807 inhabitants) and Quechua (1,837,105 inhabitants), the minority Nations or Peoples considered by the Electoral Regime Law (ERL, 2010, Article 57), for the Department of La Paz are: Afro-Bolivians (considered as a nation or people by the Bolivian Constitution 2009, according to Article 32 of the Constitution, 23,330 inhabitants), Mosetén, Leco, Kallawayá, Tacana and Araona; for Santa Cruz: Chiquitano, Guaraní, Guarayo, Ayoreo and

by the western white culture as minor, backward and miserable. In the same way, the legal system, whether colonial or republican, was the main tool used by the governments in power (Spanish and Creole) for the cultural oppression of black and indigenous groups; examples such as indigenous tutelage became legal weapons that deprived indigenous people of their ability to control their own destiny.

In spite of this, the historical continuity of the Law of the NICNPs endured. Its rights were first claimed by the International Law of Human Rights (both the Universal and Regional Protection System) and more recently by various Latin American constitutions such as those of Colombia (1991), Peru (1993), Argentina (1994), Ecuador (2008) and Bolivia (2009), which recognise the collective rights of the indigenous peoples, requiring, as mentioned above, a double sphere of protection: personal, of the indigenous people as individuals, and collective, of the people as a whole (which includes protecting their right to administer justice). These two dimensions of protection lead us to analyse reality very carefully, as certain cultural practices of Bolivian NICNPs would violate individual human rights; for example: arbitrary decisions by the native authorities, expulsion from the communities of minors and seniors, gender violence, etc.

Since February 7, 2009, the Plurinational State of Bolivia has been pursuing a process of dissemination of its Political Constitution of the Plurinational State (hereinafter, PCP) in institutions, politics and the Law. This process of constitutionalisation, whereby the rights of indigenous peoples are widely recognised, is not and will not be linear, nor is it free of contradictions or even setbacks, as it entails developing an institutional framework that will ensure the effectiveness of rights, principles and guarantees. A task of this magnitude is not possible without committed judges and adequate guarantees. Based on this, the PCP understands that the Judicial Function is unique but has several jurisdictions: ordinary Jurisdiction, Native Indigenous Campesino Jurisdiction, Agro-environmental and other special jurisdictions. These are all hierarchically equal but subject to their constitutional mandates,

Yuracaré – Mojeño; for Cochabamba: Yuki and Yuracaré; for Oruro: Chipaya and Murato; for Tarija: Guaraní, Weenayek and Tapiete; for Beni: Tacana, Pacahuara, Itonama, Joaquiniano, Maropa, Guarasugwe, Mojeño, Sirionó, Baure, Tsimane, Movima, Cayubaba, Moré, Cavineño, Chácobo, Canichana, Masetén and Yuracaré and Pando: Yaminagua, Pacahuara, EsseEjja, Machinerí and Tacana.

which implies the establishment of bases for a new system of justice through legal pluralism. The body in charge of ensuring compliance with these postulates of the PCP is the Plurinational Constitutional Court (hereinafter, PCC), which: (1) in cases of individual and collective human rights violations; (2) as well as a resolution of conflicts of competence between the native indigenous Campesino jurisdiction and the other jurisdictions; (3) consultations with the indigenous authorities on the application of their own rules and procedures to a specific case; and (4) lower regulatory control, is subject to the «Plural Control of Constitutionality», whose decisions are binding.

In this context, the PCC has a new structure, organisation and powers, established by the PCP with the Law of the Plurinational Constitutional Court (made effective on July 6, 2010) and the Constitutional Procedural Code Law (made effective on July 5, 2012), which until last year (2015) have been prolific in producing constitutional sentences, setting and pushing forward a broad case law in terms of legal pluralism, the rights of indigenous peoples, interculturality and the character of the Plurinational State, that is, they have developed new jurisprudential lines supporting Bolivia's new pluralistic justice project.

Having considered the normative framework in force, we see that the PCC is no stranger to the problem posed by cultural diversity (two dimensions of protection: individual and collective) but has a very significant role or function - mandated by the PCP - in the resolution of concrete cases, which does not involve intervention but rather attention to the fulfilment of constitutional postulates. Thus, in cases where an indigenous people intervenes, the PCC has a duty to interpret rights, principles and guarantees interculturally, a situation it called: the interpretation of fundamental rights in intercultural contexts. As a result, this mandate generates a generic question about the right to administer justice of the NICNPs from which we must work: what are the scope and limits of the administration of justice of the Native Indigenous Campesino Nations and Peoples in the Plurinational State of Bolivia starting from the double sphere of protection of their rights?

Our research, as it stands, does not involve a mere exegesis of the norms that regulate the PCC and its relation to the NICNPs, but an examination of its legal coherence, with historical, political and cultural variables, in the resolution of actual cases. With interdisciplinary support of the doctrine and an analysis of the jurisprudence it issues, we will evaluate the protection of individual human rights in cases

where the right to administer justice of the NICNPs would affect these fundamental precepts. In this regard, the PCC constitutes the first (not the only) institution of protection in Bolivia, and since it is the body that provides binding jurisprudence, it is necessary for it to apply standards of rights, principles and guarantees effectively; therefore, we will analyse the instruments it has available in order to manage the tension between individual rights and the collective right of the NICNPs to administer justice. Thus, pressure on the PCC will be a *sine qua non* for the effectiveness of the PCP and the international instruments of protection of human rights, since the members of this body have the enormous responsibility to structure and lead the protection of individual and collective human rights.

As mentioned, this work is divided into three Chapters. In Chapter I we will analyse Indigenous Peoples as a manifestation of the World's Cultural Diversity, systematising different perspectives of the human right to cultural identity (its factors and the philosophical foundations of this right, whose international instruments of human rights we will describe for both the Universal and Regional Protection System), and in particular we will look at their right to administer justice. We will also analyse the catalogue of rights of indigenous peoples in contemporary Latin American Constitutionalism and finally, we will look at the Plurinational Constitutionalism of Bolivia, again as far as the administration of justice of the NICNPs and the normative framework on which it rests, as well as lay out the challenges that this is going to face.

The new structure, organisation and powers of the Plurinational Constitutional Court will be examined in Chapter II. Taking into account the body's new normative provisions, they will be discussed in relation to the rights of the NICNPs: (1) supervision of the human rights of individuals; (2) consultations with NICNP authorities on the application of standards or procedures; and (3) resolution of conflicts of competence between the various jurisdictions. In this regard, the PCC, as an independent body that safeguards the respect and validity of the human rights of the NICNPs, also establishes the scope or limits of these rights, including the power to administer their own justice. Therefore, in order to understand this work, it is important to analyse the Plural Control of Constitutionality, from its historical antecedents to the implementation of the new model by the PCP of 2009, delving deeper in its relationship with the rights of the NICNPs. At the same time, we

will analyse the structure and indigenous representation of the PCC, as well as aspects thereof, and finally, general criteria of constitutional interpretation established by the PCP.

Chapter III will expound on the scope and limits of the right to administer justice of the Native Indigenous Campesino Nations and Peoples through the jurisprudence of the PCC in cases where authorities originating from this legal system violate the individual human rights of its members. To achieve this objective, we will carry out a general review of the PCJs of the PCC in cases involving the NICNPs. Our analysis went from the time the magistrates elected by popular vote took office (January 3, 2012) until the end of their management, in the year 2015. After this review, we identified PCJs that resolved the violation of one or several human rights of one or several members of NICNPs determined by the administration of justice carried out by their authorities. Based on these terms of reference, 16 PCJs were selected. Subsequently, we analysed the selected resolutions from two perspectives: the first dealing with the position of the PCC on the alleged violation of an individual human right caused by the indigenous administration of justice granting or denying legal protection to the person or persons affected, the second having to do with the jurisprudential lines that the PCC established in the resolution of these cases, with their reasoning made binding for all the NICNPs of the Plurinational State. We can understand the scope and limits of the administration of native indigenous justice within the Plurinational State of Bolivia as a result of considering these two perspectives.

The pertinence and coherence of our inquiry is meant to be reflected in Chapters that close with their respective conclusions, linking each one of the Chapters with the whole of the investigation (the power of the indigenous peoples to resolve their own conflicts), with the final conclusions aspiring to be a contribution to the defence of the individual human rights of the people and the human right to administer justice of the NICNPs.

1.

CULTURAL DIVERSITY, HUMAN RIGHTS  
AND THE RIGHT OF INDIGENOUS PEOPLES  
TO ADMINISTER THEIR OWN JUSTICE

1.1. CULTURAL DIVERSITY AND HUMAN RIGHTS IN THE CONTEMPORARY  
WORLD: INDIGENOUS PEOPLES

Cultural diversity is one of the most difficult and controversial issues of International Human Rights Law (hereinafter, IHRL). This discussion involves subjects such as migration, religion and indigenous and tribal peoples. The right to identity of indigenous peoples within a context of cultural diversity places other rights within the framework of their relationship with the State, including the power to administer their own justice (indigenous legal systems, rights, duties, procedures and sanctions). By the same token, the right to an identity recognised to indigenous peoples through the ratification of Convention C169 of the International Labour Organisation concerning Indigenous and Tribal Peoples in Independent Countries of 1989 (hereinafter, Convention C169), the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter, UNDRIP) and the American Declaration on the Rights of Indigenous Peoples (hereinafter, ADRIP) entail legal consequences that should be treated with care by the States Parties, including the Latin American States and especially Bolivia.<sup>2</sup>

Since Bolivia has the most progressive constitutional precepts on cultural diversity in Latin America - with greater specificity as regards indigenous peoples - studying the Bolivian case means testing the practice of inclusion of cultural minorities in the state structure. Its

<sup>2</sup> The Plurinational State of Bolivia is located in central South America. Its total area is 1,098,581 Km<sup>2</sup> (4,241,646 mi<sup>2</sup>). It borders to the north and the east with Brazil, to the south with Argentina, to the west with Peru, to the southeast with Paraguay and to the southwest with Chile.

normative force is such that its president - Evo Morales Ayma - by means of Supreme Decree 048 of March 18, 2009, changed the name of the country from “Republic of Bolivia” to “Plurinational State of Bolivia”. This is not only a formal change but also a substantial one, since it seeks to reassess the identity of indigenous peoples and institutionalise their rights by introducing them into the very structure of the State.

As a consequence, the right of indigenous peoples to administer their own justice opens a debate about internal legal pluralism in a State, which inevitably results in the need to conceptually define its legal area and powers, in such a way that the indigenous legal system may be differentiated from the ordinary legal system, thus establishing its limits and scope in terms of protecting the human rights of individuals, whether or not they belong to an indigenous people.

### *1.1.1. Cultural diversity in the contemporary world*

The 20<sup>th</sup> century saw an intense process of rearranging cultural boundaries. The political, economic, social, religious and geographic boundaries that once isolated States/Nations crumbled. The intercrossing of various worldviews, typical of each of these communities, became a characteristic phenomenon of our time.

Factors such as the needs and dynamics of capitalism, wars, poverty and authoritarian governments are forces that have played an important role in the waves of mass migration that have led to cultural hybridisation and/or the coexistence of multiple cultural visions within the same geopolitical space. (Bonilla, 2006, p. 19).

As a result, most of the world’s States are culturally diverse today. Within the borders of the 193 independent States of the world, there are 5,000 ethnic groups and 600 linguistic groups.<sup>3</sup> Countries where all citizens speak the same language and belong to the same ethnic group, like Iceland and North or South Korea, are an exception.

Considering the world as a sort of global village, these cultural differences generate a series of challenges that exert a strong influence on the political, social, economic and juridical aspects of many countries,

<sup>3</sup> See International Labour Organization (2009). *Indigenous and Tribal Peoples’ Rights in Practice: A guide to ILO Convention No. 169*. Geneva. 1v.



with even greater incidence in Latin America (Kreimer, 2014; Olivia & Blázquez, 2007). What is indisputable, up to this point, is that there is not a single culture but a variety of cultures that are nothing if not the proof of this diversity. Every human grouping that lives on earth has its own way of explaining the reality in which s/he is immersed, dissimilar ways of organising, different moral codes, rules of social engagement and legal conduct as well as distinct interpretations of what they are as ethnocultural groups. Along these lines, we must understand cultural diversity as the multiplicity of ways by which the cultures of social groups are expressed. From these, cloaked with culture over time and space, emanate the originality and multiplicity of the cultural identities and expressions of the peoples that make up mankind. Cultural diversity does not only manifest in the various ways in which the cultural heritage of mankind is protected, enriched and transmitted to future generations, but also in the complexity of expressions carried by goods and services everywhere in the world, at all times, through different modes of production, dissemination, distribution and consumption.

In this context, cultural minorities face difficult issues pertaining to their linguistic rights, social customs, legal and economic systems, territorial autonomy, education and immigration and naturalisation policies. As Bonilla points out (2006), "Finding politically viable and morally sustainable answers to these disputes is one of the most important challenges facing democracies across the globe today." (2006, p. 20). Above all, efforts to consolidate democracies in the Global South (backward modern state), for example, have been affected by strong national conflicts and their political life has been influenced by ethnocultural controversies for quite some time. Since the end of the cold war in Central and Eastern Europe, ethnic and cultural confrontations have been a source of political instability and brutal armed conflicts. That said, given the cultural diversity of most countries in the world, it is paradoxical that those who are engaged in the study of Law and Political Philosophy have not analysed such controversies in depth.

Traditionally, Western political philosophers and legal theorists have not discussed problems related to multiculturalism or, when they have done so, they have generally ignored the interests of cultural minorities or minimised the importance of culture in political and moral matters. (Bonilla, 2006, p. 21).

The solutions to the problem were mostly built on theories, models

and arguments starting from an idealisation of the Greek polis, a community made up of people whose differences are inconsequential compared to the cultural, ethnic and linguistic elements that they have in common. This presupposition of political Philosophy and the theory of Western Law have suppressed cultural differences and as a consequence have been the source of governmental policies aimed at coercive assimilation or the actual elimination of cultural diversity.

### *1.1.2. The response of liberal Philosophy to cultural diversity*

We witness in our time institutional and normative changes in the universal, regional and national systems for the protection of human or fundamental rights,<sup>4</sup> by which the right to cultural identity of differentiated groups, such as indigenous peoples, is being recognised by addressing issues that deal with, for example, the preservation of their legal systems. This issue is a global challenge that has to do with whether or not it is possible for cultures (forms of knowledge) to coexist and dialogue as basic elements of national and international relations; whether it is possible to think of a harmonisation of seemingly contradictory proposals such as the “universalism-particularism” and “homogenisation-differentiation” debate or whether humanity is condemned to witness in future times a confrontation between cultures or civilisations or can instead advance on the path of meeting and recognising the other.

As set forth by Olivia & Blázquez (2007), it was not until the second half of the 20<sup>th</sup> century - in response to the atrocities committed by the Nazis and fascists and the collective massacres carried out by Stalinism - that the intention of protecting the rights of minority groups triumphed. This protection was built on both theoretical and practical levels,

<sup>4</sup> As professors De Lucas (1997), Bea (1997) and Olivia & Blázquez (2007) explain, the Human Rights terminology is also comparable to natural rights, subjective rights, individual rights, fundamental rights and citizens' rights; according to Bea (1997), it is true that each of these expressions is the result of a different conception of what human rights have been or should be, however, for the purposes of our research, we use this terminology indistinctly, but, following the main criterion of the general doctrine, we differentiate human rights from fundamental rights. We understand the latter to be rights positivised within a country, with institutional powers recognised by state legal systems and human rights, such as the rights affirmed in international declarations and conventions, as well as basic requirements pertaining to individual dignity, freedom and equality that have not achieved a positive legal status of their own.

through the extension of human rights to people belonging to cultural minorities. Over time, however, it has become evident that human rights are insufficient to respond adequately to the needs of these communities, and when the question of human rights and cultural diversity arises, it seems to be a difficult relationship, even impossible to some, due to the very concept of it, “Whereas human rights have individuals as their fundamental reference, many cultural minorities have communities as their primary reference.” (Bonilla, 2006, p. 21).<sup>5</sup>

Understanding that human rights are structured around individuals but many of the cultural challenges involve collectivities causes a tension that needs to be analysed. According to Olivia & Blázquez (2007), this relationship is not disjunctive - as stated by Dworkin (1984) - but cultural diversity and human rights as a form of approach should be taken seriously:

Advancing a concept of rights is not only a theoretical or conceptual issue because, to a large extent, the idea that we can offer of the relationship between human rights and cultural diversity will be in function of the idea of rights that we defend. (Olivia & Blázquez, 2007, p. 21).

As we see, for many cultural minorities, for example, indigenous peoples from Latin America, the very concept of human rights is unknown or in conflict with their vision of the world; a vision in which the person is not as important as the collective and where human beings are not the centre but only a part of the universe, or where many of the cultural practices of indigenous peoples considered necessary for their survival are classified as human rights violations by people in the West.<sup>6</sup>

This problem, as noted above, was met with indifference and

<sup>5</sup> In his cited work, Professor Bonilla provides the example of the Nukak Makús, a nomadic group that inhabits the Colombian Amazon, whose worldview centres on the group and not the individual. Its basic social unit is the community. Since they are continuously moving through the forest, an especially difficult environment, its members can only survive through the coordinated work of all. “A single person cannot adequately address the challenges and opportunities of life in the rainforest. Therefore, the individual is not perceived as important in and of itself, but for the role it plays in the life of the community. The community is the precondition for the existence of the individual; it precedes individuals ontologically and practically.” (Bonilla, 2006, p. 21).

<sup>6</sup> Bonilla (2006) points out that, with some indigenous peoples, when a child or elderly person is very sick or has a physical disability, they are abandoned in the forest. “As a nomadic group, they can not stay in the same place for a long time, and they cannot carry a sick or physically disabled person through the difficult terrain of the rainforest. They need to be constantly on the move to find new sources of food.” (2006, p. 22).

misunderstanding by jurists and political philosophers as far as cultural diversity and the challenges it generated, but this began to change in the late 1980s and early 1990s.

[...] in our opinion, the timid advances made in matter of protecting cultural identity and diversity rights constitute a renewed approach called upon to lead a process of questioning, adjustment, improvement and adaptation to the new realities and contemporary needs of the universal and regional and national systems for the protection of human rights. (Olivia & Blázquez, 2007, p. 22)

At that point, political philosophers and Law theorists began to reflect on the challenges of cultural diversity, trying to take into account the particular circumstances that characterise this type of issues. Interest in this subject was especially intense in the Global North (developed or first world countries); the multicultural movement appeared in the early 1970s in Canada and Australia, a little later in the United States, England, Germany and France. Since the 1980s, authors such as Will Kymlicka (1991), Charles Taylor (1994) and James Tully (1997) have developed studies that attempt to respond to the problems and perplexities of contemporary culturally diverse societies. “These scholars made explicit the importance of community and culture for people, as well as the dynamics of intercultural conflicts.” (Bonilla, 2006, p. 23). They also discussed the nature and relevance of collective rights for the satisfaction of minority demands and offered political models aimed at the fair recognition and inclusion of cultural minorities.

However, according to Bonilla (2006), these North American studies suffer from two important limitations. In the first instance, they mainly focus on the multicultural characteristics and dynamics of North America and Western Europe, mentioning only tangentially the cultural pluralism of Asia, Latin America, Africa and Europe. Some of the more abstract arguments put forward by the North American authors are, of course, applicable to the situation of peripheral and semi-peripheral countries. However, many of the particular arguments they defend are not:

Such arguments were developed for States with very peculiar characteristics, that is, for consolidated liberal democracies, with strong and stable economic systems, where non-liberal traditions do not constitute an important part of native cultures and where minority cultures have a strong organisation that can articulate and publicise their demands. (Bonilla, 2006, p. 23).

In the second instance, most of these studies on cultural diversity are caught within the theoretical limits defined by the hegemonic political philosophy of our age: liberalism. Again according to Bonilla (2006), the descriptive and normative categories of liberal political philosophy have determined the way in which most authors understood and tried to solve the problems generated by the coexistence of dissimilar cultural communities within the borders of the same State. Even when these authors describe the problems facing culturally diverse societies in non-liberal terms, the normative solutions they offer to satisfy the claims of these minorities were designed in such a way as to avoid violating the values of liberalism. For these authors, the pretensions of non-liberal cultures are unjust, therefore they must be rejected. Similarly, the particular dynamics of cultural groups in which liberal values confront non-liberal traditions (hybrid cultures) are not taken into account, and any possibility that the latter might prevail over the former is discarded *a priori*.

### *1.1.3. The recognition of cultural diversity and the ideal of universal human dignity*

Academic studies on cultural diversity produced in the Global South are even more problematic than those published in the Global North. When the demands of cultural diversity are taken into account, the answers are generally articulated in liberal terms and satisfying demands is considered only if doing so does not imply violating the values of this liberal political and philosophical current (as we shall see below in the analysis of multicultural Latin American constitutionalism). As per Bonilla (2006), in this part of the world, legal and philosophical research on cultural diversity is little and of uneven quality. Thus, whereas minority cultures in Western Europe and North America have been extensively examined, the demands of cultural minorities in the countries of the Global South have been insufficiently studied and are often overlooked even by local scholars. However, in the last decades (since 1980, as shown below), more care went into trying to solve this problem in Latin America, since its cultural minorities, especially the indigenous groups, are numerous and constitute an important part of its history. As a result, the process of specifying human rights has been increasing, “a certain Eurocentric universalism insensitive to the value and richness of cultural diversity is being called into question, together

with the opening towards an intercultural and pluralist interpretation of human rights.” (Olivia & Blázquez, 2007, p. 21).

It is open to debate whether human rights should be regarded as absolute, immovable and non-negotiable values produced by human rationality or as historical constructions specific to the regional contexts that gave rise to them and which, therefore, “should be able to adapt as instruments for coexistence in the new international reality of our time characterised by two opposing forces: homogenising globalization and identity reactions from particular cultural settings.” (Olivia & Blázquez, 2007, p. 22).

There are many theories that claim to provide answers to this issue. An analysis of these numerous positions would exceed the objectives of this research. However, we share Olivia & Blázquez’s (2007) conception of human rights as normative realities under constant construction, contingent, in process, entrenched in a multilateral cause and history (sociocultural transformations), inspired by a yearning for freedom and the result of morally justifiable claims. Human rights as a response to the ever-emerging threats against human dignity, “in any case not as *res gestae* but as *res gerendae*, not as something finished, but as something on its way to the future.” (Olivia & Blázquez, 2007, p. 24). Human rights as reference frameworks for human coexistence, organised under a set of beliefs that constitute identity, the result of particular moments that constitute a certain contingent and historical coexistence, which can be readapted to new challenges, open to transformations. (Borja, 2006, p. 11).

Therefore, we must analyse plural realities connected to the process of recognition of cultural rights and the formation of institutional frameworks specialised in the preservation of cultural diversity, bound by the empirical verification of the emergence of multiple distinct ethnocultural communities and their claims in national and international venues. Under this inclusive theoretical proposal, we intend to tackle and confront reductionist proposals (both individualistic and communitarian),

[...] we want to recognise the complementarity and mutual implication of equality and diversity, of the universal rights and the right to be different or more generally, but always with conditions, of individual and collective rights.” (Olivia & Blázquez, 2007, p. 24).

We should not think in terms of superposing or imposing a conception of human rights, but rather of complementarity between the criterion of universality found in internationally recognised human rights and the right to be different and preserve a culture (cultural identity). The idea of humanity's diversity as a paradigm is reinforced with the recognition of otherness, difference and pluralism as the basis of an intercultural approach to human rights. As we shall see, in the first decade of the 21<sup>st</sup> century, Ecuador and Bolivia have developed the most progressive constitutional frameworks in Latin America in terms of cultural diversity. For this reason, an analysis of these States is useful to understand the dynamics of cultural diversity in Latin America and to imagine plausible ways of responding to the demands of cultural minorities in this part of the world. Therefore, enunciating these changes and reflecting critically inspires in us a commitment to cultural diversity in general and to indigenous peoples in particular, betting on the theoretical disarmament of Western ethnocentrism and the position of the ethnic ethnocentrist discussed by Olivia & Blázquez, the "identitarian-exclusivist ideologies, so typical of our time and of the absolutism of the differences found in extreme relativism, which imprison us in a fixed, closed and limited conception of culture." (Olivia & Blázquez, 2007, p. 29). In our view, proposals that see identity (as a cognitive-subjective fact of identification) as a pure, perfect, homogeneous, unique, isolated and finished product are erroneous. In the same way, the conception of ethnicity as a phenomenon of natural behaviour folded back on itself, away from nature and the condition of being human, is also erroneous.

The Universal Declaration on Cultural Diversity, adopted by UNESCO in 2001, is one of the legal instruments that recognise cultural diversity and understand it to be a common heritage of humanity, which should be considered concrete and imperatively ethical, inseparable from the respect for human dignity.<sup>7</sup> Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent.<sup>8</sup> In

<sup>7</sup> "Article 4 – Human rights as guarantees of cultural diversity. The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope." (UNESCO, 2002, p. 5).

<sup>8</sup> As stated in Article 5 of UNESCO's Universal Declaration on Cultural Diversity, cultural rights are the enabling framework for cultural diversity. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal



accordance with its international obligations, each State should define its cultural policy and implement it, using the means of action that it deems most appropriate, whether concrete support or appropriate regulatory frameworks. This means that we should improve our understanding and clarify the content of cultural rights, considered as an integral part of human rights, since, as Alain Touraine (1994) points out, “a culturally homogeneous national society is by definition an antidemocratic society.” (Touraine, 1994, p. 171).

In the face of this situation, human rights defenders should engage in the construction of a state/supra-state normative and institutional framework that protects cultural diversity. When possible conflicts arise caused by cultural differences, they should be resolved through intercultural, dialogic and respectful meetings, that is, there is a tense relation between human rights and cultural diversity that should be solved on the basis of the protection of human dignity<sup>9</sup> and limits to individualist/communitarian projects. “Intercultural dialogue is the best guarantee of peace and of categorically rejecting the thesis that predicted an inevitable clash between cultures and civilisations.” (UNESCO, 2007, p. 4). Far from an ethnocentric approach, accepting cultural diversity largely entails assuming that there are no cultures that are inferior or superior, rich or poor, advanced or backward. Cultures are a valuable testimony to human diversity, but this does not mean forgetting that all of them integrate practices that undermine the dignity of people. Perhaps far removed from any attitude of cultural superiority, after having accepted cultural diversity, we can also encourage ourselves to criticise and denounce certain practices that, shielded by extreme relativism, endure in many societies. Through anthropological and field studies, we can denounce that indigenous peoples carry out practices that violate individual rights and that are an attack on personal

Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights. All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.

<sup>9</sup> The idea, value or principle of human dignity has been a basic idea of current international human rights law since the end of WWII. According to some authors like Olivia & Blázquez (2007), the idea of human dignity is universal, with an objective dimension that involves geographical and cultural universality, as well as a subjective dimension where dignity is recognised to all human beings.



autonomy and freedom; in this respect, women's rights take on great relevance, as we should not lose sight of the fact that many societies maintain traditional laws, customary practices and justice systems that are discriminatory against women or restrict their political participation based on cultural pretexts.

In our increasingly diversified societies, it is indispensable to guarantee a harmonious interaction and a willingness to coexist of people and groups with cultural identities that are at once plural, varied and dynamic. Policies that promote the inclusion and participation of all citizens guarantee social cohesion, the vitality of civil society and peace. Defined in this way, cultural pluralism constitutes the political response to the fact of cultural diversity. Inseparable from its democratic context, cultural pluralism is conducive to cultural exchanges and the development of the creative capacities that feed public life (UNESCO, 2002, Article 2).

According to Kreimer (2014), we need to establish certain minimum IHRL standards on the promotion of diversity, the value of pluralism, freedom of belief, lifestyle, conduct, cultural practices and the right to be different. Because of this, some cultural practices cannot be tolerated and should be criticised. No one can invoke cultural diversity to violate or limit the scope of guaranteed human rights. For human rights to be truly universal, not as in the idea of imposition or superposition of a particular civilisation, they should be a universal aspiration of the different nations. It is cultural diversity that adds to a more complete conception of human rights. Latin American cultural diversity reflected in indigenous peoples is a historical reality, their reality. The nation States had before them a complex conflict that comes from exclusion, imposition of a parameter of correction, integration and finally, as we will see in the next section, their acceptance of being different in two ways, discourse (formal or normative) and practice “focused on developing concrete instruments that can meet the demands of these sectors.” (Ramírez, 2015, p. 27).

#### *1.1.4. Indigenous peoples in International Human Rights Law*

Indigenous peoples, as an expression of cultural diversity, generated in the IHRL a legal status of their own due to their conditions of historical marginalisation and discrimination; their struggles and demands, according to Esther Sánchez (2010) and Osvaldo Kreimer

(2008 and 2014), like for other subordinate sectors and persecuted political groups, will be formulated in terms of Human Rights. An international normative body of indigenous peoples began in 1977, with the “International Non-Governmental Organization Conference on Discrimination Against Indigenous Populations in the Americas”. Starting from this event, the revision of ILO Convention C107 of 1957 was initiated, which resulted in Convention C169 of 1989, the proposal for a Universal Charter of Indigenous Rights and the UNDRIP (Universal Protection System) and ADRIP (Inter-American Regional System).<sup>10</sup> These legal instruments, as will be seen below, in the specific case of the Plurinational State of Bolivia, constitute its Constitutionality Block and a part of the hierarchical structure of its normativity.

#### *1.1.4.1. Definition of indigenous people*

International instruments such as ILO Convention C169,<sup>11</sup> the UNDRIP,<sup>12</sup> and the ADRIP do not conceptualise or define “indigenous people”, differentiating it from other social groups, but rather they establish their distinctive features for a better understanding. For some authors,<sup>13</sup> the most important matter, beyond achieving a rigid conceptualisation of indigenous people, is to have greater visibility

<sup>10</sup> On June 15 of the current year, the 46<sup>th</sup> Ordinary Period of Sessions of the General Assembly of the Organisation of American States (OAS) approved the American Declaration of the Rights of Indigenous Peoples. This legal instrument had been worked on since 1999 and its main innovations are as follows: Self-identification as an indigenous people is a determining factor for those to whom the Declaration applies (Article I.2.); Indigenous people have the right to self-determination (Article III); Indigenous women have collective rights that are indispensable to their existence, well-being and integral development within their peoples (Article VII); Indigenous individuals and communities have the right to belong to one or more indigenous peoples, according to the identity, traditions and customs belonging to each people (Article VIII); States shall fully recognise their legal personality, respecting forms of organisation and promoting the full exercise of the rights included in the Declaration (Article IX); They have the right to maintain, express and freely develop their cultural identity (Article X); They have the right not to be subjected to any form of genocide (Article XI); They have the right not to be subjected to racism, racial discrimination, xenophobia or other forms of intolerance (Article XII); They have the right to their own cultural identity, integrity and heritage (Article XIII); They have the right to autonomy or self-government for matters related to internal affairs (Article XXI); Indigenous peoples in voluntary isolation or in a situation of initial contact have the right to remain in that condition and live freely and according to their cultures (Article XXVI); They have the rights and guarantees recognised by the national labour law and international labour law (Article XXVII); and they are entitled to the lands, territories and resources that they have traditionally owned, occupied, used or acquired (Article XXV), among other things.

<sup>11</sup> Bolivia ratified this agreement with Law No 1257 of June 11, 1991.

<sup>12</sup> Bolivia elevated this rule to State Law on June 26, 2008 with Law No 3897.

<sup>13</sup> See for example, Sánchez (2014) and Ramírez (2015).

in terms of the language of rights in IHRL, because “by considering indigenous peoples as peoples, they have recognised them as collectives before international regulations.” (Sánchez, 2010, p. 42). This does not mean, however, forgetting the issues that came up in the debate over the terms “peoples” and “self-determination” because of the supposed attitude toward unity of nation states,<sup>14</sup> as ILO employers and state representatives expressed their misgivings toward these terms, preferring linguistic alternatives like “populations”, since, “their transcription as peoples in the agreement would bring with it political problems due to the burden of social and national self-determination.” (Sánchez, 2010, p. 42). In the end, the term “peoples” was imposed because of its value,

[...] there seems to be a general agreement that the term “peoples” better reflects the characteristic identity to which a revised agreement should aspire in order to recognise these population groups. (International Labour Conference, 1998, p. 12).

Thus, we will describe the characteristics that determine what an indigenous people is in the legal instruments of the IHRL and later reason holistically over the concept Native Indigenous Campesino of the Political Constitution of the Plurinational State of Bolivia.

#### *1.1.4.1.1. Elements for defining indigenous peoples*

According to the instruments of the International Human Rights Law, the elements for the definition of indigenous peoples are: (1) Historical continuity, according to this characteristic, indigenous peoples are social groups that descend from groups prior to the conquest or colonisation (Convention C169 Article 1. 1. b. and UNDRIP Article 9); (2) Territorial connection, referring to the fact that the ancestors of these groups inhabited a certain territorial space of a country or region, which implies the occupation and use of that territory (Convention C169 Article 1. 1. b. and UNDRIP Article 10; 26); (3) Distinct/specific institutions, including social, economic, cultural, legal and political, that belong to the group and were retained in whole or in part, that

<sup>14</sup> Faced with this concern, Convention C169 clarifies by providing the following in Article 1.3.: “The use of the term peoples in this Convention shall not be construed as having any implication as to the rights that may be conferred on that term in international law.”.

is, they determine their structure and composition of their institutions according to their own procedures (Convention C169 Article 1. 1. b. and UNDRIP Articles 33. 2 and 34); (4) Collective identification, the fundamental subjective element of the social group to be recognised as an indigenous people (Convention C169 Article 1.2. and UNDRIP, Articles 8 and 33. 1), its cultural identity (traditions, oral expressions, customs, arts, rituals, philosophy or worldview, values, among others) depends on the respect of the land that has sheltered them since pre-colonial times and the protection by the national, departmental, municipal and local authorities bound to preserve it from any kind of abuse that could eliminate the necessary conditions for the communal identification of the indigenous people belonging to it; (5) Experiencing subjugation, marginalisation, dispossession, exclusion or discrimination, these conditions may or not be persisting. (Convention C169 Article 1.1.b.).

As reported by the ILO through its Convention C169 Promotion Department, indigenous peoples cannot easily be captured in a universal definition and “a consensus is developing that it is neither necessary nor desirable to have a formal definition of the term “indigenous people”. By the same token, there is no international agreement on the term “minorities” or the term “peoples””. (2009, p. 9). In our view, the problem of its conceptualisation is even more complex in statistical terms, trying to determine the real number of people in the world self-identified as indigenous.

#### *1.1.4.1.2. Native Indigenous Campesino Nations and Peoples*

The category “Native Indigenous Campesino Nations and Peoples» (hereinafter, NICNPs) is an indivisible unit established by the Bolivian PCP of 2009 as a result of the social consensus of the Constituent Assembly of 2006 between lowland nations and peoples calling themselves “native”, lowlanders preferring to be called “indigenous” and midlanders preferring the appellation “campesino”. In this regard, the Plurinational Constitutional Court of Bolivia (hereinafter, PCC) through PCJ 1422/2012 of 24 September, reported the following:

[...] for socio-historical reasons, this term should be understood as a compound and indivisible concept, comprising indigenous peoples of highlands, lowlands and intermediate geographical areas subjected to a process of miscegenation, which is why this concept is composed of

native-indigenous-campesino elements with indivisible socio-historical semantics. (PCJ 144/2012 of 24 September).<sup>15</sup>

Now that we understand that NICNPs are the product of a constituent assembly pact, we need to know what that is. Article 30 of the PCP establishes similar characteristics to those set forth in the IHRL, which determine what human groups the NICNPs are in Bolivia:

A Native Indigenous Campesino Nation and People is a whole human community that shares a cultural identity, language, historical tradition, institutions, territoriality and worldview, whose existence predates the Spanish colonial invasion. (PCP, 2009, Article 30. I.).

As we can see, the Bolivian constitutional article establishes the same elements to understand an indigenous people as in the legal instruments of the IHRL. Thus, the categories “indigenous people” and “NICNPs” will be used interchangeably as synonyms.

#### *1.1.4.2. Right of indigenous peoples to self-determination*

In this section, we will analyse what is meant by “self-determination” in the light of the IHRL. It is worth mentioning that we understand the self-determination of an indigenous people as a collective group self-identified with their own institutions but without sovereignty. We will not go over the debates on external and internal self-determination<sup>16</sup> that doctrine makes to differentiate external determination with the sovereignty of a State, such as is the case for Bolivia, Argentina and others,<sup>17</sup> from internal determination, which may be of a tribal or

<sup>15</sup> See also PCD 009/2013, PCJ 0026/2013 and PCJ 1256/2013.

<sup>16</sup> This classification is rejected by James Anaya (2000), for which he sets another criterion of differentiation; seeing as how humanity is structured in circles of association and political organisation that occur at different levels, overlap each other and are interdependent, two aspects arise, constitutive and ongoing, which may apply to all spheres of human association. Constitutive self-determination refers to when the governing institutions of a community are created or modified; continuous self-determination refers to their form and operation.

<sup>17</sup> The following are among the international instruments on external self-determination: The Charter of the United Nations of June 26, 1945, which recognises in its first article the principles of «self-determination of peoples» and «equal rights» as the basis of international order; The International Covenant on Civil and Political Rights (ICCPR) providing that, “all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”; The International Covenant on Economic, Social and Cultural Rights (ICESCR) and many

indigenous people without sovereignty. With this clarification, a basic notion of the right of indigenous peoples to self-determination may be the right to autonomy or self-government in matters of local and internal affairs, while respecting the integrity of a State, within the IHRL framework, which is the legal basis upon which one can discuss their different political, economic and cultural rights, among others. Soraya Santiago Salame (2014) follows this line of thinking, when she understands that self-determination is indigenous peoples' most basic right, "if we start from the perspective of the community that, by virtue of its self-determination, assumes its own forms of regulation and institutions, including legal ones, and exercises its legal systems in this context" (Santiago, 2014, p. 94).

In our opinion, following the normative mandates of the IHRL, we understand self-determination to be the right of an indigenous people to be different, thus reaffirming cultural diversity and recognising the contribution of each people to that diversity; which rejects racism and recognises historical injustices and their consequences, as stated in the UNDRIP:

Article 3. Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4. In exercising their right to self-determination, indigenous peoples have the right to autonomy or self-government for their internal and local affairs, and to have the means to finance their autonomous functions.

In this regard, James Anaya (2014), the second United Nations Special Rapporteur on the situation of the Human Rights and Fundamental Freedoms of indigenous peoples, emphasised that the aforementioned instrument represents a breaking away from the

UN General Assembly resolutions that refer to this principle and develop it; for example, resolutions 1514 (XV), 1541 (XV) and 2625 (XXV), concerning the colonial peoples' right to self-determination. On the other hand, some institutions, such as the Permanent Forum on Indigenous Issues, use these instruments without differentiating between the external and internal nature of self-determination; this can be observed in their recommendation to the Human Rights Committee and the Committee on Economic, Social and Cultural Rights to request "States Parties to take into account in their reports to their respective bodies the first article of the International Covenant on Civil and Political Rights and the first article of the International Covenant on Economic, Social and Cultural Rights, to be considered in line with Article 3 of the United Nations Declaration on the rights of indigenous peoples, which sets forth the right of indigenous peoples to self-determination." (Recommendation, p. 50).

historical and continuous denial of the right to self-determination of indigenous peoples, and appealed to the states to remedy such denial. Regarding Article 3, this Rapporteur stated that, “it is a fundamental right, without which all human rights of indigenous peoples, both collective and individual, cannot be fully exercised”. (Anaya, 2014, p. 9). We share this thought and understand that the aforementioned Articles affirm the right of indigenous peoples to decide for themselves the adoption of their own forms of government, to choose their own authorities, decide on the administration of their natural assets such as lands and their economic, social and cultural development and resolve community conflicts according to their legal systems of administration of justice.

In the Plurinational State of Bolivia, the right of “self-determination” has a constitutional rank and respect thereof is a priority in order to ensure the full effectiveness of its collective, social, economic and cultural rights, while respecting its social identity and cultural institutions, with the understanding that:

Given that the native indigenous campesino nations and peoples existed in precolonial times and their ancestors had dominion over their territories, their self-determination is guaranteed within the framework of the unity of the State, which consists of their right to autonomy, self-government, its own culture, the recognition of its institutions and the consolidation of its territorial entities, in accordance with this Constitution and the law. (PCP, 2009, Article 2).

Within the framework of the unity of the State and in accordance with this Constitution, the native indigenous campesino nations and peoples have the following rights: [...] Self-determination and territoriality. [...]. (PCP, 2009, Article 30.II. 4.).

#### *1.1.4.3. Legal pluralism in international instruments for the protection of Human Rights*

One of the objectives of this research is understanding what standards the IHRL establishes with respect to the legal systems of indigenous peoples, that is, the internal legal pluralism of a State. In this regard, in ILO Convention C169, Article 8, we find parameters of interpretation such as: consideration of the values, principles, norms and procedures of indigenous peoples in applying the ordinary law of a country, the limits of indigenous legal systems with respect to human rights and establishing conflict resolution procedures in the exercising of the legal systems of indigenous peoples.

Article 8. 1. In applying national legislation to the peoples concerned, due regard should be had for their customs or customary law. 2. These peoples shall have the right to preserve their own customs and institutions, provided that they are not incompatible with fundamental rights defined by the national legal system nor with internationally recognized human rights. Whenever necessary, resolution procedures should be established for conflicts that may arise in the application of this principle. 3. The application of paragraphs 1 and 2 of this Article shall not prevent the members of these peoples from exercising the rights recognised to all citizens of the country and assuming the corresponding duties.

In our understanding, the revised rule obliges all judges and courts of the judiciary of a State (in the Bolivian case) and also the PCC to carry out an intercultural interpretation in the application of the ordinary legal system to the members of an indigenous people.<sup>18</sup> It also obliges them to respect the application of their law, unless it goes against the fundamental rights embodied in the fundamental law (Convention C169, Article 9. 1). Finally, it also obliges judges and courts to establish mechanisms, that is, special conflict resolution procedures for indigenous peoples (Convention C169, Article. 10. 1 and 2).<sup>19</sup>

Article 9. 2. The authorities and the courts called upon to decide on criminal matters shall take into account the customs of said peoples.

Article 12. The peoples concerned shall have protection against the violation of their rights and be able to initiate legal proceedings, either personally or through their representative bodies, to ensure the actual respect of such rights. Measures should be taken to ensure that the members of these peoples can understand and be understood in legal proceedings, providing interpreters, or other effective means, if necessary.

We can also find the right of indigenous peoples to exercise their own legal systems in the UNDRIP (Article 13. 1.) and ADRIP (Article XXII), as well as the States' obligation to protect the norms, values, principles of indigenous peoples (UNDRIP, Article. 13. 2).

<sup>18</sup> In this regard, the UN Permanent Forum on the Indigenous Issues recommended "that all States where indigenous peoples live should review their legislation and their policies and programmes, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples and the Programme of Action for the Second International Decade of the World's Indigenous People" (Recommendation, p. 47).

<sup>19</sup> In this regard, we can see, in one of the observations made by Austria in the Universal Periodic Report of the Plurinational State of Bolivia (2010), the concern for the application of legal systems to specific cases that Bolivia should promote "social inclusion and stability, endeavouring, among other things, to fully adjust the different jurisdictions to the new Constitution." (2010, p. 113).



Indigenous peoples have the right to promote, develop and maintain their institutions and their own customs, spirituality, traditions, procedures, practices and, where they exist, legal customs or systems, in accordance with international human rights standards. (UNDRIP, art. 34).

Therefore, from the reading of the IHRL on internal legal pluralism, the Plurinational State of Bolivia, through the Judicial Branch and the PCC, should apply to specific cases, the norms, values and principles it establishes on the legal systems of indigenous peoples.<sup>20</sup> This will make it possible to read human rights through the worldviews or paradigms of indigenous peoples.

## 1.2. INDIGENOUS PEOPLES IN LATIN AMERICAN CONSTITUTIONALISM

### 1.2.1. *Recent constitutional transformations in Latin America*

Latin American constitutionalism can be classified into three models: classical liberal, social and contemporary, called by some authors Latin American neo-constitutionalism (Carbonell, 2006 and 2007; Viciano Pastor Roberto, 2013). In the *classical or liberal model*, bearing British, American and French influence, the rights of the Latin American indigenous population were not recognised nor included in the structure and organization of the State, which is why, in the Bolivian case in its Constitution of 1825, “the indigenous peoples were absolutely excluded from the State in political, economic and social terms.” (Attard, 2014, p. 35). The principle of legal monism is defined as the existence of a single legal system within the territorial space of the State, which made it impossible to think of the recognition of the right of indigenous peoples to administer their own justice.<sup>21</sup> In social *constitutionalism* a kind of

<sup>20</sup> As recommended by the Permanent Forum on Indigenous Issues in its Report of the ninth period of sessions from 19 to 30 April 2010, “In accordance with Article 42 of the United Nations Declaration on the Rights of Indigenous Peoples, States, the United Nations system and other intergovernmental organizations should provide political, institutional and financial support to the efforts of indigenous peoples, so that they can consolidate their own development models and concepts and good living practices (for example, *sumakkawsay*, *suma qamaña*, *laman laka*, *gawis ay biag*), based on indigenous cosmologies, philosophies, values, cultures and identities, and coordinate efforts to implement the Declaration.” (Recommendation, No 11).

<sup>21</sup> According to Yrigoyen (2011), in the nineteenth century, the Creole project of indigenous subjection to the horizon of liberal constitutionalism was expressed under three

agrarian reform was generated that propitiated the first changes for the rights of the indigenous peoples; this can be seen in the Constitution of Querétaro in 1917 as a constitution type or model, which in the Bolivian case is reflected in the Constitution of 1938, “this made possible the recognition of indigenous communities and their collective rights to the land, as well as other cultural specificities, within an integrationist indigenism framework” (Yrigoyen, 2001, p. 140), but this implied not breaking the identity of the State-Nation nor legal monism, the reason why it is not possible to even speak of a right to administer justice on the part of the indigenous peoples. In the third model, contemporary Latin American constitutionalism, beginning with the formation of the UN organisation and the emergence of an international legal statute such as the IHRL, designs a model of Social and Democratic State based on the Rule of Law and the validity and effectiveness of fundamental rights. There is thus an opening toward the IHRL in general and as far as the rights of indigenous peoples in particular. “This treatment has led national judges to expand international human rights standards through elements such as the constitutionality block, which has acquired a special meaning in Latin America” (Uprinsky, 2011, p. 114).<sup>22</sup>

Due to the recognition of cultural diversity and the rights of indigenous peoples of the last constitutional reforms (from the 1980s to the 2010c), as Yrigoyen (2011) suggests, we will classify this contemporary Latin American constitutionalism in three cycles: “multicultural constitutionalism” (1982-1988), “pluricultural constitutionalism”

constitutional techniques: assimilate or convert the Natives into citizens entitled to individual rights by dissolving their peoples, with collective lands, own authorities and indigenous jurisdiction to avoid indigenous uprisings; reduce, civilise and christianise the Natives who were not yet colonised, whom the Constitutions called savages, minor and rustic, to expand the agricultural frontier; and lastly, wage offensive and defensive war against the Native nations – with whom they had signed treaties and whom the Constitutions called barbarians – to annex their territories to the State. (2011, p. 140).

<sup>22</sup> Contemporary constitutionalism begins with the formation of the UN, which established a Universal System for the Protection of Human Rights, determining the dogmatics of Human Rights starting with an essential instrument, the Universal Declaration of Human Rights, which formed a catalogue of human rights. Two specific instruments were issued: the International Covenant on Civil and Political Rights (characterised by three essential aspects: it recognizes and enshrines civil and political rights, all of which are directly applicable in the Member States and are directly justiciable through protection mechanisms) and the International Covenant on Economic, Social and Cultural Rights (characterised by the recognition of economic, social and cultural rights, which however are not directly applicable in the Member States, as they constitute programmatic postulates of progressive application, with the only conditioning factor of the principle of prohibition of regressivity, as its execution is entrusted directly to the Legislative and Executive Bodies, for which reason they are not directly justiciable).

(1989-2005) and “plurinational constitutionalism” (2006-2009), which “have the virtue of progressively questioning the central elements of the configuration and definition of Latin American republic states designed in the nineteenth century, and the inheritance of indigenous colonial tutelage, thus proposing a far-reaching decolonising project.” (2011, p. 141). As a result of these recent constitutional reforms, new categories were incorporated in legal language, which in one way or another affect or transform the characteristics of the State: “multiculturalism”, “interculturalism” and “plurinationalism”. These terminologies prevail as the thinking on cultural diversity evolves and, as will be seen below, in the Bolivian case, this issue will be paradigmatic, as its last constitution aims to refund the same State, since “plurinationality has become a very powerful concept, with ideological and political content that tends to organise the State and the distribution of power in a radically different way from the way the present was made”. (Ramírez, 2015, p. 51).

#### *1.2.1.1. Rights of indigenous peoples in multicultural Constitutionalism*

The first cycle, which goes by the name of multicultural constitutionalism, was developed in the 1980s; international instruments, such as the ILO Convention C107 of 1957 – as emphasised by Attard (2014) –, generated an awareness of tolerant multiculturalism and recognition of rights of indigenous peoples, including the right to communal lands, but would fail to explicitly recognise legal pluralism. It is thus that cultural diversity in Latin America began from this constitutional model, whose first expressions would be the constitutional reforms of Guatemala in 1985 and Nicaragua in 1987.<sup>23</sup> These

However, through the influence of doctrinal conceptions that question the differentiation or cataloguing of rights, thanks to the maximum effectiveness of human rights and within the framework of a truly guarantist vision to be entrusted to the constitutionality control bodies, the limitations of the Social and Democratic State of Law are criticised in order to advance to an even more guarantist design embodied in the Constitutional State of Law. From the point of view of contemporary constitutional theory, the Constitutional State of Law model finds its *raison d'être* in three essential features: the autonomy and identical hierarchy of all rights, insofar as economic social and cultural rights cease to be programmatic clauses, the direct justiciability of all hierarchically identical rights and the scope of constitutionality control roles, since the real effectiveness and materialisation of the justiciability of all fundamental rights involves the regulation of new, broader and more extensive constitutional procedures and lines of interpretation.

<sup>23</sup> Both constitutions respond to indigenous demands in the process of armed reconciliation of their society. “The Guatemalan Constitution recognises the multi-ethnic, multicultural and multilingual configuration of the country and the right of individuals and communities to their cultural identity, as well as certain specific rights for ethnic groups and

constitutions recognise the existence of other cultures that occupy the same geopolitical space of a State. “This way, the relevance of cultural diversity became important for the States, and multiculturalism obtained its citizenship papers, in a process of change that appeared unavoidable throughout the continent.” (Ramírez, 2015, p. 53). “Multiculturalism” was the terminology used as an adjective to this opening of policies that the State would have to carry out for indigenous peoples, an expression of the cultural diversity of Latin America. At the same time, categories such as “pluri-ethnic” were used that when implemented turned out to be insufficient for the construction of inclusive States. As we saw above, this multiculturalism established by liberal philosophy led to a stronger classical State, for it does not allow one to alter its structure nor to open democratic processes of participation. The rights of indigenous peoples are recognised as cultural practices that must conform to the state model.

In spite of this, we see that as the first step for the right to cultural diversity in general and the rights of indigenous peoples in particular, which, according to Ramírez (2015, p. 60), will be a half recognition, since if cultural difference is well recognised, relationships between cultures are not symmetrical, for one of them is dominant and imposes the State. In addition, those who welcome this category (Multicultural State) are limited to non-discrimination. Therefore, a proposal is necessary that will overcome these limitations of the multicultural model.

#### *1.2.1.2. Rights of indigenous peoples in pluricultural Constitutionalism*

This second cycle of Latin American constitutional reforms developed in the 1990s; it affirmed the cultural diversity and the law of indigenous peoples (introduced in the first cycle), and the concepts of “multi-ethnic/multicultural nation” and “Pluricultural State”, describing the nature of the population and shaping the redefinition of the character of the State. The Bolivian constitution of 1994 was part of this cycle of constitutional reforms; it declared Bolivia to be a multicultural and pluri-ethnic State and recognised the administration of justice by indigenous peoples as an alternative form of conflict resolution (PCP,

indigenous communities. The Nicaraguan Constitution also recognises the multi-ethnic nature of the people, as well as the cultural, linguistic and territorial rights of the ethnic communities of the Atlantic coast, so that they can organise themselves according to “their historical and cultural traditions” and develop an autonomous system.” (Yrigoyen, 2011, p. 141).

1994, Articles 1 and 171). “Pluralism and cultural diversity become constitutional principles.” (Yrigoyen, 2001, p. 142). A catalogue of the rights of indigenous peoples was included in the dogmatic part of the constitutions: languages, bilingual education, land rights, prior consultation, among others, in the framework of the adoption of ILO Convention C169 of 1989.

The Constitutions of this cycle recognise the indigenous authorities, with their own rules and procedures or their customary law and jurisdictional or judicial functions. Based on these recognitions, the classical idea of sovereignty and the monopoly that the Constitutions assigned to the “sovereign powers or bodies” of the State for the production of law and legitimate violence are called into question. (Yrigoyen, 2011, p. 143).

In this cycle, many Latin American countries faced constitutional reform processes: Brazil in 1988, Colombia in 1991,<sup>24</sup> Paraguay in 1992, Peru in 1993,<sup>25</sup> Argentina and Bolivia in 1994, Ecuador in 1996 and 1998 and Venezuela in 1999. This movement included countries that introduced important constitutional amendments in their texts, such as Costa Rica in 1989 and Chile and México in 1992.<sup>26</sup> However, following Ramírez (2015), the constitutional matrix of these constitutional reforms,<sup>27</sup> more than the important indigenous population in each of these countries, strengthens a conception of State that is built without the participation of indigenous peoples. We consider this statement to be correct, since the claims of Latin American indigenous peoples are not just a positivisation of rights in the dogmatic part of the Constitution, but also transformations of the political organisation that make the

<sup>24</sup> Article 246. “The authorities of indigenous peoples may exercise jurisdictional functions within their territorial area, in accordance with their own rules and procedures, provided that they are not contrary to the constitution and laws of the republic. The law establishes the forms of coordination of this special jurisdiction with the national judicial system.” (Colombian Constitution, 1991, Article 246).

<sup>25</sup> Article 149. “The authorities of the Campesino and Native Communities, with the support of the Peasant Rounds, may exercise jurisdictional functions within their territorial area, in accordance with customary law, provided that they do not violate the fundamental rights of the person. The law establishes the forms of coordination of said special jurisdiction with the courts of Peace and with other instances of Judicial Power.” (Peruvian Constitution, 1993, Article 149).

<sup>26</sup> See, for example, Uprimmy (2011), Yrigoyen (2011), Gargarella (2011) and Ramírez (2015) among others.

<sup>27</sup> Constitutional matrix should be understood as “a basic structure around which the State organised itself juridically and politically as we know it today, and which marked its birth with the independence from Spain”. (2015, p. 25).

satisfaction of these rights feasible. In this regard, Ramírez (2015, p. 30) studies constitutions in relation to the legal status of indigenous peoples and understands that, in plurinational constitutions (as we will see below), the rights of indigenous peoples are justified (to respect the principle of equality and to build equal and inclusive States) and that they generate deep constitutional transformations in terms of catalogues of rights as well as political organisation and power distribution issues.

Likewise, the idea of a special jurisdiction for indigenous peoples – where they can exercise their own legal system – generated a series of conflicts in which neither the laws nor the Courts or Constitutional Courts (except the Colombian Constitutional Court)<sup>28</sup> could specify the extent of that right, especially in relation to the interpretation of other human rights. However, this constitutional cycle was still strongly influenced by the tolerant multiculturalism of liberalism. Cultural diversity served as a support, but also a limit for the recognition of indigenous legal systems.

Based on these multiple factors, the Constitutions managed to overcome the phantom of legal monism and incorporated some formula of internal legal pluralism seeking not to affect national integrity, legal security and the values of human rights. (Yrigoyen, 2011, p. 145).

As we have seen, the limit of the right to administer justice of indigenous peoples is established by Article 8.2 of ILO Convention C169, which prescribes the incompatibility of indigenous law with human and fundamental rights;<sup>29</sup> this is elevated by other countries into laws and public order (as in the case of the Venezuelan Constitution). These limitations that had as a source liberal multiculturalism generated a strong political and legal dispute, due to inconsistencies in cultural diversity, legal pluralism and the equality of cultures that the very same constitutions of this cycle recognised.

In a progressive sentence, the Colombian Constitutional Court resolved this apparent constitutional contradiction by saying that the adoption of the principle of pluralism could be rendered void if indigenous jurisdiction had to

<sup>28</sup> Since Colombia was the first country to recognise the indigenous jurisdiction as special, it influenced in part the dogmatics of this pluralistic constitutional cycle, for example, from Peru and Bolivia it inherited this nomenclature and calls non-indigenous jurisdiction ordinary. See, for example, Bonilla (2006), Yrigoyen (2011) and Botero (2012).

<sup>29</sup> As the Peruvian Constitution does in its Article 149.

submit to the entire Constitution and laws. From there, it established only four fundamental minimums, that is, that the decisions of the indigenous jurisdiction could not include the death penalty, torture or slavery, and that they had to be somehow predictable, that is to say that they had to respect their own due process. (Yrigoyen, 2011, p. 148). The bold face is ours.

This constitutional precedent had a great influence on Latin American constitutionalism, especially since they opted for “cultural assessment” as a means of proving the intercultural understanding of constitutional judges towards indigenous cultures. However, as understood by Bonilla (2006), Yrigoyen (2011) and Sánchez (2010) the same Colombian Constitutional Court would later limit the right to administer justice of indigenous peoples to only their members in minor or domestic cases and within their territorial circumscription.

### *1.2.1.3. Rights of indigenous peoples in plurinational Constitutionalism*

In the first decade of the 21<sup>st</sup> century, Ecuador (2008) and Bolivia (2009) were the Latin American countries that underwent a profound constitutional transformation characterised by political mobilisations of indigenous peoples and other social organisations, which authors like Santos (2012) and Del Real Alcalá (2010) see as processes of social, economic, cultural and political re-foundation, with paradigmatic incidences on the Law and the modern State; which they called “Transformational Constitutionalism” or “Plurinational Constitutionalism”, outlined in terms of “a decolonising and anti-capitalist political project... that will break away from Eurocentric ties that have conditioned development processes in recent years.” (Santos, 2012, p. 13). This constitutional model postulates two essential concepts: structuring its design according to the dogmatic bases of individual, collective and diffuse fundamental rights, understanding its application in intercultural and not strictly universal contexts, and designing the model in the light of “interculturality”, “pluralism” and “decolonisation”. (Attard, 2014, p. 38).

In this constitutional cycle, indigenous peoples are recognised not only as diverse cultures but as NICNPs with the right to self-determination within the unity of the State.<sup>30</sup> These constitutions seek

<sup>30</sup> On the differentiation between civic nation and native indigenous campesino nationality, see, for example, García (2007) and Tapia (2008), among others.



to overcome the absence of constituent power of indigenous peoples in the foundation and development of the republic period, countering the legal situation of minors and rural people, subject to State tutelage. For its part, the Ecuadorian constitution incorporates the rights of the Pachamama, elevating it to the status of subject of rights. (Constitution of Ecuador, 2008, Articles 71 to 74).

“The foundation of legal pluralism in the Constitutions of Bolivia and Ecuador no longer lies solely in cultural diversity, which is also recovered through the principle of interculturality, but above all in the recognition of the right of indigenous or native peoples to self-determination (Ecuador) or self-determination of the peoples (Bolivia).” (Yrigoyen, 2011, p. 150).

Here we can see that these states are undergoing a process of political positioning, new rights and restructuring. The most distinctive feature of Bolivia’s Political Constitution of the State<sup>31</sup>

is rights across the board for the NICNPs transforming the conception of State to a greater extent than the Ecuadorian Constitution (which is limited to the extension of fundamental rights). There is also an implosion of categories that are just being developed in their true constitutional scope: plurinationality, interculturality, decolonisation, self-determination and «Living Well» or «Suma Qamaña». The aspiration to build a plurinational community State arises as a demand for overcoming colonialism along with the liberal model of State/ Nation. Despite sharing the same postulates with the constitutions of Ecuador of 2008 and Venezuela of 1999, the Bolivian magna charta is to date unique and exceptional (Ramírez, 2015). It gets past the monolithic and homogeneous conception of the State and incorporates cultural diversity in open terms, whose recognition and incorporation at State level inevitably generates conflicts to overcome at the political, economic and legal level.

Contrary to liberal multiculturalism, which recognises the presence

<sup>31</sup> The Political Constitution of the Plurinational State of Bolivia is the seventeenth constitutional text in its history. It entered into force on February 7, 2009, when President Evo Morales promulgated it after it was approved in a referendum with 90.24% participation. The consultation was held on January 25, 2009 and the approval vote reached 61.43% of the total (2,064,417 votes). The nays were 38.57% (1,296,175 votes). The blank votes totalled 1.7% and null votes 2.61%. National Electoral Court (2009). National Constituent Referendum 2009. Retrieved from <http://web.archive.org/web/20110917004514/http://www.cne.org.bo/ResultadosRNC2009/> on 14 May 2016.



in society of non-Eurocentric cultures insofar as they operate only in the communities that adopt them and do not interfere with the dominant culture in the rest of society, the emerging Plurinational Constitutionalism, with its intercultural component, does not simply demand recognition of diversity, but rather celebrates “cultural diversity and mutual enrichment among the various extant cultures”. (Santos, 2012, p. 21). According to Professor Santos (2012), recognising indigenous justice as a fundamental element of Bolivia’s plurinational project, based on a strong conception of legal pluralism, involves tensions and transitions in various fields that can be differentiated as follows: legal monism and pluralism, liberal multiculturalism and interculturality, the notion of nation and plurinationality, Eurocentric democracy and intercultural democracy, dependent capitalist development and Suma Qamaña, coordination and cooperation between ordinary and indigenous justice and finally intercultural interpretation of the Constitution and IHRL. This last aspect mentioned by Santos (2012) should be based on the notion that tension between indigenous justice and ordinary justice is not a study between the traditional and the modern, “it is rather a study between two rival modernities, one Indocentric and another Eurocentric. Both are dynamic and each has its own rules to adapt to the new and respond to threats, in short, to reinvent itself.” (Santos, 2012, p. 47).

In plurinational constitutionalism, it is clear in its dogmatic part, infra-constitutional law cannot violate the fundamental law given the primacy attributed to it. Legal pluralism is recognised on the level of equality that must obey the constitution. Given also the primacy of the IHRL, internal legal pluralism in the same way owes obedience to it. But in the case of indigenous jurisdiction the issue becomes a little more complex, a drama of its own according to Santos (2012), which it is necessary to distinguish and analyse (as we will in Chapter 3).

As we have seen, this plurinational constitutionalism incorporates projective categories such as “interculturality”, which becomes the concept that overcomes the limitations of multiculturalism. It will require a new dialogue between the State and the indigenous peoples, based on respect for their cultures and not simply tolerance as proposed by multiculturalism. This is how the idea of spaces is determined where everyone can freely express and claim their rights. Interculturality takes on the meaning of a serious dialogue between the State and the indigenous peoples; it calls for dialogue, sharing, exchange and mutual enrichment.

“One step closer to inclusion.” (Ramírez, 2015, p. 63). An aspiration for coexistence and exchange of knowledge for which the intercultural State recognises and incorporates institutions of indigenous peoples and also of other cultures. Thus, legal pluralism is formally incorporated in a State, so that indigenous peoples have the power to administer their own justice.<sup>32</sup> The state loses the monopolisation of legal production.

Interculturality is a tool or principle that promotes the interrelation of different social groups characterised by a cultural identity, taking into account their logics, practices, knowledge of the political, economic, social, cultural, linguistic and legal order with a horizon of consolidation for an intercultural society, where the exercise of fundamental and collective rights is respected and guaranteed without discrimination of any kind. (Walsh, 2009, p. 152).

Later, “plurinational” would be presented as the name of a political project for a State that some countries like Bolivia and Ecuador aspire to be.<sup>33</sup> This is the value carried by this terminology and as a consequence it breaks with the traditional (dogmatic) idea of State/Nation. With the plurinational model, the situation of indigenous peoples changes - at least as a project - from being vulnerable to being a political subject with a regulatory statute of protection and promotion. A double dimension of equality is generated as an effect, equality as citizens and as peoples. Being equal in diversity and maintaining the unity of the State with these differences. The plurinational model will be – according to Ramírez (2015) – the last step for Latin American indigenous peoples claiming their rights.

It cannot be otherwise, since it is an idea full of angles, typical of Andean particularities, to be understood as a decolonisation and recognition of minorities, but which is also pluralistic, although in a very different sense from

<sup>32</sup> For a detailed analysis, see Ramírez (2015, pp. 49-73).

<sup>33</sup> The origin of the plurinational category lies in the struggle of the indigenous peoples to claim their rights, that is, it has a political origin. Some of the authors who have written about plurinationality are: Albó and Barrios (2007), García Linera (2007), Tapia (2008), De Sousa Santos (2012), De Sousa Santos and Exeni (2012), Acosta and Martínez (2009) and Walsh (2009). The plurinational category appears to be at an intersection of discussions that include Indianism and indigenism; academic criticism, multiculturalism, politics and nationalism; as far as the rights of indigenous peoples and also of the left. “Although the concept is articulated with what could be considered a continuation of the formation processes of the State in South America (completing unfinished nineteenth century processes), the discussion of plurinationality is also connected with a post-republicanism that seeks to expand the limits of politics surpassing the modern liberal and state forms.” (Schavelzon, 2015, p. 71).

liberal multiculturalism since it calls for open interculturality. (Schavelzon, 2015, p. 10).

The projection of a new State distinct from the colonial period will be the discourse of emancipation and vindication of their rights. As we shall see below, in the Plurinational State, the legal systems of indigenous peoples are recognised as hierarchically equal to the ordinary system. Despite its being of recent construction, we can identify positive consequences; respect for culture, language and worldview among others.

These particularities require a creative State, with political institutions that can adapt to these standards, where a unity in the leadership can be maintained with representation of all the nations that it encompasses. Undoubtedly, not a simple task, which in some countries is in a permanent process of construction. (Ramírez, 2015, p. 66).

Another concept that has the same axiological charge in the PCP of Bolivia is “decolonisation”. This category implies that colonialism did not end with Bolivia’s independence and that racist and discriminatory concepts still endure. For this reason, the State must be re-founded together with the plurinationality framework.

[...] we conclude that decolonisation should be understood from a basis of restitution-equalisation-reconstitution, as a process destined to the restitution and reconstitution of the political, cultural and social authorities of the native indigenous campesino nations and peoples; in addition, their political, juridical, economic, cultural, spiritual and territorial institutions should be restored and reconstituted, in a harmonious process of solidarity and respect, a vision that is fully harmonious with the Plurinational Unitary State. (Attard, 2014, p. 33). The bold face is ours.

Other pillars that the 2009 PCP established for Bolivia are the “self-determination of the NICNPs” and “Living Well” or “Suma Qamaña”. The former, as we have seen above, is an essential element of the re-foundation of the Bolivian State; its purpose is to consolidate an internal equalitarian sovereignty within a State, which is realised

In both Bolivia and Ecuador, the plurinational idea emerges from the Quechua and Aymara political and intellectual forces, with their critique of the liberal republic constructed by a Creole elite that in 1825 (Bolivia) and 1830 (Ecuador) gained political independence, but maintained the admiration for and dominance of European culture.

- according to Attard (2014) - through self-government, public self-management, territoriality and the reconstitution of all indigenous legal, social, political and cultural institutions. For its part, “Living Well” is another element based on which the constitutional process re-founded the State. We should point out that this value, beginning and end of the State, finds its reason for being in the community and integrates the dimensions of humanity, nature and deity, from which a way of life based on complementarity, balance, duality and harmony should be organised.

The restoration of these ancestral principles has the purpose of consolidating a noble or qhapajñan life, which, in the plan of the Unitarian State, ensures peaceful coexistence with respect for and equality of the diverse cultures; with harmony, complementarity, duality and solidarity between them, within them and in relation to the State. This element of State re-foundation is the axiological basis for both the Plurinational State model and the constitutional model designed starting from the Constitution of 2009. (Attard, 2014, p. 35).

### 1.3. NATIVE INDIGENOUS CAMPESINO LAW IN THE PLURINATIONAL STATE OF BOLIVIA

#### 1.3.1. *Pluralism as a foundational element of the Bolivian State*

The re-foundation of the Plurinational State of Bolivia implies designing a new model of a State structured on the basis of “pluralism” as a foundational element (PCP, 2009, Article 1), in harmony with the Preamble of the PCP. Thus, the Bolivian constituency, based on historical, sociological and cultural factors, consolidates the protection and effective recognition of the NICNPs, ensuring the realisation of pluralism, with the specific enshrinement of the «self-determination» principle (PCP, 2009, Article 2), a postulate that ensures a real inclusion of these collectivities in the structure of the state model according to interculturality, complementarity and decolonisation criteria.

With pluralism as a foundational element of the State, Bolivia is structured on the basis of individual as well as collective rights. Likewise, the conception of pluralism and interculturality configure a plan of plural guiding values intended to consolidate the living well experience in this order and sheltered from the axiomatic structure embodied in the Preamble of the PCP.

[...] interculturality ensures that the supreme plural values will complement each other in a plural society and disseminate with content all acts of social life, including those procedures or decisions emanating from the native indigenous campesino nations and peoples. (PCJ 1422/2012 of 24 September).

This implies leaving behind the State-Nation project that underpinned the legal monism developed with the idea of being equal sociologically speaking, together with the idea that public officials should monopolise political power and the use of legitimate violence, and the fear of recognising the plurality of normative sources, which would affect the rule of law and the principle of equality before the law.<sup>34</sup> Therefore, in the Bolivian Plurinational State project, indigenous people are no longer a problem and become a factor of cultural, linguistic and human wealth that should be recognised and protected in its diversity by the State. "...hence the indigenous people can no longer be considered as human beings to be treated as children but as complete and independent beings developing within their own worldview the meaning of their individual and collective life." (PCJ 0026/2013 of 4 January 2013).

### *1.3.2. Constitutional system of native indigenous campesino nations and peoples*

From the preamble of the PCP, we report that the construction of the new State is based on respect and equality among all within the scope of the principles of complementarity, solidarity, harmony and equity in the distribution and redistribution of the social product, where the pursuit of living well prevails, with respect for the economic, social, legal, political and cultural plurality of the inhabitants of this land in collective coexistence and with access to water, work, education, health and housing for all. The system of collective rights of the NICNPs is configured based on these axiomatic guidelines, by recognising them as collective subjects of rights. In that constitutional framework, the PCC through PCJ 1422/2012 of September 24, established that the provision in Article 30, which lists the catalogue of rights of the NICNPs should be interpreted – in accordance with the principle of constitutional unity –, in harmony with the structural clause of the State embodied in Article

<sup>34</sup> See PCJ 0026/2013 of 4 January 2013.

1 of the PCP, which consolidates pluralism as the structuring element of the State.<sup>35</sup>

Based on the constitutional framework described above, it is assumed that native indigenous campesino nations and peoples are owners of collective rights, an aspect that consolidates the vision of a collective construction of the State; in this context, the second paragraph of Article 30 of the Constitution regulates the catalogue of rights, which cannot be considered closed constitutional clauses but, on the contrary, an open list of rights to which, through constitutional interpretation, other rights of a collective nature may be added that belong to native, indigenous and campesino peoples. (PCJ 1422/2012 of September 24).

Among the collective rights established by the PCP is the right to exist freely (PCP, 2009, Article 30.II.1), which, according to the PCC, constitutes the essential postulate for the exercise of self-determination by the NICNPs. This collective right guarantees freedom of social and cultural development to collectivities united by common anthropological and cultural elements such as cultural identity, language, administrative organisation, territorial organisation, ancestral territoriality, rituality and worldview, among other characteristics of collective cohesion.<sup>36</sup> In this way, the PCP recognises the rights of the NICNPs to their own cultural identity, religious beliefs, spirituality, practices, customs and worldview (PCP, 2009, Article 30.II.2), in addition to the right of territoriality (PCP, 2009, Article 30.II.4), so that the principle of self-determination embodied in Article 2, in line with Article 30.II.4 of the PCP, will have a useful effect on the purpose and substance of pluralism, interculturality and decolonisation as essential elements of the re-foundation of the State.

In this constitutional framework, the components described above will be the necessary elements for the identification of NICNPs in the Plurinational State of Bolivia, thus enshrining collective rights regarding the exercise of their political, legal and economic systems framed in their worldview (PCP, 2009, Article 30.II.14), consolidating also the fact that their institutions are part of the general structure of the State (PCP, 2009, Article 30.II.5), thus ensuring the supreme plural value of living

<sup>35</sup> Likewise, Article 30.1 of the PCP should be interpreted within the dogmatic scope of the principle of self-determination of the native indigenous campesino nations and peoples embodied in Article 2.

<sup>36</sup> See PCJ 1422/2012 of 24 September.

well in a Unitary State whose design reflects the postulates of pluralism, interculturality and decolonisation.

In order to apply the collective rights enshrined in the prevailing constitutional system, the identification of native indigenous campesino nations and peoples in the Plurinational State of Bolivia will have to consider the existence of the cohesion elements that refer to their cultural identity: language, administrative organisation, territorial organisation, ancestral territoriality, rituality and worldview, among other characteristics of collective cohesion. (PCJ 1422/2012 of September 24).

These aspects configure NICNPs as collective subjects of law. However, their organisational structure, for socio-historical reasons, could be composed of campesino organisations, neighbourhood councils or other organisational modes that reflect a process of miscegenation experienced in the country; in these cases, the recognition of collective rights as NICNPs will respond to the concurrence of any of the elements of collective cohesion described by PCJ 1422/2012 of September 24, i.e. the existence of their own cultural identity, language, administrative organisation, territorial organisation, ancestral territoriality, rituality and worldview, among others.<sup>37</sup> Therefore, in spite of the influence of organisational elements characteristic of a process of miscegenation, insofar as any of the elements of collective cohesion mentioned above are identified, the collectivity will be subject to collective rights and all effects in the two paragraphs of Article 30 of the PCP will be applicable, as well as the effects of the principle of self-determination inherent to the NICNPs embodied in the second Article of the PCP. At the same time, the members of these collectivities with common elements of cohesion that configure them as NICNPs will enjoy individual rights to be interpreted in intercultural contexts and according to supreme plural values.

### *1.3.3. The jurisdictions of the judicial branch of the Plurinational State of Bolivia*

In the framework of the principle of separation of functions (PCP, 2009, Article 12.1), the Bolivian constituent regulated in Articles 178

<sup>37</sup> See PCJ 1422/2012 of 24 September.

et seq. the structure and powers of the Judicial Branch, by which, in the light of pluralism and interculturality, one gathers that the plural administration of justice is unique in the Plurinational State of Bolivia and was entrusted to this body, which, within the framework of the judicial unity principle, is made up of the ordinary jurisdiction, agro-environmental jurisdiction, indigenous jurisdiction and specialised jurisdictions.

Based on the above, it is imperative to establish that legal pluralism generates as an effect in the State model the consecration of a pluralism of legal sources, an aspect that implies going beyond the Monist State; as far as this aspect, the prevailing legal order in the Plurinational State of Bolivia consists of two essential elements: 1) The Constitution as the first direct source of law; and 2) the norms and procedures of native indigenous campesino peoples and nations, also as a direct source of law. (PCJ 1422/2012 of September 24).

According to the PCC, based on these two aspects and in harmony with the postulates proper to pluralism and interculturality, we gather that the prevailing legal system is composed of positive norms and also norms not necessarily positivised, which form the “inter-legality” category, defined by PCJ 1422/2012 of September 24:

[...] it is understood that plural legal sources are autonomous but axiomatically interdependent in application of the principle of complementarity, which in turn finds its *raison d'être* in interculturality and pluralism as foundational elements of the State; along these same lines, based on the scope of the theoretical elements described, we can establish that precisely legal pluralism and inter-legality are supporting concepts in the framework of the principle of jurisdictional unity and, in the light of pluralism and interculturality, elements structuring the re-foundation of the State, the plan for a tripartite exercise of ordinary jurisdiction, agro-environmental jurisdiction and native indigenous campesino jurisdiction. (PCJ 1422/2012 of September 24).

Therefore, inter-legality and the tripartite administration of plural justice, in the re-foundation of the State, consolidate the paradigms of decolonisation, a concept about which, from the epistemological point of view, the PCC implies there is no complete or absolute and unquestionable knowledge, therefore, emerging types of knowledge about cultural pluralism must complement each other to consolidate a plural society included in a unitary state structure.

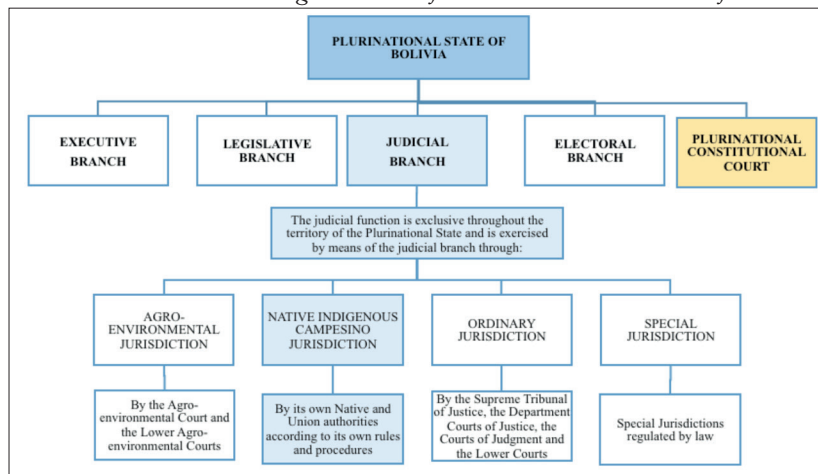
Within this interpretative framework, the judicial function is unique, but different jurisdictions exist. The PCP establishes three:



first, ordinary jurisdiction exercised by the Supreme Court of Bolivia, departmental courts of justice, sentencing courts and judges; second, the agro-environmental jurisdiction exercised by the agro-environmental Court and judges; third, the native indigenous campesino jurisdiction exercised by their own authorities.

Likewise, it establishes that there will be specialised jurisdictions regulated by law and that the ordinary jurisdiction and the native indigenous campesino jurisdiction are hierarchically equal. (PCP, 2009, Article 179 and LDJ, 2010, Article 3). See Chart No 1.

*Chart 1. Structure and Organisation of the Plurinational State of Bolivia*



Produced by the writer

### *1.3.3.1. Principles governing the jurisdictions of the Judicial Branch of Bolivia*

The principles that govern the jurisdictions of the judicial branch, according to the Law of Jurisdictional Demarcation-LJD (2010, Article 4), are: (1) respect for the unity and integrity of the Plurinational State, (2) spiritual relationship between the NICNPs and Mother Earth, (3) cultural diversity, (4) intercultural interpretation, (5) legal pluralism with hierarchical equality, (6) complementarity, (7) independence, (8) equality and gender equality, and (9) equality of opportunity.

### *1.3.3.2. Coordination and cooperation between the jurisdictions of the Judicial Branch*

The authorities of all jurisdictions cannot omit the duty of coordination and cooperation. The LJD (2010, Articles 13, 14, 15, 16 and 17) establishes that the omission of this duty will be sanctioned as a serious disciplinary offense in ordinary, agro-environmental and special jurisdictions and in the case of indigenous jurisdiction, according to its own rules and procedures. All jurisdictions within the legal pluralism framework will make concerted efforts to achieve harmonious social coexistence, respect for individual and collective rights and an effective guarantee of being able to access justice individually, collectively or communally. Coordination between all jurisdictions may be oral or written, respecting their particularities. Coordination between the authorities of the different jurisdictions may be achieved through the following means: (1) establishing transparent systems for accessing personal information; (2) establishing spaces for dialogue or other venues on the implementation of human rights in its resolutions; (3) establishing spaces for dialogue or other venues to share experiences on conflict resolution methods; (4) other coordination mechanisms that may emerge based on the implementation of the LJD.

For their part, all legally recognised jurisdictions have the duty to cooperate with each other, for the fulfilment of their goals. The following are cooperation mechanisms: (1) judicial authorities and authorities of the Public Prosecutor's Office, Bolivian Police, Penitentiary System or other institutions should provide immediate cooperation and report the case history to the authorities of the native indigenous campesino jurisdiction when requested; (2) the authorities of the native indigenous campesino jurisdiction shall cooperate with the authorities of the ordinary, agro-environmental and other legally recognised jurisdictions; (3) providing information and history on matters or conflicts between the native indigenous campesino jurisdiction and the other jurisdictions; (4) other coordination mechanisms that may emerge based on the implementation of the LJD.

#### 1.3.3.3. *Conflict of competence between jurisdictions*<sup>38</sup>

Understanding that indigenous jurisdiction predates ordinary jurisdiction (PCP, 2009, Articles 2 and 179.I), there should be a dynamic of cooperation and coordination, not paternalism, between the two. In the event of a conflict of competences, the PCP in Article 202.11, hands over to the PCC the power of recognising conflicts of competence between the native indigenous campesino jurisdiction and the ordinary and agro-environmental jurisdictions. In the hypothetical case that an authority - of any jurisdiction - deems its jurisdiction to have been usurped, it will be requested by the PCC to distance itself from such knowledge. If said authority rejects the request or does not express its views in the next seven days after the request was made, the requesting authority will be entitled to raise the dispute before the PCC. (CPC, 2012, Article 102.II).

In this regard, the decision of the Plurinational Constitutional Court only determines the native indigenous campesino or the ordinary authority, whatever the case may be, that has the competence of knowing about a certain matter and also if through this type of constitutional process we hope to safeguard the guarantee of the natural judge, not because we observe if the standards of the competent jurisdiction respect due process, as this corresponds, where appropriate, to other constitutional actions. (PCJ 0026/2013 of 4 January 2013).

#### 1.3.3.4. *Respect for fundamental rights and constitutional guarantees*

All recognised jurisdictions should respect, promote and guarantee the right to life and the other rights and guarantees recognised by the PCP. Likewise, all jurisdictions should respect and guarantee the exercise of women's rights, their participation, decisions, presence and permanence, both in equal and fair access to offices and in the control and decision making of and participation in the administration of justice. In addition, all recognised jurisdictions prohibit and punish all forms of violence against children, adolescents and women; any conciliation on this issue is illegal. As for the indigenous jurisdiction authorities, they should not sanction with loss of land or expulsion elderly or disabled persons due to noncompliance with communal duties, charges, contributions and

<sup>38</sup> For greater understanding on the resolution of conflicts of competence between jurisdictions, see PCJ 0026/2013 of 4 January 2013, PCJ 0037/2013 of 4 January, PCJ 0925/2013 of 20 June 2013 and PCJ 0388/2014 of February 2014.

communal work. By the same token, lynching is a violation of Human Rights; it is not allowed in any jurisdiction and should be prevented and sanctioned by the Plurinational State. Lastly, in strict application of the PCP, the death penalty under criminal proceedings for the crime of murder in the ordinary justice system is strictly prohibited to anyone who imposes, consents to or executes it. (LJD, 2010, Articles 5 and 6).

*1.3.4. Native indigenous campesino jurisdiction: right to exercise and administer justice of the NICNPs*

In European legal doctrine, legal pluralism began to be debated with the works of Eugene Ehrlich (1936), who rejected the legal orthodoxy of the State's monopoly on legal production.<sup>39</sup> Notwithstanding the criticisms brought against this author, the debate on legal pluralism was opened, and later developed by Santi Romano, Georges Gurvitch, Jean Carbonnier, André-Jean Arnaud, Norberto Bobbio and Boaventura de Sousa Santos, among others.<sup>40</sup>

As we see in plurinational constitutionalism, the right of the NICNPs is an intrinsic part of Bolivia's internal juridical pluralism, although just recently recognised in the constitution; its validity has a relevant historical tradition (precolonial-republican), the product of a double relationship with the dominant sectors: resistance in order to maintain their autonomous community structures against the colonial or republican state, and assimilation, imposition and superimposition of dominant practices in a progressive process of sociocultural homogenisation. With regard to this, conceiving that each society develops its legal system, which regulates the behaviour of all its members, Bolivian legal doctrine, influenced by the continental European system of written Roman-Germanic tradition - which meant the monopolisation of political and legal power within the State - conceived as resolution of local conflicts and never as full legal systems the forms of conflict resolution of the

<sup>39</sup> For this author, law was the central axis of human behaviour as far as people interrelating within a group, regardless of its size. In these groups, individuals do not act independently, but as members of a group or subgroup within a larger society, for necessity or supremacy. Therefore, people's behaviour is not governed by state laws but mainly by the internal regulations of the subgroups or as he called it: living law.

<sup>40</sup> See Sánchez Castañeda Alfredo (2006). The Origins of Legal Pluralism. National Autonomous University of Mexico. Legal studies in homage to Martha Morineau, t. I, Roman law. Law history. Retrieved from <http://bibliohistorico.juridicas.unam.mx/libros/4/1855/29.pdf> on 10 July 2016.

indigenous peoples. One of the arguments that supported this position was that the NICNPs do not have the coercive apparatus that the State system has. However, in colonised societies - like Bolivia - which had a prior State, political and juridical tradition, which were superimposed upon being subjected to a dominant continental European colonial system, the debate turns rather on the domination of colonial powers over dominated societies as much as its inevitable restructuring by contemporary state schemes: internal constitutional legal pluralism.

It is thus that NICNPs, as a manifestation of the principle of self-determination, the right to their free existence and in harmony with the principles of pluralism, interculturality and decolonisation, have the fundamental right to exercise and administer their justice within the framework of their norms and procedures, which are a direct source of law. In the order reported, Article 190.1 of the PCP provides that NICNPs shall exercise their functions and powers through their authorities and shall apply their own principles, cultural values, norms and procedures, therefore, through legal pluralism and in agreement with the concept of inter-legality, this jurisdiction is autonomous and hierarchically identical to the ordinary jurisdiction and the agro-environmental jurisdiction, thus generating among them a relationship of coordination and cooperation rather than subordination.

However, although the native indigenous campesino jurisdiction is competent for the administration of justice within the framework of the material, personal and territorial criteria regulated by Art. 191.II of the Constitution, its exercise is limited to the respect of fundamental rights that must be applied and interpreted in inter- and intracultural contexts, to which end, we infer that, for their protection, this jurisdiction is subject to the plural control of constitutionality according to guidelines of intercultural interpretation as will be shown below. (PCJ 1422/2012 of September 24).

The power of NICNPs to administer justice according to their own justice system exercised through their authorities is within the framework of what is established in the PCP and LJD. (2010, Article 7). Likewise, the decisions of native indigenous campesino jurisdiction authorities are mandatory and to be complied with by all persons and authorities. These decisions are irrevocable by ordinary, agro-environmental and other legally recognised jurisdictions (LJD, 2010, Article 12).

#### 1.3.4.1. *Areas of validity of native indigenous campesino jurisdiction*

PCJ 0026/2013 of 4 January 2013 concluded that indigenous jurisdiction does not distinguish between subjects but recognises day to day problems, due to which it has broad competence and for this reason this jurisdiction is exercised in the areas of personal, material and territorial validity, when they concur simultaneously (PCP, 2009, Article 191; LJD, 2010, Articles 8, 9, 10 and 11). As we have seen above, this provokes that, in a hypothetical conflict of competence between jurisdictions, the procedural object is determined by the facts discussed and not by the legal qualification or subject matter of a competent ordinary judge.

In the «area of personal application» the members of the respective indigenous campesino nation or people are subject to the native indigenous campesino's jurisdiction (PCP, 2009, Article 30.I.; LJD, 2010, Article 9). Likewise, Article 191.II.1 establishes that members who act as plaintiff, appellant, complainant, defendant and are sued or accused are subject to the native indigenous campesino jurisdiction. Consequently, members of a NICNP share cultural identity, language, historical tradition, institutions, territoriality and worldview that exist since before pre-colonial times and exercise ancestral dominion over their territories. However, for socio-historical reasons, it could be composed of campesino organisations, neighbourhood councils and other organisational modes that reflect a process of miscegenation experienced in Bolivia.<sup>41</sup> Therefore, the special bond shared by the members of an NICNP should not be attributed to birth or physical traits.<sup>42</sup>

Likewise, understanding that the right to administer NICNPs is related to the construction of their social identity, as intended by the PCC, it is logical to accept that it is possible to prosecute persons who do not necessarily belong to a NICNP but who voluntarily or expressly or tacitly submit to such jurisdiction “for example when deciding to

<sup>41</sup> See PCJ 1422/2012 of 24 September 2012.

<sup>42</sup> “In regard to this, we should consider that the “special” bond shared by the members of an NICNP should in no way be based on birth or physical traits, meaning that a person not born in a particular culture can adopt it and therefore be judged by the native indigenous campesino jurisdiction, as also established in Art. 1.2 of Convention C169 of the International Labour Organisation (ILO), “Awareness of their identity or tribal identity shall be considered as a fundamental criterion for determining the groups to which the provisions of this Convention apply.” (PCJ 0026/2013 of 4 January 2013).

occupy their ancestral territories although this does not imply that the concurrence of the territorial, material and personnel areas referred to in Art. 191.II of the PCP should not be analysed in all cases.” (PCJ 0026/2013 of 4 January 2013).

In the “area of material application”, native indigenous campesino jurisdiction knows the issues or conflicts they have known historically and traditionally under its rules, their own procedures and knowledge, according to their self-determination (PCP, 2009, p. 191; LJD, 2010, Article 10).<sup>43</sup>

The knowledge issues of the indigenous jurisdiction cannot be known to the ordinary jurisdiction, the agri-environment and other legally recognized jurisdictions. In the face of doubt, the PCC resolves a possible case of conflict of competence between different jurisdictions (as we will see in Chapter 2, one of the PCC’s powers within the Plural Control of Constitutionality is to resolve conflicts of competence).

The «area of territorial application» covers the legal relations and facts that are carried out or whose effects occur within the jurisdiction of a NICNP, as long as the other areas of application concur as established in the PCP (2009, Article 191.II.3) and the LJD (2010, Article 11). In the PCC’s view, this seeks to preserve legal certainty in legal relationships, understood as a condition essential for the life and development of the NICNPs and the individuals that belong to them, and is an objective guarantee of the indigenous norm. Therefore: i) in general, native indigenous campesino jurisdiction applies in ancestral territories; ii) acts committed outside the physical space of native indigenous campesino territory that may affect the social cohesion of the collective, as they could, for example, when they are produced by an authority representing the native indigenous campesino people or

<sup>43</sup> With regard to Art. 191.II.2 of the PCP, as far as material validity, it establishes that native indigenous campesino jurisdiction, “...is aware of the native indigenous campesino issues of conformity with the provisions of the Law of Jurisdictional Demarcation”, however, it is absolutely clear to this Plurinational Constitutional Court that the native indigenous campesino communities have known since ancient times all the controversies that have arisen within them so that they have presumption of competence due to their historical situation of disadvantage with respect to ordinary jurisdiction, which is why the Law of Jurisdictional Demarcation should be interpreted in such a way that prohibitions to the native indigenous campesino jurisdiction would be the result of a systematic interpretation of the constitutional text saying that the exclusion of an “issue” from the competence of the native indigenous campesino jurisdiction seeks in a clear way in the specific case to protect a national or international legal asset according to the particularities of the case itself.” (PCJ 0026/2013 of 4 January 2013).

there is a misuse of power with respect to such representation. (PCJ 0026/2013 of 4 January 2013).

*1.3.4.2. Practices of community justice and their compatibility with human rights.*

The NICNPs' right to administer justice has a set of fundamental institutions and organisations from their communities and to a lesser extent from the State participating or collaborating in conflict resolution at the local level. As we can see, we are dealing with a set of mechanisms and institutions that have emerged and continue to be developed within the communities and that allow justice to the rural, campesino or native population. The failure to empower indigenous jurisdiction with the knowledge, guidance and legal training of the indigenous authorities about human rights standards is grievously well known. Many of community justice practices lead to degrading treatment and sanctions that violate recognised rights and guarantees. Many of these practices are considered offensive human dignity; some of them have even been confused with justice by one's own hand, such as lynching.

In this regard, the Plurinational State of Bolivia has the duty to promote, protect and respect the rights, principles and guarantees recognized in favour of the individual, whether or not belonging to the NICNPs. On the other hand, communitarians understand that the particular bond people have with their community is fundamental, their law has a set of practices, procedures, instruments, etc. that develop in the process of administration of justice and whose total subordination to human rights standards would be a cultural imposition from the West. In Chapter 3, we will see what progress has been made in the area of human rights and the administration of justice on the basis of 16 cases resolved by the PCC. In several of these PCJs, the PCC ruled in favour of individuals alleging violation of an individual human right. In other cases (two of them), the PCC ruled in favour of indigenous administration of justice, in particular, by the authorities of the NICNPs.

*1.3.5. The institutional challenges of cultural diversity and the rights of Indigenous Peoples in the Plurinational State of Bolivia*

The Plurinational State of Bolivia is currently undergoing a gradual constitutionalisation process of its constitution (put into effect in 2009) with regard to its laws, institutions and politics. This process, in the



view of Uprinmy (2011), Grijalva (2012) and Santos (2012), is not and will not be linear and is not exempt from contradictions and even setbacks; it also implies developing an institutionality that assures the effectiveness of the rights, principles and guarantees. Such a task is not possible without courts, committed judges and adequate guarantees; according to Grijalva (2012, pp. 16-17) the adequate reception of this process of constitutionalisation of this multinational model depends on several conditions: (1) the new approaches and institutions should be correctly understood, studied and applied; (2) such reception should be active but also critical, meaning no mechanical adoption of ideas and experiences from other latitudes that do not coincide with to our reality, however, as is the case for the most developed constitutional systems, we should communicate more actively with the international circulation of doctrine, jurisprudence and institutions; (3) this process should provide the basis for an ever better and more original doctrinal, jurisprudential and legislative production.

On the other hand, regarding Bolivia's internal legal pluralism, which we will analyse in the rest of this research, the work done by Santos (2012) highlights the importance of reforms in this field, since they are "one of the privileged windows from which to analyse the contradictions, ambivalences, rhythms, steps forward and setbacks of the processes of social transformation, especially by those who affirm themselves as bearers of new political projects or decisive moments of political transition." (2012, p. 12). Also, as we saw above, recent Latin American constitutional reforms, in addition to expanding the catalogue of fundamental rights of indigenous peoples, extended protection mechanisms: constitutional guarantees and defence actions. The forms of constitutional justice were expanded or reinforced by strengthening or creating constitutional courts or chambers in the supreme courts with the role of protecting fundamental rights. For the matters, Bolivia's constitutional control body is the Plurinational Constitutional Court, which means that, in cases of possible violations of human rights of indigenous peoples, as well as conflicts of competence, consultations and lower regulatory control are subject to the «Plural Control of Constitutionality», whose decisions are binding, i.e. mandatory. Therefore, its institutionalisation is also a great challenge for Bolivia's plurinational constitutionalism.

In conclusion, NICNPs are plurinational constitutionalism's *raison d'être*, as a result of the struggles for the vindication of their rights, which defied the bases of the legal and political edifice of the modern

State,<sup>44</sup> in a more radical way in Bolivia than in Ecuador, “indigenous struggles have the potential of radicalising (as in going to the roots of something) social transformation processes, especially when they assume a constituent dimension. When the State and the Law are put in discussion, as happened in the Bolivian constituent process, the tendency is to maintain control of the discussion and impose limits to the questioning. It so happens that at the end of centuries of hegemony and colonisation of the political imaginary, the State and the Law, even when shaken, hold the line of separation between what may be questioned and criticised (what is on this side of the line) and what may not (what is on the other side of the line).

Those who are better able to challenge this control and limits are the social groups that were always on the other side of the line, made invisible precisely to make the line not visible, that is, to make their exclusion and suffering not questionable and, ultimately, to have no limits. (Santos 2012, p. 12).

This plurinational constitutionalism has a long-term historical vocation in its transition process, whose materialisation in the short term shows several difficulties, “in the short term, it is more likely that the old politics will subsist and even dominate, oftentimes disguised as a new policy” (Santos, 2012, p. 14) which would provoke boycotts and differences. It is clear that this construction project of the plurinational model is spearheaded by the native indígenas campesino justice, which is not a project to be built, but a reality that has formed, whether or not recognised by the State, is part of the life of the communities and is very vulnerable in this transition process “because its practice on the ground exposes it to hostile and prejudiced interpretations by the opponents of plurinationality” (Santos, 2012, p. 14).

<sup>44</sup> The problem with Eurocentric logic in Latin America – whether from a liberal or leftist discourse – was to make multiple cultures invisible by not carrying out a concrete historical analysis of each native society, “while class oppression forms part of the hegemonic canon of leftist ideas, ethnic or racial domination has not yet been assimilated as one of the axes of analysis necessary to understand Latin American societies, whose foundation is until now profoundly colonial. Indigenous peoples have persisted in the face of this colonial model, which offered them nothing more than physical exploitation and annihilation, paternalistic tutelage, “whitening” and cultural assimilation. Many aspects of all that mark this coexistence to this day. As is well known, despite this, the peoples have succeeded in giving continuity to certain practices that mark their cultural and civilising difference, like the exercise of indigenous justice.” Miriam Lang (2012): “Presentation”, in Boaventura de Sousa Santos and José Luis Exeni Rodríguez Eds. (2012). *Indigenous justice, plurinationality and interculturality in Bolivia*. 1<sup>st</sup> ed. Rosa Luxemburg/Abya Yala Foundation.

## 2.

CONSTITUTIONAL JUSTICE OF THE PLURINATIONAL  
STATE OF BOLIVIA

The PCC is an independent body that protects the respect and validity of the human rights of the NICNPs; it also establishes the scope or limits of these rights, including the power to administer their own justice. In this Chapter, we are going to explore these functions by analysing what is meant by «Plural Control of Constitutionality», from its historical antecedents to its implementation as a new model, with which the PCP of 2009 delved into the rights of NICNPs. We will also analyse the structure of the PCC, the indigenous representation in the PCC and, lastly, general criteria of constitutional interpretation.

## 1.1. HISTORICAL PROCESS OF CONSTITUTIONALITY CONTROL IN BOLIVIA

The constitutional courts are configured as a paradigmatic invention of twentieth century legal culture, its first introduction in Europe turning out to be even paradoxical for it was necessary to break down two dogmas deeply rooted in this political culture: parliamentary sovereignty and separation of powers. However, as stated by Ríos (2007, p. 287) and Attard (2014, p. 40) Hans Kelsen erected a dogma superior to the two previous ones: the supremacy of the Constitution. It was a structuring dogma that provided for its protection and developed the establishment of the Constitutional Court, an institution independent from the classical powers and instituted by the Constitution itself, without a doubt, a formula that did not harm parliamentary sovereignty nor the doctrine of separation of powers, making it impossible for the Judiciary to interfere in a field that was considered outside its competence. Along these lines, in Latin America, and specifically in Bolivia, the establishment of this institution is preceded by a long historical course,

which in its origins, when it embraced France's revolutionary influence, created the circumstances for an initial system of «political control of constitutionality»,<sup>45</sup> and subsequently adopted the «diffuse judicial control of constitutionality»,<sup>46</sup> and the «concentrated judicial control of constitutionality», created through the 1994 constitutional reform the Constitutional Court,<sup>47</sup> a specific body in charge of controlling Constitutionality; however, the lack of modification of any articles of the Political Constitution in force at that time<sup>48</sup> makes one consider the existence of a diffuse kind of constitutionality control.<sup>49</sup> Apart from this

<sup>45</sup> The Bolivian Constitution of 1826, drafted by Simón Bolívar, established a tri-chamber legislative power, one of the chambers being the Chamber of Censors, whose powers included «making sure that Government fulfil and enforce the Constitution, laws and public treaties; and Denounce before the Senate the infractions of the executive branch on the Constitution, laws and public treaties» (Article 51). The second Bolivian Constitution of 1831 marked a new stage in the control of constitutionality, as such task was entrusted to a special body, the State Council, nevertheless, that body was still political. The State Council had seven members, appointed by the Congress of the Republic. The Bolivian Constitutions that came later, of 1834, 1839, 1843 and 1851, did not separate from political control, as only the first of the four texts continued to attribute such control to the State Council, which disappeared in 1839. However, the Constitution of that date, like that of 1851, would incorporate a provision that persisted even in the Constitution of 1967, which supported a type of political control, since, as its Article 14 spelled out, Congress was empowered to resolve any doubts arising on the intelligence of any or some of the articles of this Constitution, if declared to be reasonable by two-thirds of the votes of each Chamber.

<sup>46</sup> In the Political Constitution of 1861, by Law Decree of December 31, 1857, the Supreme Court is given the power of constitutionality control. «Diffuse judicial control» is clearly seen in the light of the provisions of Article 86, «The authorities and courts shall apply this Constitution based on the laws, preferring these over any other resolution». In short, after the Bolivian magna carta of 1861, all jurisdictional bodies were forced to disregard infra-constitutional norms considered to be contrary to the postulates of the Constitution, and the Supreme Court responded to appeals of unconstitutionality of a legal provision and judged with *inter partes* effects (only for the parties). According to Santiago (2010, p. 109) the model in force between 1938 and 1999 included the variant of the tutelary control of fundamental rights, initially through the habeas corpus appeal, approved with the Popular Referendum of 1931 and incorporated into the Constitution at The National Constitutional Convention of 1938; and subsequently through the adoption of constitutional protection at the National Constituent Assembly of 1967, and the promulgation of the Code of Civil Procedure (1975), which introduced the appeals against legislative resolutions and illegal taxes.

<sup>47</sup> Its organisation and operation were established through the Constitutional Court Law No 1836 of 1 April 1998, formally installed on 05 August 1998 with the inauguration of the first ten Magistrates with activities starting on 01 June 1999.

<sup>48</sup> Article 228 of the Political Constitution of 1994 states, «The Political Constitution of the State is the supreme law of the national legal system. Courts, judges and authorities shall apply it based on the laws, preferring these over any other resolution».

<sup>49</sup> In this regard, Baldivieso Guzmán (2006, p. 33) points out that the creation of a specialised body does not lead to the interpretation that in Bolivia constitutionality control may be mixed, especially if we consider the fact that the aforementioned articles of the Political Constitution of the State were drafted before the creation of the Constitutional Court; in contrast, Rivera Santiviáñez (2004, p. 117) deems that Article 228 of the 1994 Constitution establishes the system of diffuse jurisdictional control, because, in determining the legal supremacy of the Constitution, it establishes the hierarchical order and therefore institutes the

debate of a theoretical nature, we need to recognise the importance of the establishment of a Constitutional Court, as in the Bolivian case one may always assert that the doctrine is becoming more and more prone to recognising that the Diffuse-Concentrated System alternative has been surpassed, combining both systems and evolving towards a common system (Pizzorusso, 1984), as we will see in the next section; where we will analyse the relationship/influence of NICNP rights as far as the control of constitutionality.

## 2.2. NATIVE INDIGENOUS CAMPESINO NATIONS AND PEOPLES AND THE PLURAL CONTROL OF CONSTITUTIONALITY OF THE PLURINATIONAL CONSTITUTIONAL COURT

### 2.2.1. *New plural system of constitutionality control*

As regards the disquisition of a diffuse or concentrated constitutionality control system, the system set forth by the PCP of 2009 does not establish a concentrated character in the strict sense, keeping to the European model with remnants of the American model of Judicial review (Rivera, 2006). While it is true that this new PCC has sole control over annulling and expelling from the legal system of Bolivia the infra-constitutional legal provisions incompatible with the PCP, to contradict and infringe upon it, ordinary jurisdiction judges and courts participate in promoting the concrete Unconstitutionality Action.<sup>50</sup> However, the substance of this new system of control of Bolivian constitutionality is

preferred application of the constitutional norm; it implicitly empowers judges and courts to disapply the law, decree or resolution whose rules are contrary to the Constitution.

As for the jurisprudence of the Constitutional Court, Constitutional Judgment 0001/2007 of 09 February states the following, "...when in the Judicial practice normative contradictions are discovered between legal norms inferior to the Constitution and not with it, these antinomies should be resolved by the relevant authorities based on the principles provided by Art. 228 of the PCP, complying with the rule of direct and mandatory application provided in said article, which constrains all courts and judges to give life to the principles of constitutional supremacy and normative hierarchy..."

<sup>50</sup> In accordance with this criterion, Alberto del Real Alcalá (2010, p. 143) points out that a «purely concentrated» system of constitutionality control cannot be established, because the main defence actions in the hands of the citizenry are initially submitted before ordinary courts determined by law, which is apparently an influence of a diffuse nature from the Anglo-Saxon constitutional model, although in the end the decisions of ordinary judges are reviewed ex officio before the Plurinational Constitutional Court. It could be said that this is control of constitutionality initially «diffuse» but «concentrated» in the end.

inspired by «pluralism» as a foundational element of the Plurinational State of Bolivia, entailing the recognition of a pluriculturality and therefore an axiomatic pluralism, which postulates supreme plural values added to the Preamble and the articles of the PCP.

As we have seen, the recognition across the board of the rights of NICNPs also encompasses the legal field, for there is a recognition of egalitarian legal pluralism derived from the constitutional recognition that native indigenous campesino and ordinary jurisdiction are hierarchically equal (PCP, 2009, Article 179.II), the same going for the legal systems of the two jurisdictions. Under PCC specifications (PCJ 0300/2012), the «Plural Control of Constitutionality» determines that control be exercised both on formal norms of the ordinary system and on (1) the norms of the NICNPs, in addition to (2) knowing the conflicts of competence between the various jurisdictions and (3) reviewing the decisions pronounced by the native indigenous campesino jurisdiction when these norms are considered to be detrimental to fundamental rights and constitutional guarantees.<sup>51</sup>

The plan framed in the postulates of pluralism, interculturality and decolonisation as factors in designing the State model requires the configuration of a vertical system of analysis comprising three specific compartments (Attard, 2014a): (a) the base of the system composed by the jurisdictional authorities, the administrative authorities, the authorities of the NICNPs and individuals, who are the first guarantors of the constitutionality block and fundamental rights; (b) the intermediate compartment comprising guarantee judges and courts; and (c) the top compartment, which houses the ultimate and maximum guarantor of the constitutionality block and fundamental rights, the Plurinational Constitutional Court.

<sup>51</sup> PCJ 0300/2012 states the following, “These powers were introduced in the current Political Constitution of the State, in express recognition of the rights of the native indigenous campesino peoples to the hierarchical equality of legal systems and jurisdictions; but we should also consider that the Fundamental Law was the result of a dialogical process involving the different sectors of the Bolivian population, including the native indigenous campesino nations and peoples of course, who played a leading role in the consolidation of the Plurinational State.”.

### 2.2.2. *Source of the powers of the new Plurinational Constitutional Court*

According to Escobar (2008, p. 303), there are different normative models for determining the powers of constitutional magistrates: the PCP could establish an exhaustive list of powers,<sup>52</sup> or the issue could be developed by the infra-constitutional normative system, and lastly there exist intermediate models where the definition of the competences of the constitutional judge is the result of the interaction between the different sources of the Law; Bolivia's constitutional system adheres to this last variation, because although the powers of the PCC are generally determined in the PCP, they are specified through the CCL and the CPC, which we will discuss below.

The powers of the PCC are, in addition to those established in the PCP (2009, Article 202), LPCC and CPC (See also Chart No. 2): (1) the defence of fundamental rights, through a review of the following actions: Constitutional Protection Action, Freedom Action, Privacy Protection Action, Popular Action and Action of Compliance; (2) the settlement of unconstitutionality actions, including: actions of unconstitutionality of an abstract nature against laws, autonomous statutes, organic charters, decrees, ordinances and all kinds of non-judicial resolutions, and actions of unconstitutionality of a concrete nature, which shall proceed within the framework of a judicial or administrative process whose decision depends on the constitutionality of laws, autonomous statutes, organic charters, decrees, ordinances and all kinds of non-judicial resolutions; (3) the settlement of conflicts of competence, including: Competences and powers assigned by the PCP to the Public Authorities; Competences attributed by the PCP, or by the Law to the Autonomous Territorial Entities; and Competences between the Native Indigenous Campesino Jurisdiction, the Ordinary Jurisdiction and the Agro-Environmental Jurisdiction; (4) the prior control of constitutionality and consultations, through the following channels: prior Control of constitutionality in the ratification of international treaties; Consultations on the constitutionality of draft laws, Control of

<sup>52</sup> This system is convenient to the extent that the list contains all the powers of constitutional control, as it will prevent legal or regulatory assignment or deletion of functions outside its nature; however, if the list is not complete, the constitutional judge will have serious limitations in guaranteeing constitutional supremacy (Escobar, 2008).

constitutionality of draft statutes or charters of autonomous territorial entities, and Consultations on the constitutionality of questions for referendums; (5) the resolution of Consultations of native indigenous campesino authorities on the application of their legal rules to a specific case; (6) the resolution of Appeals before the PCC, including:

- Appeals against taxes, fees, patents, rights or special contributions;
- Appeals against resolutions of the legislative body;
- direct Actions for annulment; and (7) the constitutionality of the partial reform process of the PCP.

#### *2.2.2.1. Regulatory framework in force for the Plurinational Constitutional Court*

The PCC governs its actions based on what is established by the PCP and the constitutionality block. The PCP is the supreme rule of the Bolivian legal system and enjoys primacy over any other normative provision. Likewise, the constitutionality block is integrated by the International Human Rights Treaties and Conventions and by the norms of Community Law (PCP, 2009, Article 410). In this way, the normative value of the PCP ensures the direct and effective implementation of human rights through the interpretative work of magistrates of the PCC, whose decisions are binding and to be complied with on a mandatory basis, as there can be no further ordinary appeal against them (PCP, 2009, Article 203). In addition, Law No 027 of the Plurinational Constitutional Court is a constitutional development norm, (PCP, 2009, Articles 196-204), specifically in Articles 197. I and II, and 204 of the PCP, considered to be a law of a substantive nature for establishing the normative principles and bases that regulate the organisation and structure of the PCC, through which we will analyse the representation of the NICNPs in the structure of the PCC.<sup>53</sup> We also have Law No 254, named Constitutional Procedural Code, a norm promulgated on July 5, which represents Bolivian constitutional procedural law and provides the tools through which the exercise of Plural Control of Constitutionality materialises to achieve plural Constitutional Justice. This norm constitutes a procedural guide to regulate the constitutional processes submitted to the PCC. As will be seen below, we will cite some articles regarding the constitutional

<sup>53</sup> We should point out that its Second Part, pertaining to the regulation of constitutional processes, was repealed because of the promulgation of the Constitutional Procedural Code specialised in this subject.



processes pertaining to the NICNPs. Lastly, No 212: Transition Law for the Supreme Court of Bolivia, Agro-Environmental Court, Council of Magistracy and Plurinational Constitutional Court; it regulates the transition, sale, transfer and operation of the financial administration, assets, liabilities and other items from the Judicial Power to the Judicial Branch and the Plurinational Constitutional Court; it also regulates the transition and transfer of cases from the Supreme Court of Bolivia to the Supreme Tribunal of Justice, from the National Agrarian Court to the Agro-Environmental Court, from the Judiciary Council to the Council of Magistracy and from the Constitutional Court to the Plurinational Constitutional Court.

### *2.2.3. Tutelary control of constitutionality in the Plurinational State of Bolivia*

As we have seen, with the PCP of 2009, the Plurinational State of Bolivia adopted a plural and concentrated jurisdictional system of constitutionality control. In detail, PCJ 2143/2012 of November 8 specified that, after the 2009 constitutional reform, the Plurinational State of Bolivia adopts a concentrated and plural jurisdictional system of constitutionality control in the hands of the PCC, an authority that exercises the functions of the Plural Control of Constitutionality, starting with responsibility over its magistrates, with plural composition and elected by popular suffrage, an aspect that we will analyse later. It is thereby established that the plural control of constitutionality, whose highest authority is entrusted to the PCC, exercises all the jurisprudential functions regulated by the body of the PCP (2009, Article 202.1 concordant Article 196.I).

In PCJ 1227/2012 of September 7, the PCC pointed out that, from a systemic analysis of its organisational structure, the prevailing constitutionality control system is practiced in two specific areas: (1) preventive and (2) subsequent or reparatory control of constitutionality (See Chart No 2).

#### *2.2.3.1. Preventive control of constitutionality*

The purpose of the «preventive control of constitutionality» carried out by the PCC is to activate the control roles pertaining to the efficacy of the constitutionality block and fundamental rights prior to any general rule coming into force. Based on this purpose, the PCP (2009, Article

202.7), determines that the PCC, within the scope of the preventive control of constitutionality, has the task of resolving queries on the constitutionality of bills coming from the President of the Republic, the Plurinational Legislative Assembly, the Supreme Tribunal of Justice or the Agro-Environmental Court. According to Article 202.9 of the PCP, prior control of the constitutionality of international treaties is within the same preventive scope and is to be handled by the PCC in plenary session, whose decisions are mandatory.

As for the NICNPs, within the framework of pluralism, interculturality and decolonisation, the PCC has the power provided in Article 202.8 of the PCP pertaining to the queries of native indigenous campesino authorities on the application of their legal norms to a specific case, which according to the LPCC (2010, Article 32) will be handled by the Specialised Chamber of the PCC; this falls within the scope of constitutionality control, although with its own characteristics different from those of proper preventive control.<sup>54</sup>

#### *2.2.3.2. Subsequent or reparatory control of constitutionality*

The exercise of the plural and concentrated jurisdictional control of constitutionality also applies to subsequent or reparatory instances, in that order; this facet is composed of three specific types of constitutionality control: normative, competence and tutelary.

##### *2.2.3.2.1. Normative control of constitutionality*

The purpose of the normative control of constitutionality is to verify that the contents of any rule of a general nature are consistent with and respond to the block of constitutionality of the Plurinational State of Bolivia; this is because if a contradiction occurs, once the normative control of constitutionality is activated, the PCC will declare the total or partial unconstitutionality of such rule, a decision that will abrogate or revoke the rule according to the case. In this case, the normative control of constitutionality is activated through abstract and concrete actions of unconstitutionality, as well as by appealing against taxes, fees, patents, rights or contributions created, modified or suppressed in contravention of PCP provisions.

<sup>54</sup> For additional references, see PCJ 2143/2012, PCD 0006/2013 of 5 June and PCJ 0778/2014 of 21 April 2014.

#### 2.2.3.2.2. *Competence control of constitutionality*

The competence control of constitutionality protects the institutional guarantee of competence, therefore, its activation responds to three express constitutional mechanisms: i) conflicts of competences and powers between public authorities (PCP, 2009, Article 202.2); ii) conflicts of competences between the plurinational government and autonomous decentralised territorial entities and between the latter (PCP, 2009, Article 202.3) and iii) conflicts of competences between the native indigenous campesino jurisdiction and the ordinary and agro-environmental jurisdictions (PCP, 2009, Article 202.11). Direct nullity appeals also fall within this scope of constitutionality control (PCP, 2009, Article 202.12).

#### 2.2.3.2.3. *Tutelary control of constitutionality*

The tutelary control of constitutionality is activated through the defence actions regulated by the PCP: freedom, constitutional protection, privacy protection, compliance and popular actions, according to Article 202.6 of the PCP, are reviewed and resolved by the PCC.

*Chart No 2. Plural Control of Constitutionality of the Plurinational Constitutional Court of Bolivia*

Preliminary Control of Constitutionality	Subsequent or Reparatory Control of Constitutionality
<p><i>I) Preventive Normative Control</i> Activated through the following mechanisms: Consultations of the President of the Republic, Plurinational Legislative Assembly, Supreme Tribunal of Justice or Agro-environmental Court on the constitutionality of bills (art. 202.7). Consultations in relation to international treaties (art. 202.9). Consultations on the constitutionality of the partial reform procedure to the Constitution (art. 202.10). Consultations on the constitutionality of Draft Statutes and Charters (art. 275 of the PCP).</p>	<p><i>A) Normative Control of Constitutionality</i> Activated through the following procedural mechanisms: Abstract Action of Unconstitutionality (art. 202.I of the PCP). Concrete Action of Unconstitutionality (art. 79 of the Constitutional Procedural Code). Appeals against taxes, fees, patents, rights or contributions created, modified or suppressed in contravention of the Constitution (art. 202.4 of the PCP).</p>
<p><i>Ii) Constitutionality Control for the Implementation of Standards and Procedures of the Nicnps</i> This mechanism is activated through: Consultations of the native indigenous campesino authorities on the application of their legal norms to a specific case (art. 202.8).</p>	<p><i>B) Competence Control of Constitucionality</i> Activated through the following procedural constitutional mechanisms: Conflict of competences and powers between public authorities (art. 202.2 of the PCP). Conflict of competences between the plurinational government, the autonomous and decentralized territorial entities and between them (art. 202.3 of the PCP). Conflict of competences between the native indigenous campesino jurisdiction and the ordinary and agro-environmental jurisdictions (art. 202.11). Direct Nullity Appeals (art. 202.12).</p>
	<p><i>C) Tutelary Control of Constitutionality</i> Appeals against resolutions of the Legislative Branch, when its resolutions affect one or more rights, regardless of the persons affected (art. 202.5 de la PCP). Revision of the actions of freedom, constitutional, privacy, popular and compliance protection (art. 202.6 of the PCP).</p>

Source: Attard (2014, p. 45) The bold face is ours.

### 2.3. CONSTITUTIONAL INTERPRETATION OF THE PLURINATIONAL CONSTITUTIONAL COURT

In general terms, the interpretative function of the PCC should preferably apply the will of the constituent in accordance with the documents, minutes and resolutions of the Constituent Assembly of 2006. Likewise, the rules will be interpreted in accordance with the general context of the PCP, through a systematic understanding thereof aimed at achieving its purposes. (LPCC, 2010, Article 6). As determined by the CPC (2012, Article 10), the PCC issues three types of resolutions in the exercise of its functions: (1) Plurinational Constitutional Judgments, through which actions are resolved, claims (for example, conflicts of competence between native indigenous campesino and ordinary or agro-environmental jurisdictions) and appeals, as well in the reviewing of defence actions (Freedom, Constitutional Protection, Privacy, Popular and Compliance); (2) Constitutional declarations, the same adopted in the case of prior control or queries with the PCC (for example, the queries of native indigenous campesino authorities on the application of a rule of their legal system); and (3) Constitutional Orders, which constitute decisions of admission or rejection, withdrawal, compliance and others that are issued in the development of the process.

#### 2.3.1. *Binding nature of and mandatory compliance with its judgments*

The binding nature of PCC resolutions determines the constitutional doctrine, as well as the sub-rules drawn from the implicit rules of the PCP. These must be applied by the rest of the public authorities (among them, by the judges, courts and authorities of the NICNPs) in the resolution of all the cases that present similar factual assumptions.<sup>55</sup> With PCJ 0846/2012,<sup>56</sup> the PCC determines in no uncertain terms that

<sup>55</sup> Rivera (2005) points out that the results of the constitutional interpretation that was developed are included in the ratio decidendi or reason for the decision of the constitutional sentence. It is this part of the constitutional sentence that has binding force, so its application is mandatory for other judges and courts resolving similar cases. It is necessary to clarify that the resolving or decisional part of the constitutional sentence, in the safeguard of the right to due process, binds or has effect only in relation to the parties that participated in the judicial dispute, except in cases of collective actions or when the constitutional system confers erga omnes effects to the resolution, as in the case of sentences that declare the unconstitutionality of the norm subject to constitutionality control.

<sup>56</sup> Plurinational Constitutional Judgment 0846/2012 of August 20 states that,

constitutional jurisprudence has the value of a direct source of the law, thus becoming binding and mandatory for the rest of the public authorities, particularly for judges and courts that are part of the judiciary; Vargas (2011, p. 37) points out that the power of the constitutional *res judicata* is a foundation that complements this criterion. This notion translates into the provision established by the final part of Article 203 of the PCP,<sup>57</sup> which enshrined the constitutional *res judicata*, stating that “there is no further appeal against the judgments of the Constitutional Court”.

Interpreting Article 15 of the CPC, PCJ 0846/2012 relays that the effects of the operative part of the constitutional sentence are divided in two ways: 1) «*inter partes*», entailing mandatoriness affecting only the intervening parties, as in sentences on defence actions (freedom, constitutional and privacy protection, popular and compliance), and PCC declarations and decrees; and 2) *erga omnes*, entailing mandatoriness affecting everybody in general, as in actions of unconstitutionality and appealing against taxes.

As regards the «temporal scope of constitutional jurisprudence», a constitutional precedent, being a means by which the PCP shifts its general effectiveness, has full validity in time and, therefore, is not governed by the principle of non-retroactivity, which means that it can be retroactively applied to past events, regardless of whether the facts to which the jurisprudential understanding has been applied occurred before the constitutional precedent. However, retroactive applications have the following limits: (1) the *res judicata*, and (2) jurisprudence that harms the accused in matters of substantive criminal law.

As for prospective overruling in constitutional Jurisprudence, it was applied to future instances by the PCC with PCJ 0032/2012 of 16 March in a freedom action, in a case in which it interpreted the rules of material competence to recognise freedom actions.<sup>58</sup>

<sup>57</sup> Article 203 of the Political Constitution of the State establishes that, “The decisions and judgments of the Plurinational Constitutional Court are binding and mandatory, and no further appeal can be filed against them.”.

<sup>58</sup> This judgment stated that, “...the prospective effectiveness of case law known as prospective overruling, referred to changing a binding precedent or replacing it with another that becomes binding in subsequent cases starting with the introduction of a new piece of reasoning; in other words, the change or replacement of the binding precedent is applicable thereafter and in accordance with the criteria assumed in the new ruling. Along the same lines, this Constitutional Judgment, as of its publication, will be binding by mandate of Art. 203 of the fundamental norm and Art. 8 of the LPCC, insofar as it applies to all subsequent cases.”.

We should also take into account the provisions of PCJ 2233/2013-AL,<sup>59</sup> supplemented by PCJ 0087/2014-S3,<sup>60</sup> which established that the constitutional precedent in force is the one that holds the highest standard of protection of the fundamental right or constitutional guarantee invoked, that is, the decision solving a legal problem in a more progressive way through an interpretation that tends to realise in a better way the fundamental rights and constitutional guarantees provided in the PCP and in the International Human Rights Treaties that are part of the constitutionality block, meaning that the invocation and application of a precedent should be chosen after a comprehensive examination or analysis of the jurisprudential line and not just by focusing on its temporal criterion.<sup>61</sup>

### *2.3.2 Bolivia's Constitutionality Block*

The notion of constitutionality block is based on the existence of constitutional norms that do not appear directly in the Constitution, thus having to resort to references of an express or tacit nature for their incorporation into constitutional practice.<sup>62</sup> It is thus an attempt to systematise this phenomenon legally, according to which the materially constitutional rules - that is, with constitutional power - are more numerous than those that are formally constitutional - that is, expressly mentioned by the constitutional articles. Therefore, the constitutionality block is compatible with the idea of a written constitution and its supremacy because it is by mandate of the constitution itself that norms that are not part of its articles should share the same normative power, since its

“constitutional jurisprudence has the value of a direct source of Law, hence it is recognised as binding for public and private bodies and individuals.”

<sup>59</sup> PCJ 2233/2013-AL of 16 December.

<sup>60</sup> PCJ 0087/2014-S3 of 27 October 2014.

<sup>61</sup> PCJ 2233/2013-AL of 16 December.

<sup>62</sup> Uprimny (2010, p. 2) points out that there are five basic referencing techniques that can be classified, from the tightest and most legally safe to the most flexible and complex, as follows: (i) referring to set and definitive texts, like when several Latin American constitutions incorporate the Inter-American Convention; (ii) referring to closed texts, but whose determination raises some controversies and uncertainties, like when the Preamble of the French Constitution of 1946 (which is part of the block for the reference to the Preamble of the Charter of 1958) in turn refers to, “the fundamental principles recognised by the laws of the Republic”, for it is not known precisely what these laws and principles are; (iii) referring to texts to be developed, like when the Spanish Constitution refers to the statutes of autonomy that are going to be approved later; (iv) referring broadly to values and principles, such as the nameless rights in the clause of the ninth amendment to the US Constitution; and (v) lastly, referring to other values by using particularly indeterminate concepts, such as the substantive due process clause in the United States, where debates about the integration of the block are confused with issues of interpretation.

own Charter, as the supreme set of laws, has so ordered<sup>63</sup>. Generally, in Latin America this technique has been used for the inclusion of IHRL instruments, that is, embodying more the French current<sup>64</sup>, presenting the same characterization of assimilation in Bolivia. This is denoted in the abrogated Constitution of 1967<sup>65</sup> and currently in the PCP of 2009.<sup>66</sup>

In *prima facie*, the contents of Bolivia's constitutionality block are determined in the articles of the PCP,<sup>67</sup> establishing its composition by means of the Human Rights Treaties and International Conventions and the norms of Community Law ratified by the country. It is the PCC that with PCJ 0085/2012<sup>68</sup> specifies the contents of the constitutionality

<sup>63</sup> See, for example, Bidart (1995)

<sup>64</sup> According to Góngora (2014, p. 306), there are at least two versions of the doctrine that respond to the diverse functions acquired by the concept of block in the European countries that developed it. In France, the idea of a block emerged in the light of the concept of "material Constitution"; in response to the lack of a declaration of rights in the constitutional text and in Decision 71-44 DC of July 16, 1971, the Conseil Constitutionnel included within the parameter of constitutionality the 89 articles of the Constitution of 1958 (*sensu stricto*) and the rules mentioned in its Preamble, including the Declaration of the Rights of Man and of the Citizen of 1879 and the principles enshrined in the preamble of the previous Constitution of 1946. In contrast to that, Spain adopted the constitutional block as an instrument to resolve conflicts of competence between the State and the autonomous communities, and includes constitutional rules, the autonomous statutes and the organic laws that regulate the distribution of competence between jurisdictions.

<sup>65</sup> Article 35 of the Political Constitution of 1967 noted that, "The declarations, rights and guarantees proclaimed in this Constitution shall not be understood to deny other rights and guarantees that are not stated and arise from the sovereignty of the people and the republican form of government."

<sup>66</sup> Article 13, paragraph II of the Political Constitution of the Plurinational State of 2009 establishes that, "The rights proclaimed in this Constitution shall not be understood to deny other rights not stated."

<sup>67</sup> Article 411, paragraph II of the Political Constitution of the State of 2009 states that, "The Constitution is the supreme rule of the Bolivian legal system and has primacy over any other normative provision. The constitutionality block is integrated by the International Treaties and Agreements in the subject of Human Rights and the norms of Community Law, ratified by the country. The application of the legal rules will be governed by the following hierarchy, according to the competence of the territorial entities: 1. Political Constitution of the State. 2. International treaties. 3. Domestic laws, autonomous statutes, organic charters and all other departmental, municipal and indigenous legislation. 4. Decrees, regulations and other resolutions issued by the corresponding executive bodies."

<sup>68</sup> Plurinational Constitutional Judgment 0085/2012 of 16 April states that, "Article 410.II of the PCP accepts the constitutionality block theory and enshrines the principle of constitutional supremacy, noting the following: The constitutionality block is integrated by the International Treaties and Agreements involving Human Rights and the norms of Community Law, ratified by the country. In an interpretation in the light of the principle of constitutional unity, considering that, as previously mentioned, the Political Constitution of the State is characterised by its being axiomatic and dogmatic-guarantist, in order to manifest the phenomenon of constitutionalisation and the dissemination of constitutional order in all public and private acts of social life, it should be pointed out with precision that the block of constitutionality that will shape the prevailing constitutional order and that will be protected by the principle of constitutional supremacy will be composed of the following compartments: 1) The Political Constitution of the State as a positivised text; 2) International Treaties involving Human Rights; 3) Community law rules; and



block, determining its composition as follows: (1) the PCP as a positivised text; 2) International Human Rights Treaties; (3) the rules of community law; (4) the supreme principles and values. In a more detailed interpretative sense, Attard (2014a, p. 144) points out the following as integral elements of Bolivia's constitutionality block:

*Chart No 3. Constitutionality Block of the Plurinational State of Bolivia*

Constitutionality Block			
The written text of the Constitution	International Treaties concerning Human Rights and all opinions and resolutions of supranational Human Rights protection bodies	Integration Treaties and Agreements	Plural supreme Principles and Values in the light of Living Well

Source: Attard, 2014, p. 39.

We can also point out that the PCC has not yet pronounced itself on a distinction between the notions of constitutionality block in the strict sense and in the broad sense, only holding to the constitutionality block in the first sense, that is, rules of Constitutional rank.<sup>69</sup> However, the inclusion of international human rights treaties ensures or reinforces this category of rights.<sup>70</sup>

4) The supreme principles and values. These compartments should disseminate content in all public and private acts of social life.

<sup>69</sup> In this respect, the Colombian Constitutional Court established a clear methodological distinction that was consolidated in Judgment C-191 of 1998, expressly distinguishing between the block in the strict (constitutional norms) and broad sense (constitutionality parameters). Thus, foundation 5 of this judgment states the following, "It is possible to distinguish two meanings in the concept of constitutionality block. The first meaning of the notion, which could be called constitutional block *sensu stricto*, has been determined to conform to those principles and norms of constitutional value found in the text of the Constitution proper and of the international treaties that enshrine Human Rights, whose limitation is prohibited during states of emergency. (P.C., Article 93). [...] More recently, the Court adopted a notion *sensu lato* of the constitutionality block, according to which it would be composed of all those rules with different hierarchies that serve as parameters to carry out the constitutionality control of the legislation. According to this meaning, the constitutionality block would be formed not only by the articles of the Constitution but also, *inter alia*, by the international treaties referred to in Article 93 of the Charter, organic laws and, sometimes, statutory laws."

<sup>70</sup> Likewise, the open clause subject to an evolutionary and extensive interpretation ensures the effectiveness of all supranational decisions related to rights such as those issued by the Universal System of Protection of Human Rights and the Inter-American System of Human Rights. The contents of the resolutions issued by these bodies extend to all acts of social life of the Plurinational State.

### *2.3.3. Constitutional Supremacy and the guardianship task of the Plurinational Constitutional Court*

The PCP is the supreme rule of the Bolivian legal system and has primacy over any other normative provision. According to current regulations, the PCC has the task of being the guardian of the PCP, the supreme interpreter of the Fundamental Law, without prejudice to the interpretative power of the Plurinational Legislative Assembly as the body depositary of popular sovereignty. Thus, constitutional justice emanates from the people and is unique throughout the Bolivian territory (LPCC, 2010, p. 7). In its interpretative function, the PCC shall preferably apply as a criterion the will of the constituent, according to its documents, minutes and resolutions, as well as the letter of the text (PCP, 2009, Art. 196; LPCC, 2010, Art. 1). The courts and tribunals of the ordinary jurisdiction shall hear Freedom, Constitutional Amparo, Privacy Protection, Popular and Compliance actions, and judge in accordance with the PCP and the LPCC. (LPCC, 2010, Art. 1). As we will see below, when a legal norm accepts more than one interpretation, the PCC, under the principle of conservation of the norm, will adopt the interpretation that agrees with the constitutional text (LPCC, 2010, Art. 4) and the constitutionality is presumed of all laws, decrees, resolutions and acts of the State Bodies at all levels until the PCC resolves and declares their unconstitutionality (LPCC, 2010, Art. 5). The PCC is independent of the other constitutional bodies and is subject only to the PCP and the LPCC.

## 2.4. STRUCTURE AND ORGANISATION OF THE PLURINATIONAL CONSTITUTIONAL COURT

### *2.4.1. Configuration of the Chambers of the Plurinational Constitutional Court*

Escobar (2008, p. 298) points out that configuring or not chambers inside the Constitutional Courts and Tribunals has a close relationship with the institutionality, legitimacy and efficiency of constitutional justice. There are three basic theoretical models. In the first model, one can opt for the formation of a single full chamber, in charge of deciding on all matters of constitutionality; this model is based on the need to guarantee homogeneity in judicial criteria and policies, and in giving their constitutional justice decisions

the greatest possible legitimacy. At the other extreme we find those systems in which all decisions are made by specific chambers, with the understanding that the distribution of labour ensures the efficiency of constitutional justice, and that alternative mechanisms can guarantee coherence in the decisions of the different chambers. The third model is about intermediate systems, in which cases submitted to the Court are resolved either by the full chamber or by specific chambers configured according to multiple criteria (Escobar, 2008). The PCC has this last organisational structure: Full Chamber and Specific Chambers (See Chart No 3).

Along the same lines, the LPCC determines that the PCC, as a collegiate body, acts in plenary session with 7 judges (LPCC, 2010, Articles 28, 29 and 30) and being chaired by one of them. The Plenary Chamber of the PCC is aware of the matters indicated in the Articles quoted and dictates resolutions by an absolute majority of votes (LPCC, 2010, Article 29). Likewise, conflicts of competence between the native indigenous campesino and the ordinary and agro-environmental jurisdictions are resolved by the Plenary Chamber by an absolute majority of votes. In a different development, in order to take cognisance of and make resolutions on matters under review by delegation, the establishment of three chambers is instituted, First Specialised Chamber, Second Chamber and Third Chamber. each of which is chaired by a President<sup>71</sup> and consists of two judges (See Chart No 3). All of these Chambers recognise and resolve, in review, Freedom, Constitutional Protection, Privacy Protection, Popular and Compliance actions (LPCC, 2010, Article 31). The structuring of an admission committee is also established, made up of three judges who carry out their functions on a rotating basis.<sup>72</sup>

Within the chambers established in the organisation of the PCC magistrates, a specialised one (the first) is given exclusive responsibility for the consultations of native indigenous campesino authorities on the

<sup>71</sup> Law 027 of July 6, 2010 states the following with regard to chamber presidents, "Article 33. I. The presidency of the chambers shall be exercised in turn on a yearly basis by the female and male magistrates of the chamber. II. The President of the chambers has the following tasks: 1. Controlling the draw for the distribution of causes in the chamber s/he presides. 2. Supervising the performance of functions by the jurisdictional and administrative support staff in the chamber s/he presides.

<sup>72</sup> Article 34 of Law 027 of July 6, 2010 states the following, "The Admission Committee is composed of three magistrates of whatever gender who will perform their functions in a rotating and compulsory manner. None of them will perform these functions for more than two consecutive times for each turn."

application of their legal norms to a specific case.<sup>73</sup> These consultations with NICNP authorities on the application of their rules to specific cases are intended to ensure that they are in conformity with the principles, values and purposes set forth in the PCP (CPC, 2012, Article 128). Any authority of the NICNPs familiar with the specific case is entitled to present a query.

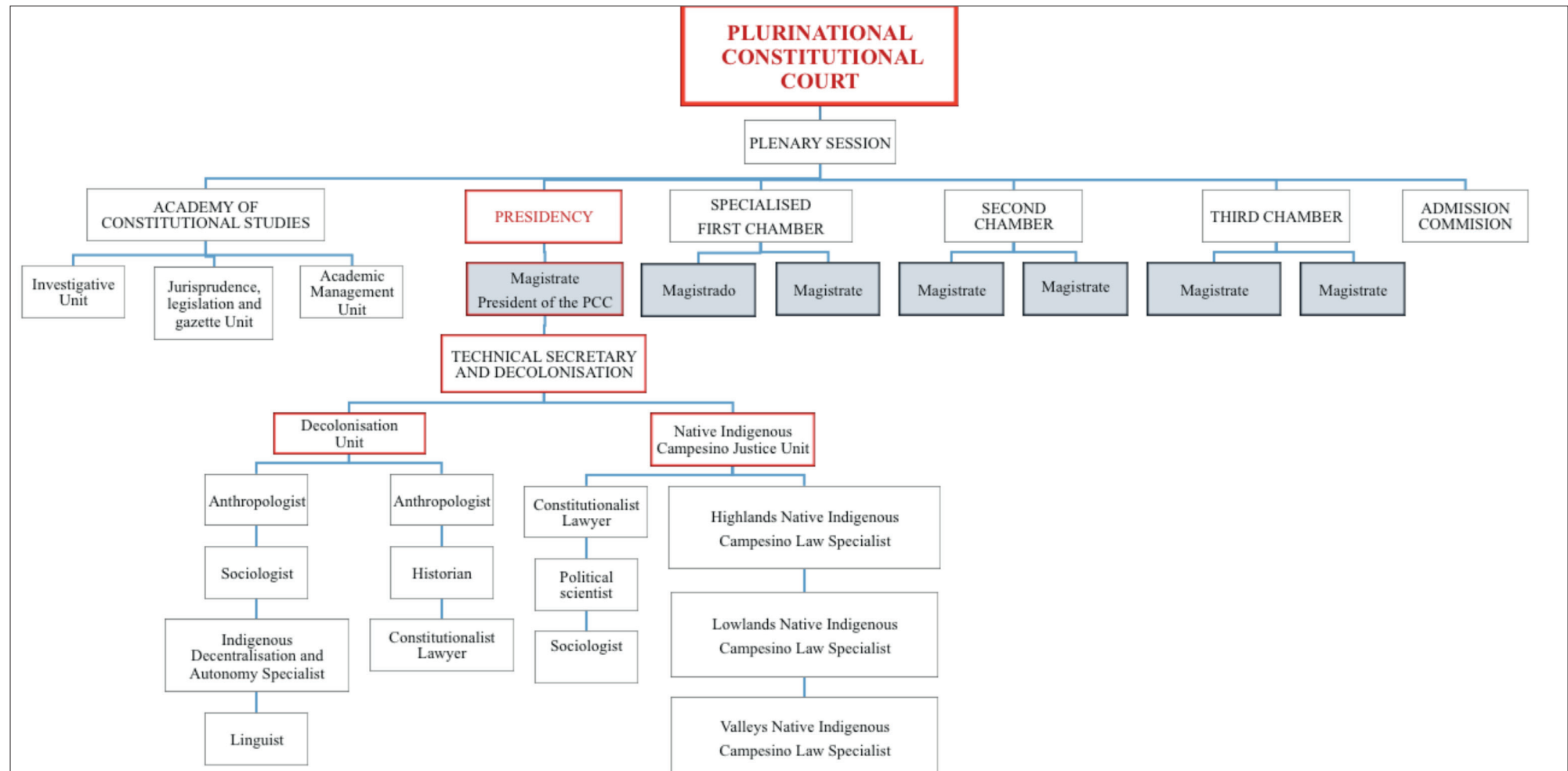
*2.4.2. On the judges and courts of guarantees as an intermediate structure of the plural control of constitutionality*

Judges and Courts of guarantees have the authority to hear in the first instance the defence actions regulated by the PCP in their dogmatic part, which will be heard and resolved in review by any of the PCC chambers. Similarly, in the capitals of the nine Departments of the Plurinational State of Bolivia, tutelary actions are heard in the first instance by Members of the Departmental Courts of Justice, divided into chambers, which do not act as ordinary courts but as courts of guarantees and their decisions are up for review by the PCC within 24 hours.<sup>74</sup> According to Attard (2014), the systemic dysfunction in this instance has two special causes: i) At the level of judges and courts of guarantees the prevailing legislation does not recognise a plural composition, which means that the tutelary actions are analysed in the first instance with a Western vision of justice, an obstacle to the application of intercultural patterns of interpretation and the generation of intercultural constitutional procedures, in accordance with the current constitutional model. ii) The legal culture that formed the judges and court members is a real obstacle to plural constitutional justice, as material justice must prevail in it for the enforcement of fundamental rights beyond extreme ritualisms, that is why, so as to avoid a systemic dysfunction, it would be appropriate and reasonable that, in the Plurinational State of Bolivia, judges and courts specialised in plural constitutional justice would be formed, with mixed composition.

*Chart No 4. Organisation of the Plurinational Constitutional Court of Bolivia*

<sup>73</sup> Article 32 states the following, “One of the chambers of the Plurinational Constitutional Court shall handle exclusively consultations with native indigenous campesino authorities on the application of their legal rules to a real case.” (LPCC, 2010, Article 34).

<sup>74</sup> Along the same lines, ordinary judges in the provinces recognise and resolve tutelary actions, not as ordinary judges, but as constitutional judges, and their decisions will be referred to the PCC for review.



Source: Own elaboration based on the organization chart presented by the PCC. See, the complete organization chart at <http://www.PCCbolivia.bo/PCC/sites/default/files/images/organigrama.jpg>

## 2.5. MAGISTRATES REPRESENTING THE NATIVE INDIGENOUS CAMPESINO NATIONS AND PEOPLES IN THE PLURINATIONAL CONSTITUTIONAL COURT

For Bolivia to be constituted in a Constitutional State of Law, the PCC must work adequately and for it to work adequately its independence is essential. The selection process of the PCC magistrates is key for this constitutional body to achieve independence. The professionalism of those who have been elected should prevent the improper interference of other government bodies and therefore judge impartially. In this respect, we can appreciate that the Universal System of Protection of Human Rights took a stand as far as the UN's Basic Principles on the Independence of the Judiciary,<sup>75</sup> which establishes quality standards for judges, who should be suitable people of integrity, with appropriate legal training or qualifications, and that selection processes should be geared towards the verification of these qualities. By comparison, in our regional system, like for the Inter-American System for the Protection of Human Rights,<sup>76</sup> criteria have been established to ensure that the people chosen are the most appropriate, such as ensuring equality of conditions and non-discrimination in the selection processes, carrying out the selection on the basis of merit and the capabilities of the candidates, providing publicity and transparency to the processes, granting a sufficient duration of the appointed office and making sure that the interventions of political bodies in the processes will not affect Judicial independence.

There is a diversity of systems in Latin America to elect judges of Constitutional Courts (called Supreme Courts or Constitutional Chambers in other countries). Starting with systems where the executive branch and the legislature participate in the selection of judges: the United States, Nicaragua and Argentina. There are also systems where only the legislative branch intervenes: Costa Rica and Uruguay; or only the executive branch: Jamaica, Barbados and Canada. There are also other systems where the council of the judicature or magistrature plays an important role in the election, such as: Peru, Colombia and the Dominican Republic. As for the Plurinational State of Bolivia, based on the Plurinational Constitutionalism

<sup>75</sup> Adopted by the Seventh United Nations Congress on the Independence of the Judiciary, the Prevention of Crime and the Treatment of Offenders, held in Milan, Italy, from 26 August to 6 September 1985.

<sup>76</sup> See, for example, IACHR (2013): Guarantees for the independence of justice operators. Towards strengthening access to justice and the rule of law in the Americas.

established by the PCP of 2009, it implemented a system that no other country in the world has ever had. A new system where PCC judges are elected by popular vote, whose candidates have been previously selected by the Legislative Body. This system has many pragmatic connotations for Latin American constitutionalism and an analysis thereof, even if just a succinct one,<sup>77</sup> is therefore obligatory at this point. Even more so when we consider that we have had a first experience of this form of election, which was carried out in 2011. As a result of this experience, various political actors, academics and judges, among others, have been pinpointing the flaws and virtues of this electoral process until today.<sup>78</sup>

### *2.5.1. Regulatory framework: PCP, LPCC and Law No 044*

The PCC is composed of judges elected with plurinationality criteria, with representation of the ordinary system and of the native indigenous campesino system. The procedure for electing these magistrates is regulated by the same PCP of 2009 and the LPCC, and the procedure of judging responsibilities is regulated by the same PCP and Law No 044 of October 8, 2010.<sup>79</sup>

### *2.5.2. Universal suffrage as a form of election*

In order to guarantee the PCC's independence and legitimise its members, the Constituent Assembly of 2006 decided to establish that the election of the magistrates of this constitutional body be carried out by universal vote.<sup>80</sup> However, the whole candidate selection stage would be

<sup>77</sup> For detailed analyses, see the works by Pásara (2014), Posse (2003) and Lorenzo & Rodríguez (2011), among others.

<sup>78</sup> Justices of peace or of equivalent level are elected in several countries; it is the case of Peru, Colombia, Venezuela and some French municipalities. Japanese citizens vote on the designations of the judges of the Supreme Court of Justice, thereby ratifying or rejecting them. In the United States and Switzerland, judges are elected, but in both cases the highest judicial authorities are not. Bolivia is the only country where, in the experience of 2011, the members of the highest courts of justice (Supreme Tribunal of Justice, Agro-environmental Court and Plurinational Constitutional Court) were elected together with those of the governing body in charge of the judicial career (Judicial Council). (Pásara, 2015, p. 1).

<sup>79</sup> Law for the judgment of the President and/or Vice-President or Vice-President, high authorities of the Supreme Tribunal of Justice, Agro-environmental Court, Judicial Council, Plurinational Constitutional Court and Public Ministry.

<sup>80</sup> In the same way, the highest authorities of the Judiciary are elected by popular vote: judges of the Supreme Tribunal of Justice and the Agro-environmental Court and members of the Judicial Council.

the responsibility of the Legislative Branch. This type of election seeks to ensure the democratic legitimacy of constitutional judges or magistrates, which means that this body fulfils political and juridical functions of great national importance beyond the traditional technical functions of the Judicial Branch and much like those exercised by the President of the State and the Legislative Body.<sup>81</sup> Here, the PCP determines a democratic system configuration in the election of PCC magistrates, whose development is based on the transforming organisation of democracy, including instruments of participatory and direct democracy, determining transparency, publicity, participation, social control and the right to representation as the basis of the system. (Millán, 2015). The PCP establishes this type of election according to the procedures, mechanisms and formalities established for the judges of the Supreme Tribunal of Justice,<sup>82</sup> which is complemented by the LPCC beginning from its second Chapter. Under these regulatory parameters, the convocation will be issued by the Plurinational Legislative Assembly six months prior to the end of the term of the magistrates and will specify the eligibility conditions and the characteristics of the pre-selection procedure, while the election should be carried out at least thirty days before the expiry of the magistrates' term of office. (LPCC, 2010, p. 16). Social Control will effectively participate in the application, pre-selection and selection process, in accordance with the law,<sup>83</sup> citizen participation will also be guaranteed. (LPCC, 2010, p. 20).

By a vote of two-thirds of its attending members, the Plurinational Legislative Assembly shall preselect twenty-eight applicants, half of whom will be women, and forward the prequalified roster to the Plurinational Electoral Body (LPCC, 2010, p. 19); the latter will organise the national electoral process. At the same time, candidates

<sup>81</sup> Escobar (2008, p. 292) points out the following systems for appointing judges of the Constitutional Court: designation through universal suffrage, which seeks to ensure the democratic legitimacy of the constitutional judge, designation through public contests, which seeks to ensure the professional suitability of its members, and discretionary and direct designation by State authorities.

<sup>82</sup> Political Constitution of the State, Article 198, "The Magistrates of the Plurinational Constitutional Court shall be elected by universal suffrage, according to the procedure, mechanism and formalities of the members of the Supreme Tribunal of Justice."

<sup>83</sup> The ERL (2010, Article 2) establishes the following as the Principle of Intercultural Democracy: social participation and control, where Bolivians, individually or as part of civil society organisations, have the right to participate in the supervision, surveillance and control of the fulfilment of the procedures for the exercise of intercultural democracy, as provided in the PCP and the ERL. "Article 252. (Social control). Social control, as established in the Political Constitution of the State for electoral matters, without prejudice to the provisions of the special Law and the Regulations issued by the Supreme Electoral Tribunal, has the following tasks:



are prohibited from carrying out electoral campaigns to promote their candidacies, directly or through third parties, under penalty of disqualification.<sup>84</sup> This is reserved for the Electoral Body, which will be solely responsible for disseminating knowledge of the merits of the candidates. The seven candidates with the most votes will be the PCC magistrates in office, and the next seven candidates according to the votes will be the substitutes.<sup>85</sup> The President of the Plurinational State shall put elected and alternate magistrates in office. The latter shall be part of a list of individuals that can be qualified for the position; the Plurinational Electoral Body shall deliver this list to the person presiding the PCC. (LPCC, 2010, p. 23). When a quorum cannot be reached in the Plenary Chamber or in the Chambers, due to a magistrate's temporary or permanent absence, recusal or excuse, the President or the Dean, as applicable, shall convene the substitutes. Thus, when, due to the definitive absence of the previous magistrate in office, the substitute is appointed, the people on the list of those that can be qualified will be summoned for one of them to act as a substitute. The people on the list of those that can be qualified will be called in order according to the number of votes obtained in the electoral process. (LPCC, 2010, p. 24).

To promote, collaborate and evaluate legislative initiatives in matters regarding elections, civic registration and political organisations.

To follow the organisation, direction, supervision, administration and execution of electoral processes, referenda and revocations of mandate, for which it will have access to required information.

To be familiar in a timely and efficient manner with the management and accountability reports of the electoral authorities. Any omission, delay or obstruction by the electoral authorities in the fulfilment of this requirement is considered to be a serious breach of duty.

To request supplements to the reports of the electoral authorities and make their observations known. Electoral authorities are required to rule on requests and observations.

To access the information on assets, financing and execution of expenses provided by political organisations to the Electoral Body.

To report or contribute to reports on the violation of political rights and the commission of electoral offences or crimes established by this Law.

To report all kinds of information, propaganda and electoral campaigns that violate the deadlines, limits and prohibitions established with this Law.

To promote popular initiatives for the organisation of referenda and mandate revocations.

To participate in the challenge and disqualification of candidacies or applications, within the terms established by Law.”

<sup>84</sup> These impediments to both candidates and the media in matters of propaganda, interviews, opinion and polls were observed by Catalina Botero, Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, who raised certain questions about them. See, for example, Catalina Botero (2011, pp. 38-40) points 54 to 59.

<sup>85</sup> The substitute Magistrates will be the next seven candidates who participated in the election by correlative voting order. The eighth voted shall be the substitute of the first voted and so on up to the fourteenth, who shall be the substitute of the seventh voted.

### 2.5.2.1. *Requirements*

In addition to the general requirements for access to public service,<sup>86</sup> qualifying for the PCC magistracy requires at least eight years of accredited specialisation or experience in the disciplines of Constitutional, Administrative or Human Rights, being able to speak at least two official languages of the country and being a lawyer; moreover, the work done in the capacity of native authority under one's own justice system is taken into account for the qualification of merits. It is also established that PCC candidates may be proposed by civil society organisations and the NICNPs. (PCP, 2009, Art. 199).<sup>87</sup> As for the term of office, it is six years counting from the date of taking office, with no re-election to consecutive terms allowed. (LPCC, 2010, p. 14). The PCC judges will be governed by the same system of prohibitions and incompatibilities of public servants of Articles 236 and 238 of the PCP, like belonging a political organization at the time of application, etc. (LPCC, 2010, p. 18).

### 2.5.2.2. *Representation of the Native Indigenous Campesino System*

A main axis for the realisation of the plural control of constitutionality is the specific inclusion of representatives not only of the ordinary system of justice but also of the NICNPs' system; as pointed out in Article 197 of the PCP, where the category of «plurinationality criteria» is added in the election of PCC magistrates.<sup>88</sup> In accordance with this

<sup>86</sup> Being a Bolivian national at least 35 years old, who has fulfilled one's military duties, in the case of men; with no pending enforceable criminal charges or convictions... (LPCC, 2010, p. 17).

<sup>87</sup> Article 199, paragraph I of the PCP states the following, "In order to qualify for the magistrature of the Plurinational Constitutional Court, in addition to the general requirements for access to public service, one will be required to be at least thirty-five years old and hold a specialisation or accreditation of at least eight years' experience in the disciplines of Constitutional, Administrative or Human Rights Law. having exercised the office of native authority under one's own system of justice will be taken into account in the qualification of merits.". Accordingly, Law 027 of July 6, 2010 establishes the prohibitions and grounds for ineligibility: "The prohibitions in the exercise of constitutional justice are indicated in Article 236 of the Political Constitution of the State. II. in addition to those indicated in Article 238 of the Political Constitution, the following are grounds for ineligibility as regards the exercise of constitutional justice: 1. Belonging to a political organization at the time of application. 2. Having been part of the directorate or management of a commercial company whose bankruptcy was declared fraudulent. 3. Having sponsored individuals found guilty of committing crimes against the unity of the State, as well as anyone who has participated in the formation of dictatorial governments or sponsored processes of surrender or alienation of natural resources and national heritage assets.".

<sup>88</sup> Article 197, paragraph I of the PCP points out that, "The Plurinational Constitutional Court shall be composed of Magistrates and Judges elected on the basis of plurinationality

criterion, Article 13 of the LPCC determines that at least two Judges shall come from the native indigenous campesino system, by means of personal self-identification.

#### *2.5.2.3. Application process*

To be a candidate, one has to meet PCP and LPCC requirements and submits an application to the Plurinational Legislative Assembly. However, there is also a provision that candidates can be proposed by social organisations of NICNPs and civil society in general,<sup>89</sup> in which case, after a committee verifies that the requirements are met, the Plurinational Legislative Assembly shall preselect a candidate with a vote of two-thirds of its attending members. When an applicant acquires candidate status, the Electoral Regime Law (hereinafter, ERL) establishes some other regulations,<sup>90</sup> thus Article 78 of the aforementioned law establishes the impossibility of carrying out challenges, complaints or manifestations of support or rejection of the applications after the pre-selection stage is completed; Article 82 establishes the prohibition of carrying out directly or indirectly any form of campaign and Article 80 reserves exclusively the dissemination of the knowledge of merits of the candidates to the Supreme Electoral Tribunal. These aspects make clear the difference between the election of some authority or representative and that of CCP judges. (Millán, 2015).

#### *2.5.2.4. Voting procedure*

The body responsible for organising the vote is the Supreme Electoral Tribunal; however, the selection of PCC judges is a two-step process, the pre-selection step, of which the Legislative Body is in charge, and the voting procedure, by universal suffrage. As we pointed out, the electoral process is divided into two steps: the application and preselection of the applicants, which lasts sixty (60) days, and the organisation and implementation of the voting, which lasts ninety (90) days. In accordance with paragraph IV of Article 79 of the ERL, after the pre-election step, carried out by the Legislative Body, comes

criteria, representing the ordinary system and of the native indigenous campesino system.”.

<sup>89</sup> Article 199, paragraph II of the PCP states the following, “Candidates to the Plurinational Constitutional Court can be proposed by organisations belonging to civil society and native indigenous campesino nations and peoples.”.

<sup>90</sup> Law 026 of June 30, 2010 (Electoral Regime Law).

the election or voting step, from a list of 28 candidates elected by the Plurinational Legislative Assembly, whose vote is added directly to the votes going to the candidate.<sup>91</sup> The list of applicants must be made up of fifty percent women and be inclusive of applicants from the NICNPs.<sup>92</sup>

The design and content of the voting ballot, which is a public document through which voting is exercised, for the election of candidates to the PCC has the following characteristics: a vertical strip (together with the other candidatures of the Judicial Branch) shall include the full name and photograph of each candidate and the design will be determined by the Supreme Electoral Tribunal (ERL, 2010, Article 139).

#### 2.5.2.5. *Vote conversion*

The vote conversion system is the simple majority wins, by virtue of which the chosen candidate is the one who obtains the most votes. The seven candidates with the most votes will take office as permanent magistrates and the next seven will be the substitute magistrates. The one who was voted eight overall will be the substitute of the one voted first overall and so on.<sup>93</sup> As we will see below, this procedure was criticised during the election by universal suffrage of the PCC magistrates, because null and white votes prevailed, generating a debate on the illegitimacy of the elected authorities.

<sup>91</sup> Article 79. (Organisation of the voting process). After receiving the lists of candidates, the Supreme Electoral Tribunal shall organise the voting process according to the following provisions of the Plurinational Constitutional Court:

The election will be held at the national level; seven (7) Magistrates will be elected along with seven (7) Substitute Magistrates.

The Plurinational Legislative Assembly will preselect twenty-eight (28) applicants, making sure that fifty percent (50%) of them are women and that applicants of native indigenous campesino origin are included.

The location of each applicant's name in the electoral ballot will be determined by means of a public draw carried out by the Supreme Electoral Tribunal.

The seven (7) candidates who shall obtain the highest number of valid votes shall be the Magistrates in office. The next seven (7) following in the voting shall be the substitute Magistrates.

In case of non-compliance with the provisions established for the preselection of candidates, the Supreme Electoral Tribunal shall return the lists to the Plurinational Legislative Assembly for correction.

<sup>92</sup> According to paragraph IV of Article 79 of the Electoral Regime Law, the location of the names of the 28 candidates on the electoral ballot shall be determined by means of a public draw carried out by the Supreme Electoral Tribunal. In real practice, this turned out to be a complex issue, since, in addition to the magistrates of the PCC, all other authorities of the other courts of the Judiciary were elected.

<sup>93</sup> Article 20 of Law 027 of July 6, 2010.

*2.5.2.6. Office term of Plurinational Constitutional Court members and possibility of re-election*

As mentioned above, the LPCC determines the office terms of PCC magistrates, comprising an individual period of six years counting from the date of taking office (3 January 2012 was the inauguration date of the first magistrates elected by universal suffrage), a shorter period than previously established for judges who are members of the Constitutional Court. The LPCC also contains the express provision that PCC judges may not be re-elected for two consecutive terms. (LPCC, 2010, Article 14).

3.

LIMITS AND SCOPE OF INDIGENOUS JUSTICE  
ADMINISTRATION STARTING WITH THE TUTELARY  
CONTROL OF RIGHTS OF THE PLURINATIONAL  
CONSTITUTIONAL COURT OF BOLIVIA

3.1. ANALYSIS OF SELECTED CASES

The purpose of this chapter is to define the scope and limits of the NICNPs' right to administer justice through the PCJs of the PCC in cases where native authorities of these legal systems violate the individual human rights of their members. In order to achieve this purpose, we will first carry out a general review of the PCJs in cases involving NICNPs. The analysis spans the period between the inauguration of the magistrates elected by popular vote (January 3, 2012) and the year-end closing of 2015.

After this review, we will identify the PCJs where the PCC resolves the alleged violation of one or more human rights of one or more members of NICNPs resulting from the administration of justice carried out by their own authorities. Based on these terms of reference, 16 PCJs were identified, which do not take into account whether the NICNPs belong to High, Mid or Low Lands, but which rather allow us to define the limits and scope of NICNP administration of justice through the work done by the constitutional justice of the PCC. These PCJs are listed below:

Chart No 5

SELECTED PLURINATIONAL CONSTITUTIONAL SENTENCES 2012-2015	
1. PCJ 0734/2012 of 13 August 2012	9. PCJ 1259/2013-L of 13 December 2013
2. PCJ 1422/2012 of 24 September 2012	10. PCJ 0041/2014 of 03 January 2014
3. PCJ 1574/2012 of 24 September 2012	11. PCJ 0323/2014 of 19 February 2014
4. PCJ 2397/2012 of 22 November 2012	12. PCJ 0478/2014 of 25 February 2014
5. PCJ 2448/2012 of 22 November 2012	13. PCJ 0486/2014 of 25 February 2014
6. PCJ 0358/2013 of 20 March 2013	14. PCJ 0778/2014 of 21 April 2014
7. PCJ 1127/2013-L of 30 August 2013	15. PCJ 0961/2014 of 23 May 2014
8. PCJ 1956/2013 of 4 November 2013	16. PCJ 1203/2014 10 of June 2014

Next, we will then carry out an analysis of each case based on three aspects: *the parties* (community member(s) vs an authority or several authorities of the NICNPs), *the list of facts* that led to the alleged violation of the individual human rights of its members by the justice administration of the NICNPs, and lastly, *the resolution of the PCC* (granting or denying legal protection).

We analysed the PCJs we selected from two perspectives, one being the PCC's position regarding the violation of individual human rights caused by the administration of indigenous justice, granting or denying legal protection to the individual(s) affected, and the other being the PCC's jurisprudential lines established in the resolution of these cases, generating the "binding nature" of their lines of reasoning for all the NICNPs of the Plurinational State. Through these two perspectives we can understand the scope and limits of native indigenous justice administration. In the analysis of the first perspective we consider the legal argumentation of the PCJs, in essence, all the arguments used by the PCC judges justifying the application or interpretation of a constitutional norm for the resolution of the selected cases, granting or denying legal protection thereby. We analysed whether the PCC magistrates simply applied constitutional provisions or used any interpretation, case-law or weighing criteria, according to the following: (a) *Simple normative application*: which examines the pure and simple application of the constitutional norm; (b) *Interpretative arguments*: cases where the PCC does not simply apply a norm, but interprets it using different methods. Based on this criterion, we then

analyse what interpretation methods the magistrates used: grammatical, teleological, historical, logical, systematic or intercultural as pertains the law and rights;<sup>94</sup> interpreting from and according to the PCP and the rules of the constitutionality block;<sup>95</sup> as well as the use of other criteria for the interpretation of human rights, such as the *pro homine* or *pro personae* principle<sup>96</sup> and the principle of progressivity;<sup>97</sup> (c) *Weighted arguments*: we also analyse the use of weighted arguments, in cases where the PCC is faced with conflicts between principles, values, rights or guarantees (with equal hierarchy), to which it has to apply the weighting methodology, analysing the suitability, necessity and proportionality in a strict sense of the measure in question. The weighting of rights, as a methodology used by the judicial authorities, is based on the rule contained in Article 13.III of the PCP, which provides for the principle of hierarchical equality of rights; whenever facing this type of situation, the constitutional jurisdictional authority is obliged, in the specific case, to give prevalence to a fundamental right, within the framework of what the doctrine calls mobile axiological hierarchy. This means that such a methodology for the resolution of conflicts between rights is constitutionalised, allowing PCC magistrates (although there is hierarchical equality between rights) to give conditioned prevalence or preference to one of them, after weighting them in the specific case; (d) *Doctrinal arguments*: PCC magistrates may turn to doctrine to support their conclusion on the interpretation of a constitutional provision; the resolutions were analysed within this context starting from the quotation of the doctrine and its correspondence with the Bolivian constitutional system; (e) *Anthropological assessment*: when deemed necessary, the PCC can request the production of additional expert information, which is granted a period of 6 months to be delivered. Based on this, we analysed if the PCC ordered an anthropological assessment to achieve a better understanding of the case and support its decisions, such as

<sup>94</sup> A standard of interpretation that emerges from Article 8 of ILO Convention C169 and Articles 1 and 178 of the PCP, as well as Article 4 of the LJD.

<sup>95</sup> Derived from the principle of constitutional supremacy or principle of constitutionality, provided for in Articles 410, 13 and 256 of the PCP and PCJ 110/2010-R, which integrates the jurisprudence of the Inter-American Court of Human Rights with the constitutionality block.

<sup>96</sup> Contained in Articles 13 and 256 of the PCP, Articles 5 of the PIPCD and 29 of the CADDHH; it has different manifestations, like the principle of labour protection provided in Article 48.II of the PCP and the principle of favourability in criminal matters stated in article 116.II of the PCP, among others.

<sup>97</sup> Which emerges from Article 13.I of the PCP, on the progressive nature of the rights.



regarding the structure, procedures and sanctions of the indigenous authorities, among other subjects; (f) *Comparative arguments*: which examine whether constitutional magistrates consulted comparative legislation or jurisprudence to support their interpretative decisions. Just as doctrinal arguments, these arguments must be consistent with the principles, values, rights and guarantees set forth in the PCP, that is, with the design of the Plurinational and Intercultural Constitutional State model, which means that, in order to support their decisions, the magistrates must take into account the normative and jurisprudential contexts of domestic law and culture; (g) *Gender focus*: we analysed whether the PCC's reasoning contains a gender approach, whether there are manifestations of gender, models of women or men, that support the resolution, while using gender sensitive or neutral language.

Because we only have access to constitutional resolutions and not the entire body of cases (court documents), we did not analyse the factual argumentations of the PCJs, that is, we do not analyse in detail the legal facts (issues or conflicts) connected to the evidence and its assessment (existence of facts proven by PCC and its assessment thereof). The results of these two analytical perspectives are shown in the following charts:

Chart No 6. Cases where the Ccp Resolves the Breaching of Individual Human Rights by the Administration of Nicnp Justice

	Resolution Number	Defence Action	Reporting Magistrate	Human Rights Involved	Jurisprudential Line	Case Analysis	Pcc Resolution
1	PCJ 0734/2012 of 13 of August	Constitutional protection action	Cortez Chávez Macario Lahor	Right to property (among other rights)	The constitutional protection action of private property before “de facto measures” of native indigenous campesino authorities	The PCC considers the de facto measures committed by an indigenous authority unfair and illegal acts that ignore and are separate from the legal and procedural instances that the law provides, doing justice directly and with abuse of power. Taking into account the fact that an authority or an individual cannot ignore the legal mechanisms adopted, these acts are harmful and illegitimate. Therefore, the CCP determined that the defendant indigenous authority in no way justified its conduct in relation to the occupation of the plaintiff's property.	Grants the protection of the right to private property requested in favour of the plaintiff
2	PCJ 1422/2012 of 24 September	Freedom action	Velásquez Casteños Ligia Mónica	Right to life and integrity (among other rights)	<ul style="list-style-type: none"> <li>• Exercise of native indigenous campesino Justice and protection of fundamental rights</li> <li>• Native indigenous campesino Justice being subject to plural constitutionality control</li> <li>• Interpreting fundamental rights in inter- and intra-cultural contexts</li> <li>• Protecting women and minors in inter- and intra-cultural contexts</li> <li>• Freedom action and its activation budgets for acts harmful to rights in inter- and intra-cultural contexts</li> </ul>	After applying its foundational judgement “the living well paradigm test” to the actual case, the PCC concluded that the decision of the indigenous authority questioned by means of the freedom action does not comply with the components of said test, within the framework of an inter- and intra-cultural vision. It is held that the rights of the plaintiffs to life, physical and psychological integrity, water and food, work, trade, prohibition of torture, cruel, inhuman, degrading or humiliating treatment, infamy, civil death, confinement and due process, all rights with direct connection to the right to life because they are interpreted according to specific inter- and intra-cultural patterns, were violated by the defendant communal authorities, as much as they must be protected through the freedom action, resulting in the granting of the protection requested.	Grants the protection of the rights requested in favour of the plaintiff
3	PCJ 1574/2012 of 24 September	Constitutional protection action	Sandoval Landívar Carmen Silvana	Due process and legal certainty	Ethical-moral principles of native indigenous campesino peoples	Although these people were elected by their community as native authorities, they were involved in acts contrary to the fundamental principles and values that are at the basis of indigenous Law (perpetrating a series of acts questioning the quality of other authorities and misbehaviours such as aggressions and offenses) with repercussions on the integrality of the NICNPs, the CCP establishes that they will be suspended from their functions as indigenous authorities.	Denies the protection of the rights requested by the plaintiffs

4	PCJ 2397/2012 of 22 November	Freedom action	Bacarreza Morales Zenón Hugo	Right to life and freedom	There is no legal basis on the administration of indigenous justice	<p>The plaintiff's right to life was effectively threatened and violated by the defendants, who perpetrated acts that violated that right, as they themselves officially acknowledged and accepted at the hearing, proving that the plaintiff's life was in constant danger, as the physical assaults, undue deprivation of personal freedom, kidnapping at the time of being notified with the freedom action, illegal detention and the signing of an act that allowed her to move freely, lead us to this conviction.</p> <p>By the same token, the plaintiff was subjected to constant persecution and harassment by two of the defendants, without any legal cause or endorsement, or an order of deprivation of freedom emanating from a competent authority, which proves that such persecution was illegal and undue, as officially recognised by the defendants at the hearing; therefore, the above points demonstrate that the legal statements made by the plaintiff are evident, for the violation of her constitutional rights to life and freedom is undisputable, as an effect of the undue persecution to which she was subjected, which are the reasons for granting the protection requested.</p>	Grants the protection of the individual rights requested in favour of the plaintiff
5	PCJ 2448/2012 of 22 November	Freedom action	Cortez Chávez Macario Lahor	Right to life and dignity (among other rights)	<ul style="list-style-type: none"> <li>• Respect for native indigenous campesino justice</li> <li>• Rules and procedures belonging to native indigenous jurisdiction</li> </ul>	<p>The native indigenous campesino justice system applied to the plaintiff does not directly or indirectly contravene the constitutional order, since the sanctions imposed are not in contravention of the due process guarantee, having respected the basic elements of the constitutional order as judged at a public hearing, all the more so when there is a declination of jurisdiction submitted to the Public Ministry representative to plead a single case in the jurisdiction of the Yanarico ayllu.</p> <p>With respect to self-representation, it must be borne in mind that customary justice is not essential to a lawyer in ordinary justice, the difference being that self-representation is seen in function of the person according to uses and customs, included in one's own language, applying one's own organic statutes and internal regulations, the same documents of organisational structure reviewed and corrected by one's municipality in order to avoid a constitutional conflict with the issuers, who are public servants of the Departmental Autonomous Government, which is also another legal filter; said public servants are the ones who grant the approval and certification with a Resolution endorsed by the departmental authorities.</p>	Denies the protection of the rights requested by the plaintiffs

6	PCJ 0358/2013 of 20 March	Constitutional protection action	Cortez Chávez Macario Lahor	Rights to private property, physical integrity and of senior citizens.	Constitutional protection against de facto measures Exception to the principle of subsidiarity	The PCC establishes that the plaintiff is indeed the sole owner of land for an area of 3.2055 ha in the former community of Jalsuri: this land, regardless of the corresponding institutional mechanisms and without due process, was stripped through violently and arbitrarily means by the defendants, allegedly in the exercise of “community justice”, for failing to comply with community uses and customs, despite the fact that this matter involves a senior citizen and that art. 5.III of Law 073 prohibits native indigenous campesino jurisdiction authorities from sanctioning senior citizens with the loss of land because of failing to comply with communal duties, responsibilities, contributions and works; this situation merits granting the immediate protection afforded by the constitutional protection action, even abstracting the principle of subsidiarity, for the purpose of restoring social peace; in any case, any controversy that could exist with respect to the plaintiff's right to own property or failing to comply with his communal duties must be elucidated in the corresponding instances.	Grants in part the protection of the rights requested in favour of the plaintiff by ordering the cessation of all actions that restrict and threaten the plaintiff's free entry into the community
7	PCJ 1127/2013-L of 30 August	Constitutional protection action	Alarcón Yampasi Blanca Isabel	Right to life and dignity Right to freedom of residence and permanence, due intercultural process and defence Right to housing and water and electricity services Right to inviolability of the home Right to property Right of women and senior citizens not to suffer physical and psychological violence Right to work Duty of protection and respect	<ul style="list-style-type: none"> <li>• Duty of the native indigenous campesino jurisdiction to respect the right to defence, due process and other rights and guarantees established in the PCP; the nature of native indigenous campesino justice and Duty of ordinary justice and other specialised jurisdictions to respect the decisions made by the native indigenous campesino jurisdiction</li> <li>• Determinations made by the native campesino indigenous jurisdiction can be examined by the constitutional justice when it notices that they are contrary to the postulates established in the PCP or there is a departure from the principles of equity, reasonableness and/or social justice with an intercultural interpretation</li> <li>• Regime of protection for women and minors in intracultural contexts</li> <li>• Freedom action is the suitable mechanism when denouncing violations of freedom rights, in inter- and intra-cultural contexts; i.e. when freedom and free locomotion are restricted by acts or omissions originating from the native indigenous campesino jurisdiction</li> <li>• Right to housing and its scope</li> </ul>	See sentence.	Grants the protection of rights to life, dignity, freedom of residence, inviolability of the home, work, property, prohibition of violence and mistreatment against women and senior citizens adults, due process, defence, due process in indigenous communities and housing, water and electricity requested in favour of the plaintiff. Denies rights in relation to an impartial tribunal and locomotion

8	PCJ 1956/2013 of 4 November	Constitutional protection action	Andrade Martínez Nelly Virginia	Rights to property and dignity (among other rights)	Repeated jurisprudence on the proscription of de facto measures or ways	The PCC considered that the leaders cannot encourage any type of aggression or commit arbitrary acts and that in order to change or restrict a member's access to collective lands, through possession, the procedure defined by their own community rules must be strictly followed. In regard to this, the de facto measures that violated the rights of the plaintiff were verified and it was determined that the leaders did not disclose what procedure was followed to establish the expulsion of a member of their community. This omission impels us to consider that the expulsion of the community member who filed the constitutional protection action was an arbitrary act not based on the procedures proper to the application of indigenous justice nor on a procedure that supports compliance with the fundamental right of access to the jurisdiction, which is closely related to the rights of intercultural due process and defence.	Grants the protection of rights to due process, defence and equality of parties requested in favour of the plaintiff
9	PCJ 1259/2013-L of 13 December	Constitutional protection action	Bacarreza Morales Zenón Hugo	Rights to life and dignity (among other rights)	<ul style="list-style-type: none"> <li>Native campesino justice must be subject to plural constitutionality control</li> <li>Exception to the principle of subsidiarity that governs constitutional protection action</li> <li>Sanctions or penalties in native campesino justice and agreement as a way of resolving conflicts in campesino communities</li> <li>Forms of judgment in constitutional protection actions</li> </ul>	The PCC showed that in August 2013, the leaders of the Native Ayllu Huancollo submitted an Extraordinary Meeting act brought forth by the Ayllu municipality of Tiahuanaco. By virtue of this document, the plaintiff was returned to his community, ratifying this decision through a Public Hearing on the following 30 September. It is important to point out that, although there is an agreement between the plaintiff and the defendant authorities, conciliation as an institution is not recognised in the constitutional jurisdiction, which is why the PCC reasoned in those terms.	Denies insofar as rights to non-discrimination, capacity, reputation, honour, image, freedom of residence, personal freedom and security, work, the exercise of democratic rights and the rights of children and adolescents
10	PCJ 0041/2014 of 03 January	Acción de amparo constitucional	Velásquez Castaños Ligia Mónica	Rights to property and dignity (among other rights)	<ul style="list-style-type: none"> <li>Limits of native indigenous jurisdiction: Respect of Supreme Standard and consequently of people's fundamental rights and constitutional guarantees</li> <li>The right of property denounced as violated in the protective action</li> <li>Exceptional protection for de facto measures: direct and immediate protection, aside from its subsidiary character</li> <li>Violation of "living well" in cases of de facto measures and their connection with other rights claimed to have been violated</li> </ul>	The PCC considered that the recognition of hierarchical equality of legal and jurisdictional systems does not imply that the jurisdiction of an NICNP may ignore or violate fundamental rights such as private property, intercultural due process, access to water and others. In this case, it became evident that the complaining family owned property deeds and was in possession of their lands when it was expelled with violence and without justification, which actions cannot be tolerated. The jurisdiction of an NICNP is recognised and communities can apply their rules as long as they respect the fundamental rights of individuals.	Grants the protection of the individual rights requested in favour of the plaintiffs

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11	PCJ 0323/2014 of 19 February	Constitutional protection action	Camacho Quiroga Mirtha	Right to due process Right to life Right to work Right to petition	<ul style="list-style-type: none"> <li>• Recognition of legal pluralism in the construction of the Social Unitary State of Community Law.</li> <li>• Right to due process in native indigenous campesino justice.</li> <li>• Protecting women in native indigenous campesino justice.</li> </ul>	With the support of its jurisprudence, the PCC considered that NICNPs are recognised the right to practice their own administration of justice and their decisions must be respected. However, indigenous jurisdiction, like all jurisdictions, is subject to the constitutional control system and must respect the rights and guarantees enshrined in the PCP. The participation of women in the distribution of land in the communities is also recognised and especially that women are considered one of the vulnerable groups, which implies that they should be given greater protection.	Grants the protection of the individual rights requested in favour of the plaintiff
12	PCJ 0478/2014 of 25 February	Constitutional protection action	Andrade Martínez Neldy Virginia	Right to due process Right to dignity Right to legal certainty Right to work (among others)	<ul style="list-style-type: none"> <li>• Repealed Jurisprudence: The constitutional State of law assumed in the Constitution supposes the proscription of de facto measures or ways</li> <li>• Repealed Jurisprudence: Institutional mechanisms in the Constitutional State of Law for the cessation of the functions of the authorities elected by citizen vote autonomous municipal territorial entities</li> </ul>	The PCC considered that for the exercise of social control by social sectors, neighbourhood associations and community members of the NICNPs, among others, compliance is required with a number of conditions and requirements set forth in the PCP and in the Social Control Law, consequently, taking de facto measures cannot be tolerated in any way. The measure of pressuring the plaintiff into signing resignations contradicts constitutional values and principles such as due process and legal certainty.	Grants the protection of the individual rights requested in favour of the plaintiff
13	PCJ 0486/2014 of 25 February	Constitutional protection action	Andrade Martínez Neldy Virginia	Right to life, food, decent work, the land, due process and petition	<ul style="list-style-type: none"> <li>• Due process in intercultural contexts</li> <li>• Due process and the right to a motivated decision</li> </ul>	The PCC was able to show that the resolutions issued by the NICNP authorities lacked a substantial part, required as a minimum, of the right to due process, which is a necessary foundation, because without it people cannot be aware of the reasons that motivate the imposition of a sanction. Having issued a Resolution that does not explain the reasons for imposing the suspension nor justifies the number of years imposed affects in an absolute way the essential core of the right to due process, as it generates ignorance of the reason for applying a sanctioning measure.	Grants the protection in part, to show that the specific case violated the right to know the reasons of the resolutions
14	PCJ 0778/2014 of 21 Abril	Constitutional protection action	Velásquez Castaños Ligia Mónica	Right to petition, due Intercultural process, exercise one's ancestral practices and customs, participate in the bodies and institutions of the State (among other rights)	<ul style="list-style-type: none"> <li>• Protecting individual rights and their direct justiciability through constitutional protection action and protecting collective rights through popular action</li> <li>• The technique of procedural renewal and its constitutional support.</li> <li>• Interpreting individual rights with collective incidence in inter- and intracultural contexts in accordance with the living well paradigm</li> </ul>	It is proved that for the issuance of the sanction the conciliation route was not exhausted nor were spaces of dialogue created according to a permanent consensus in the assembly or "cawildo", as established by the rules and procedures of the ayllu in application of the first postulate of the living well paradigm. This approach also impinges on the non-materialisation of the second postulate of the living well paradigm, for the decision under analysis violates Sinforiano Mamani Rojas' right to a due intra- and intercultural process.	Grants protection of the right to due- intra and intercultural process and, consequently, to solve existing divergences it is provided that a space for dialogue be developed within the framework of the supreme plural values prevailing in the Plurinational State of Bolivia and according to its rules and procedures

15	PCJ 0961/2014 of 23 May	Constitutional protection action	Andrade Martínez Neldy Virginia	Right to work and non-observance of the principle of legal certainty	<ul style="list-style-type: none"> <li>• Due process in intercultural contexts</li> <li>• Due process and the right to a motivated decision</li> </ul>	The PCC came to determine that the sanction imposed by native indigenous campesino authorities of the community against its members must be based on clear reasons for both the sake of the offenders and of its own law, since the resolution of the indigenous authorities lacks sufficient motivation to allow the sanctioned parties to understand the reasons for imposing the penalty. As a result of dealing with these arguments, the PCC came to gather three elements indispensable to any indigenous resolution: a) What are the precise behaviours that the accused allegedly committed; b) what evidence enables the Community to conclude that there have been actions contrary to its "own Law"; and, c) What are the norms, values and/or principles that were ignored, and what are the effects for the community, for which it is reasonable to have one resolution or another.	Grants protection of the right to due process as far as it concerns the right to a reasoned resolution
16	PCJ 1203/2014 of June	Constitutional protection action	Cháñez Chire Soraida Rosario	Right to due process in its aspect of right of defence Presumption of innocence Equality of parties Independent and impartial natural judge	<ul style="list-style-type: none"> <li>• Duty of the native indigenous campesino jurisdiction to respect the right to defence, due process and other rights and guarantees established in the Constitution</li> <li>• Legal nature native indigenous campesino justice</li> <li>• Determinations made by the native campesino indigenous jurisdiction can be examined by the constitutional justice when it notices that they are contrary to the postulates established in our fundamental law or there is a departure from the principles of equity, reasonableness and/or social justice with an intercultural interpretation</li> </ul>	Analysing the history of the administration of justice of the NICNP to which the plaintiff belongs (Expert Report PCC-ST-UD 16/2014 of April 29), the PCC observed that it has a structure and hierarchies of indigenous authorities; however, resolution 0010/2012, which imposed the sanction on the plaintiff, only had the signature of the highest authority of the Marka (FractosoAracaniYucra) and not of the other authorities, which shows that the resolution was pronounced without carrying out due process within their own community. Rather, a unilateral resolution was issued without the participation of the other authorities.	Grants the protection of the individual rights requested in favour of the plaintiff

Source: Produced by the writer

*Chart No 7: Analysis of Selected Cases*

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
	PCJ 0734/2012 of 13 August	PCJ 1422/2012 of 24 September	PCJ 1574/2012 of 24 September	PCJ 2397/2012 of 22 November	PCJ 2448/2012 of 22 November	PCJ 0358/2013 of 20 March	PCJ 1127/2013- L of 30 August	PCJ 1956/2013 of 4 November	PCJ 1259/2013- L of 13 December	PCJ 0041/2014 of 03 January	PCJ 0323/2014 of 19 February	PCJ 0478/2014 of 25 February	PCJ 0486/2014 of 25 February	PCJ 0778/2014 of 21 April	PCJ 0961/2014 of 23 May	PCJ 1203/2014 of June
Use of : Anthropological Expertise	NO	YES	YES	NO	NO	NO	YES	NO	NO	NO	YES	NO	YES	YES	YES	YES
Use of : Conventionality Control	NO	NO	NO	NO	NO	NO	YES	NO	YES	YES	YES	NO	NO	YES	NO	NO
Use of : Doctrine	NO	NO	NO	NO	NO	NO	YES	NO	YES	NO	NO	NO	NO	NO	NO	NO
Use of : Foreign Jurisprudence	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
Use of : Comparative Law	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
Use of: Gender Focus	-	NO	NO	NO	NO	-	YES	-	-	NO	NO	-	-	-	NO	-
Ratification of the decision of the Court of Guarantees	Confirms	In Part	NO	Confirms	Confirms	Confirms	In Part	Confirms	Revokes in part	Confirms	Confirms	Confirms	Confirms	Confirms	Confirms	Confirms
Protection of requested rights	Grants Protection	Grants Protection	Denies Protection	Grants Protection	Denies Protection	Grants in part	Grants in part	Grants Protection	Grants in part	Grants Protection	Grants Protection	Grants Protection	Grants Protection	Grants Protection	Grants Protection	Grants Protection

Source: Produced by the writer



### 3.2. SEDIMENTATION OF THE RIGHT TO ADMINISTER INDIGENOUS JUSTICE FROM THE CASES ANALYSED

The 16 cases analysed are without doubt the measure of the degree of judicial protection of human rights that the CCP has resolved on the defence of both individual and collective rights of the NICNPs. This allows us to understand the scope and limits of the right to administer justice by the NICNPs and to see the degree of realisation of the 2009 PCP, through the jurisprudential lines of the PCJs issued by the PCC judges for cases where the indigenous authorities violate their members' fundamental rights. As stated by Ramirez (2015), ultimately, the monitoring of jurisprudence allows for the monitoring of progress and setbacks in terms of human rights protection, analysing the different arguments, reflecting on the interpretation and scope of rights and forming a core of decisions that, in the future, may serve as solid precedents for better protection.

Therefore, we can talk about limits and scope starting with the performance of the PCC, to emphasise the degree of protection of individual and collective human rights of the NICNPs, which is achieved through defence actions. In this regard, the positive effect of the PCC's role in the administration of native indigenous campesino justice that results from the analysis of the PCJs we selected not only involves the protection of individual rights by limiting the power of their authorities but also allows one to think about the generation of precedents provoking a sort of "sedimentation of rights of the NICNPs", specifically of the right to administer justice, deepening its interpretation with each case (through «testing the living well paradigm» and «plural interpretation» as seen in the analysed cases) and application of a jurisprudential line that benefits the NICNPs

With the resolutions of cases, this sedimentation of rights through the PCJs of the PCC increasingly produces hard cores of precedents (16 cases to date, as verified by our research, which in the future will increase in number, generating a new trend of interpretation), leading to the Ordinary and Native Indigenous Campesino and other jurisdictions having to take these jurisprudential lines into account when resolving any case in their jurisdiction, because conflicts are initiated locally and must be solved locally and constitutional justice should be resorted to only on exceptional basis, only in the cases we saw in Chapter II. However, the PCC needs to build strategies to ensure that the constitutional response

given by its entity is satisfactory for the NICNP both as a whole and individually (in addition to the translation of the PCJs into the language of the NICNP and its dissemination).<sup>98</sup>

The PCJs issued by the PCC in the cases analysed realise the tutelary control of rights given by the PCP, because they limit the power of the indigenous authorities as far as their possible discretion (as can be seen, 11 of the cases violate individual human rights, see, for examples, Charts 6 and 7), meaning that if something does not correspond according to its right (verified by anthropological assessments) and there are sufficient reasons to change a certain situation (practical or in social use that threatens human rights), people who see some of their fundamental rights affected may seek legal protection from this constitutional body. As we have seen in the cases analysed, the PCC does not intervene in the conflict itself (they do not solve the social, economic, legal or moral issue), but ensures that indigenous authorities take sufficient measures to guarantee the rights established in the PCP when resolving their conflicts.

Also, as a result of reviewing these 16 PCJs we selected (See Charts No 6 and 7), we found that the PCC granted legal protection of individual rights in 11 of the 16 cases, confirming that the indigenous authorities of an NICNP violated one or more human rights of its members (most often the rights to life, physical integrity and due process). In three cases, the PCC granted only in part the protection of the fundamental rights of members of an NICNP (PCJ 0358/2013 of 20 March, PCJ 1127/2013-L of 30 August and PCJ 1259/2013-L of 13 December). Lastly, only in two cases does the PCC deny legal protection, confirming that the indigenous administration of justice did not violate the fundamental rights of its members in applying its legal systems (PCJ 1574/2012 of 24 September and PCJ 2448/2012 of 22 November).

Please be advised that the PCC limiting the power of their native authorities does not mean ordering the NICNPs to make revolutionary changes, but it does become a good starting point to facilitate transformations, which motivate the native authorities to learn about the Instruments of the IHRL and of the PCP itself so as not to violate

<sup>98</sup> See, for example, PCJ 1422/2012 of 24 September, PCJ 1127/2013-L of 30 August, PCJ 0323/2014 of 19 February and PCJ 0778/2014 of 21 April, by which the PCC orders from the Decolonisation Unit of the same institution the translation of the PCJs into the language of the NICNP for the specific case.

these rights when handling the conflicts that occur in their jurisdiction. By the same token, the potential of the PCJs that solve these cases of indigenous administration generates a scenario that contributes to the constitutionalisation of the Bolivian Plurinational State project.

Therefore, let us consider that the majority of the PCJs in our analysis show a great advance in the limitations that the indigenous authorities must keep in matters of human rights when resolving conflicts within their jurisdiction.

What is important is to achieve through the jurisprudential way a greater respect for rights as well as to raise awareness of their existence and the importance of their not being violated. Something so basic and simple, but not less complicated to achieve, especially when it is often claimed that these rights are ignored or, depending on one's perspective, give way to others supposedly of greater importance. (Ramírez, 2015, p. 360).

### *3.2.1. Human rights as the limit to be met by NICNP authorities*

In the doctrine, we can see that the greatest divergences over the right of indigenous peoples to administer justice revolve around the sanctions/punishments imposed by their authorities. There are also debates on which behaviours are determined to be human rights abuses, such as in matters of gender, for example, “which are already in place in indigenous communities and their organisations” (Ramírez, 2015, p. 485). However, what really defies the traditional conception of law is the responses of indigenous authorities and their communities to behaviours that deviate from those considered correct, which break the harmony of the community.

Disputes over sanctions show a hard-to-circumvent quota of hypocrisy. In our own societies, the conditions under which the penalty of deprivation of freedom is applied are clearly a violation of fundamental human rights. So, what is more harmful to the dignity of a human being, a lashing or jail? (Ramírez, 2015, p. 485).

We understand from the analysis of the cases studied (as well as from Chapter I and II) that human rights present the NICNPs with two kinds of limitations. One limits the State as a whole - the PCC in particular - in terms of indigenous rights being characterized as human rights. which compromises it on the international level, and violations of their rights take on an undeniable gravity (the human right of indigenous peoples to

administer justice should be respected). The other limits the authorities of NICNPs who administer justice, since their decisions should not violate fundamental rights. This is why, in cases that the PCC resolves, it should keep in mind the two limitations presented by human rights.

We should also consider that the PCC has been carrying out work that does not interfere in conflict resolution but rather just warns about the second limitation of human rights, that is, it ensures compliance with human rights standards in the resolutions of native authorities, interpreting it in its context, fulfilling the first limitation of human rights.

The cases we analysed reflect the first limits that the PCC has established for the administration of indigenous justice, which in time will establish more or even cancel some. We consider the limits on issues of human rights that the indigenous authorities must comply with in the exercise of their jurisdictional functions to be minimal. They also demonstrate the protection of individual rights of the people subject to this jurisdiction, by which it fulfils the function of protecting the rights.

From what can be seen in the reconstruction of the jurisprudential lines, one example of these minimum limits established by the PCC deals with due process in intercultural contexts, which we could call “intercultural due process”, which establishes two minimum presuppositions that must be observed by the indigenous authority (thus not violating this right), is to allow individuals to assume defence and for the sanction imposed on them not to affect their rights to life, dignity and physical integrity. (PCJ 0486/2014 of 25 February 2014).

### *3.2.2. Reasoning of the PCC magistrates*

Constitutional magistrates have to be open-minded enough to value behaviours, actions, controversial opinions, whose purpose must be to respect cultural diversity and difference. Respecting cultural diversity implies that the cases put before them should be respected according to the context where they are applied. This is the great challenge of building the Bolivian Plural System of Law, faced with which, the argumentative grounds of constitutional magistrates must demonstrate the exhaustion of human rights standards in the administration of indigenous justice, while always being respectful of cultural diversity. From the analysis of the 16 cases, in the legal argumentation of the PCC, only five cases (PCJ 1127/2013-L of 30 August, PCJ 1259/2013-L of 13 December, PCJ 0041/2014 of 03 January, PCJ 0323/2014 of 19 February and PCJ

0778/2014 of 21 April) make use of the control of conventionality of human rights for their analysis; only 2 of the 16 cases use doctrine to buttress their arguments; as for foreign jurisprudence and comparative law, they are not used in any of the 16 cases. Regarding the gender approach that must be taken by the PCC judges in resolving a case, there are 8 cases in which it is a woman seeking the legal protection of her rights. However, only cases PCJ 1422/2012 of 24 September and PCJ 1127/2013-L of 30 August analyse the case through a gender approach. (See Chart No 7).

### *3.2.3. The importance of anthropological assessments in the PCC*

Although the technical reports (anthropological, cultural and sociological assessments of members of the NICNPs) that can be requested by the PCC are not binding (they are not mandatory) in the cases it solves, they illustrate to the PCC magistrates the particularities of the NICNPs, thereby contributing in generating an interpretation of rights in intercultural contexts. We should consider that the PCC must delve deeper within the constitutional processes, a constant but feasible practice, using anthropological assessments before making any type of decision, since the benefits of the assessments provide a greater understanding of the facts that allegedly violate human rights. Although the magistrates requested that an assessment be made on the legal systems of an NICNP only for 8 of the selected cases, we can see great progress in the contents of the PCJs that use the assessment, where the magistrates are compelled to think within the framework of human rights standards in intercultural contexts. (See Chart No 7).

### *3.2.4. Compliance with plurinational constitutional judgments*

The difficulty that often arises with the rulings of a Constitutional Court or Tribunal lies in the scope of compliance with its decisions. Although there is no questioning the legitimacy and authority of the PCC in guaranteeing the execution of its sentences, the lack of monitoring or control creates a tendency toward non-compliance. “Of course, this does not only happen in conflicts where indigenous peoples are involved. This difficulty extends to all kinds of involved subjects and issues, but it becomes worrisome in the measure that the respect of the institutionality of the country is at stake.” (Ramírez, 2015, p. 408).

It is clear that the PCC should improve the instances of control of its resolutions, for it is limited in monitoring its own decisions. “This not only undermines the credibility of justice, but also frustrates the parties’ expectations. This factor should be evaluated at the time of litigation before the courts.” (Ramírez, 2015, p. 408). As we can see from the cases we analysed, the role of the PCC is very important, because it offers significant advantages to people whose human rights are violated, but these can be affected by the difficulties in obeying its decisions, which, we reiterate, is a challenge for the PCC to achieve the execution of its sentences.

### *3.2.5. The importance of respecting the right to administer justice as a strengthening of indigenous identity*

Although with bounds, the right of indigenous peoples to carry out their own legal systems is not at any rate the centre of their claims, for at present the rights to land and territory occupy the focus of indigenous claims. However, the possibility that the NICNPs can decide on and manage their potential conflicts strengthens their identity.

As seen in Chapter I, identity is reflected in different circumstances. Having one’s own legal systems and institutionalising them is also part of the survival of indigenous peoples. If the PCC contributes – which it is doing – to achieving standards that solidify the power of indigenous authorities and their legitimacy through decision-making processes with consequences for the community, this will undoubtedly become relevant to their identity consolidation processes. The power of the NICNPs to administer their own justice is nothing more than the manifestation of their right to self-determination, for the exercise of autonomy is nothing other than the possibility of deciding on the same matters on which they have always decided.

The incorporation of indigenous legal systems into the structure of the State entails processes of transformation and power distribution. The peoples can manage their own conflicts and the authorities who handle them are legitimate. Legislative power is not the only entity authorised to create laws, because the NICNPs are also determined internally; as in the mandatory, prohibited and allowed behaviours by which the individual who formulates rules that govern behaviours is also transformed. In any case, this does not imply that indigenous law should stagnate with regulations that even go against human rights standards; it

should be in a permanent state of change and dynamic in dealing with a system of indigenous authorities that enjoy high legitimacy.

### 3.3. STRENGTHENING THE ADMINISTRATION OF INDIGENOUS JUSTICE

Based on the above, it is necessary to think about answers for the different political actors directly and indirectly connected to the administration of justice of the NICNPs, to train their authorities in the standards of Human Rights and Constitutional Law, so that the rights of their members will not be violated. These answers should not imply the imposition of different values leading to the disappearance of their rights. Therefore, public policies should be formulated for the careful conducting of the constitutionalisation of their institutions, in order to strengthen the defence of their individual and collective human rights. These proposals are addressed to the State with its various bodies (Judicial, Executive, Legislative and Electoral), political parties and organisations, social and indigenous movements and organisations, the National University System and citizens in general, as the problem is of common interest. But those in charge of directing these projects are the NICNP authorities themselves together with the Ministry of Justice, the Judiciary Council, the Plurinational Constitutional Court and Bolivian University System Law Schools.

The objectives of these public policies, which should be correctly developed and executed, are as follows: first, strengthening Bolivia's native indigenous campesino legal systems; second, protecting individual human rights in the jurisdiction of the NICNPs; and last, building legal pluralism, making compatible or equating the different legal systems in force.

What can the Plurinational State of Bolivia do in concrete terms? (1) *Dialogue training for indigenous authorities*: through joint workshops with ordinary justice administration operators, and members of the indigenous peoples as a whole, on individual and collective rights of the NICNPs (Constitutional Law and Human Rights), for which it will be necessary to develop socialisation activities and form a School Of Indigenous Justice Administration, which will invite PCC magistrates, judges, prosecutors and all justice administration actors to begin with an analysis and debate on the Plural System of Bolivian Law. (2) *Systematisation of the collective memory as far as the administration*

*of indigenous justice*: where each NICNP revises its legal system with the help of cultural (anthropological) Assessments from Universities (Faculties of Law) and NGOs, among others. (3) *Systematisation and publicity of indigenous peoples' conflict resolution Acts*: where Indigenous Organisations, the Ministry of Justice, Law Schools and the PCC should cooperate in their publication, protection and dissemination processes within the same indigenous communities. (4) *Reformulation of the NICNPs' primary, secondary and higher school curricula*: to include native conflict resolution modes and a new curriculum for Law Schools (as well as training of university professors in indigenous law). (5) *Study on the allocation of economic resources to NICNPs for further strengthening of their institutions*. And (6) *Creation of a public policy observatory for indigenous peoples, geared toward the design and supervision of public policies*: where different indicators are considered, such as the participation of Indigenous women in conflict resolution.

Accordingly, we believe that the exercise of indigenous jurisdiction will not be given priority over human rights standards, if there are adequate public policies coming from the State (NICNPs, Ministry of Justice, Law Schools, Judicial Council and Plurinational Constitutional Court). Among them, the most important is the dialogue training on human rights for indigenous authorities. Moreover, the country's ordinary legal system and indigenous legal systems require an open-minded, interdisciplinary, interethnic and participatory debate, which can give account of the importance of the subject, because ultimately it is a matter of national interest. Therefore, it is not enough that it be treated within the framework of the political struggle between the current government and the indigenous movement.

Building the relationship between the indigenous authorities and the PCC, the Ministry of Justice and the Judicial Council should reflect a notion of coordination and organisation rather than a logic of imposition and/or subordination to the ordinary system. Therefore, the above proposals must be checked, examined and rethought in the light of the notions of pluralism, decolonisation and living well set forth by the PCP.



## CONCLUSION

### THE RIGHT TO ADMINISTER JUSTICE STRENGTHENS THE IDENTITY OF INDIGENOUS PEOPLES

The recognition of the human right of the NICNPs to administer their own justice entails their being able to decide and manage their own situations of conflict, strengthening their identity, as this occurs in various moments and circumstances of their life. Having their own legal systems and institutionalising them is also part of their survival as peoples. If the PCC contributes to achieving standards that solidify the power of indigenous authorities and their legitimacy through decision-making processes with consequences for the community, this will undoubtedly become relevant to the consolidation of their identity processes. Also, the power of the NICNPs to administer their own justice is nothing more than the manifestation of their right to self-determination, since the exercise of their autonomy is nothing other than the possibility of deciding on the same issues they have always resolved.

### THE INCORPORATION OF INDIGENOUS LEGAL SYSTEMS INTO THE STRUCTURE OF THE STATE ENTAILS PROCESSES OF TRANSFORMATION AND POWER DISTRIBUTION

Now the NICNPs can manage their own conflicts, and their authorities, who manage situations of conflict, have a very high legitimacy to do so. Thus, the Legislative Body is not the only authorised entity to create law, now the NICNPs also determine internally prohibited and allowed behaviours, therefore, it transforms into a political subject that formulates rules that govern their behaviour. In any case, this does not

imply that the law of the NICNPs should stagnate with regulations that even go against human rights and PCP standards; on the contrary, it should be in a permanent state of evolution and dynamic in dealing with a system of indigenous authorities that enjoy high legitimacy. Therefore, at the regulatory level, nothing new is created with the indigenous legal systems; that which already exists is recognised, that is all. However, the institutionalisation of their rights incorporated in the State Structure (Executive Branch, Legislative Body, Judicial Branch, Electoral Body and Plurinational Constitutional Court) is one of the challenges that the Bolivian people should take on with seriousness.

PLURAL CONSTITUTIONAL CONTROL IS BINDING FOR THE NATIVE INDIGENOUS  
CAMPESENO NATIONS AND PEOPLES

In the Plurinational State of Bolivia, the Plurinational Constitutional Court has the power of exercising the effective control, judicial defence and constant interpretation of the PCP, constituting itself as its maximum guardian and supreme interpreter, for which reason the interpretation it develops is binding for all the Public Bodies (including the Jurisdiction of the NICNPs), as well as the Public Authorities (native authorities of the NICNPs) and the citizens. Based on the above, we believe that the defence of the rights of the NICNPs catalogued in the PCP cannot be permanent and effective unless there is an institution with the power to carry out this work, like the PCC, since this entity exercises Plural Control of Constitutionality on the formal norms of the Regular System as well as on the norms of the NICNPs, besides knowing the conflicts of competences between the various jurisdictions and the native indigenous campesino jurisdiction, resolving the queries made by the indigenous authorities on the application of their rules to a specific case and revising the resolutions pronounced by their authorities, when they are considered to be harmful to the fundamental rights and constitutional guarantees, through the actions of defence (Freedom, Constitutional Protection, Compliance, Privacy and Popular Actions). Therefore, the full and effective validity of the Plural Control of Constitutionality in Bolivia, through the implementation of the PCC as the maximum guardian and supreme interpreter of the PCP, allows for the actual realisation of the fundamental rights and constitutional guarantees of the Native Indigenous Campesino Nations and Peoples

in the light of the values and principles enshrined therein, constituting itself into an indispensable requirement for the realisation of the Plurinational State of Bolivia.

THE REPRESENTATION OF THE NICNPS IN THE PLURINATIONAL  
CONSTITUTIONAL COURT IS DISPROPORTIONATE

Out of the seven elected magistrates of the PCC, only two belong to the native indigenous campesino jurisdiction, which we consider not proportional for the achievement of an adequate realisation of the PCP and the Constitutionality Block with respect to a Plural System of Law, a factor that could influence the intercultural patterns of interpretation, since the vision of “Western” justice will tend to prevail in its decisions. Furthermore, there is a possibility that this disproportionality will affect the constitutional intercultural processes that should be established in the light of the new constitutional model and within the framework of pluralism, decolonisation and interculturality. With this kind of setup, a formalist and ritualistic view of justice will prevail again, contrary to the vision of access to justice within the framework of living well, since extreme ritualisms can have an impact on access to constitutional justice by the NICNPs. We also believe that the requirement to be a magistrate representative of the native indigenous campesino jurisdiction, involving the criterion of personal self-identification, does not ensure a real identification and knowledge of distinct justice practices different from those of the West. This aspect constitutes a normative obstacle to the realisation of a plural interculturality in constitutional justice and in the normative legal system; in addition, it hinders the development of intercultural patterns of interpretation and constitutional procedures in accordance with the new constitutional model. A proportional plural composition of the PCC is necessary to ensure the realisation of the PCP and the Constitutionality Block on Rights of the NICNPs, which should be analysed based on the constitutional procedures and roles entrusted by the constituent function to the PCC.

HUMAN RIGHTS ARE THE LIMITS WITH WHICH THE AUTHORITIES OF THE  
NICNPS SHOULD COMPLY

The greatest divergences over the right of indigenous peoples to administer justice revolve around the sanctions/punishments imposed and practices (customs) that threaten human rights. At any rate, what defies the traditional conception of law are the responses of the indigenous authorities and their communities to those behaviours that deviate from what is considered correct (which break the harmony of the community). Human rights present the NICNPs with two kinds of limitations. One limits the State as a whole - the PCC in particular - in terms of indigenous rights being characterized as human rights, which compromises it on the international level, as violations of their rights take on an undeniable gravity (the human right of Indigenous Peoples to administer justice should be respected). The other limits the authorities of NICNPs who administer justice, since their decisions should not violate fundamental rights. This is why, in cases that the PCC resolves, it should keep in mind the two limitations presented by human rights. The PCC does not interfere in conflict resolution but rather just warns about the second limitation of human rights, that is, it ensures compliance with human rights standards in the resolutions of native authorities, interpreting it in its context, for example, the interpretation of human rights in intercultural contexts, the test of the Living Well paradigm and plural interpretation, which it defined in his Plurinational Constitutional Judgments. The cases we analysed reflect the first limits that the PCC has established for the administration of indigenous justice, which probably in time will establish more or even cancel some. We consider the limits on issues of human rights that the indigenous authorities should comply with in the exercise of their jurisdictional functions to be minimal. They also demonstrate the protection of individual rights of the people subject to this jurisdiction, by which the PCC fulfils the function of protecting the rights.

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- SCP 0085/2012 de 16 de abril.
- SCP 0087/2014-S3 de 27 de octubre de 2014.
- SCP 0300/2012 de 18 de junio.
- SCP 0323/2014 de 19 de febrero de 2014
- SCP 0358/2013 de 20 de marzo de 2013
- SCP 0478/2014 de 25 de febrero de 2014
- SCP 0486/2014 de 25 de febrero de 2014
- SCP 0734/2012 del 13 de agosto de 2012
- SCP 0778/2014 de 21 de abril de 2014 SCP 0778/2014 de 21 de abril.
- SCP 0846/2012 de 20 de agosto.
- SCP 0961/2014 de 23 de mayo de 2014 SCP 1127/2013-L de 30 de agosto de 2013

## ADMINISTRATION OF INDIGENOUS JUSTICE

SCP 1203/2014 de 10 de junio de 2014 SCP 1259/2013-L de 13 de diciembre de 2013  
SCP 1369/2010 de 20 de septiembre de 2010.  
SCP 1422/2012 de 24 de septiembre de 2012  
SCP 1574/2012 de 24 de septiembre de 2012  
SCP 1624/2012 de 01 de octubre.  
SCP 1956/2013 de 4 de noviembre de 2013  
SCP 2233/2013-AL de 16 de diciembre.  
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SCP 2448/2012 de 22 de noviembre de 2012  
SCP 2548/2012 de 21 de diciembre.

## NORMATIVA NACIONAL

Código Procesal Constitucional Ley Nro. 0254 de 05 de julio de 2012.  
Constitución del 02 de febrero de 1867.  
Constitución del 05 de agosto de 1861.  
Constitución del 12 de agosto de 1994.  
Constitución del 14 de agosto de 1831.  
Constitución del 17 de junio de 1843.  
Constitución del 19 de noviembre de 1826.  
Constitución del 20 de octubre de 1834.  
Constitución del 21 de septiembre de 1851.  
Constitución del 30 de octubre de 1938.  
Constitución del Estado Plurinacional de Bolivia de 07 de febrero de 2009.  
Decreto Ley de 31 de diciembre de 1857.  
Ley del Régimen Electoral Nro. 026 de 30 de junio de 2010.  
Ley del Tribunal Constitucional Nro. 1836 de 01 de abril de 1998.  
Ley del Tribunal Constitucional Plurinacional Nro. 027 de 06 de julio de 2010.  
Ley No 1257 de 11 de junio de 1991, 1995. Ley de la República de Bolivia que ratifica el Convenio 169 de la Organización Internacional del Trabajo.  
Ley No 1257 de 11 de junio de 1991, 1995. Ley de la República de Bolivia que ratifica el Convenio 169 de la Organización Internacional del Trabajo.  
Ley No 3897 de 26 de junio de 2008, 2010. Ley del Estado plurinacional de Bolivia que eleva a rango de Ley a la Declaración de las Naciones Unidas sobre los derechos de los Pueblos Indígena.

