

Washington University Global Studies Law Review

VOLUME 17

NUMBER 1

2018

LEGAL PLURALISM AND THE THREAT TO HUMAN RIGHTS IN THE NEW PLURINATIONAL STATE OF BOLIVIA

JAMES M. COOPER¹

ABSTRACT

Bolivia, the chronically poor, landlocked Andean country has long seen its indigenous populations marginalized, languishing in underdevelopment. Spanish colonialists destroyed any vestige of the vibrant, complex civilization that existed in the region – including the religious, political and legal systems in place for centuries. In December 2005, Evo Morales Ayma

¹ Professor of Law, Co-Director of the Center for Creative Problem Solving at California Western School of Law. As Director of Proyecto ACCESO, a rule of law think-tank and human capacity building organization in Latin America, he was an official observer, accredited by the Corte Nacional Electoral de Bolivia for the January 25, 2009 national referendum on the New Political Constitution of the State of Bolivia. The author wishes to thank Yesenia Acosta, Carlos Aguilar, Josefina Balistrieri, Drew Lautemann, and Haera Manoukian for their research assistance. The author would like to acknowledge the kind assistance of Professors William Aceves and Thomas D. Barton at California Western School of Law. Brandon Baker, Barbara Glennan, Bobbi Ann Weaver, and Linda Weathers from the California Western School of Law Library were very supportive with citation and research advice. Yerko Iljic Crosa and Dr. Jorg Stippel provided valuable insights about Bolivian indigenous issues. Marcela Guadiana Cerda, James P. Kelly, Marina Shoupe, and Sebastian Vives del Solar were also very supportive of this project. This Article is partially based on the author's previous consulting work with the Bolivian Vice-Ministry of Decentralization, the Vice-Ministry of Community Justice, and la Representación Presidencial para la Asamblea Constituyente (the President's Representative for the Constituent Assembly Negotiations or REPAC) but its content represents the views of the author only. The author thanks Sally Wong-Avery, Esq., the Avery-Tsui Foundation, and the William and Flora Hewlett Foundation for their support of Proyecto ACCESO's work in Latin America over the years.

was the first elected President of indigenous descent. After leading the changes in the country's Constitution, Morales continued to rule Bolivia until the writing of this Article. The New Political Constitution of Plurinational State of Bolivia of 2009 and a national law for community justice, signed into law by Morales, provided the foundations for a legally pluralistic judicial system – one in which traditional customary law works in parallel with a more Western-styled system. While the right of self-determination and indigenous autonomy are promoted with this bifurcated system of justice, there are many challenges to the international human rights standards to which Bolivia has acceded as part of its participation in the United Nations and Inter-American international legal systems.

This Article lays out the many treaty regimes of which Bolivia is a member and the ways in which Bolivian customary law allowing for indigenous traditions violates Bolivia's international legal obligations. The final part of the Article provides a brief survey of legal pluralistic projects in other countries around the world and the ongoing struggle in balancing the right of self-determination for Indigenous Peoples with international human rights standards and protections.

INTRODUCTION	4
I. THE HISTORY AND USE OF INDIGENOUS CUSTOMARY LAW IN BOLIVIA	12
II. CHANGES IN BOLIVIA’S LEGAL FRAMEWORK UNDER THE MORALES GOVERNMENT.....	25
A. <i>The New Political Constitution of the State of Bolivia</i>	25
B. <i>The Vice-Ministry of Community Justice and the Implementation of Indigenous Customary Law</i>	28
III. BOLIVIA’S INTERNATIONAL LEGAL OBLIGATIONS	34
C. <i>Treaties of the Americas</i>	34
1. <i>American Convention on Human Rights</i>	34
2. <i>American Convention to Prevent and Punish Torture</i>	35
D. <i>Other International Treaties and Sources</i>	36
1. <i>Rome Statute of the International Criminal Court</i>	36
2. <i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – including the Optional Protocol</i>	37
3. <i>Convention on the Elimination of All Forms of Discrimination against Women – including Optional Protocol</i>	38
4. <i>International Covenant of Civil and Political Rights</i>	39
5. <i>Convention on the Rights of the Child</i>	41
6. <i>Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery</i>	41
7. <i>International Covenant on Economic, Social and Cultural Rights</i>	42
8. <i>United Nations Declaration on the Rights of Indigenous Peoples</i>	44
9. <i>American Declaration of the Rights of Indigenous Peoples</i>	46
IV. THE TENSION BETWEEN INDIGENOUS CUSTOMARY LAW AND BOLIVIA’S INTERNATIONAL LEGAL OBLIGATIONS	48
A. <i>Some Direct Threats to the Separation of Powers, Due Process and Other Fundamental Human Right</i>	48
B. <i>Justicia Comunitaria: Sources and Process</i>	51
V. CONCLUSION.....	54
A. <i>Legal Pluralism and Legal Monism</i>	54
B. <i>Conflicts in a Legally Pluralistic State</i>	57
C. <i>Legal Pluralism in Other Countries</i>	63

INTRODUCTION

On January 21, 2006, Evo Morales stood among the archaeological remains of the Tiwanaku civilization that flourished thousands of years ago near the shores of Lake Titicaca. Addressing an assembled crowd, he promised to end the “colonial and neoliberal model.”² A day later, a new era began for Bolivia with Morales’ swearing in as the country’s President.³ On January 22, 2006, during his inauguration speech from the Government Palace President Morales raised his fist and proclaimed that 500 years of oppression would be replaced by 500 years of indigenous⁴ rule.⁵

It did not take long for Morales to act on the promises he made during his presidential campaign. On May 1, 2006, Morales nationalized the oil and gas industries in Bolivia.⁶ On June 3, 2006, Morales launched his

2 FRANCISCO PINEDA, *EVO MORALES: EL CAMBIO COMENZÓ EN BOLIVIA* 53 (2007); *but see* FORREST HYLTON & SINCLAIR THOMSON, *REVOLUTIONARY HORIZONS: PAST AND PRESENT IN BOLIVIAN POLITICS* 15 (2007).

3 *See* Amy Goodman, *Evo Morales Sworn In as Bolivia's First Indigenous President, Hails Election as “End of Colonial and Neo-Liberal Era,”* DEMOCRACY NOW (Jan. 23, 2006), http://www.democracynow.org/2006/1/23/evo_morales_sworn_in_as_bolivias (reporting that the inaugural speeches of Evo Morales focused on the need to address justice for the indigenous communities in the Andean country). “Today is the beginning of the new year for the original peoples of the world, in which we seek equality and justice. With the strength of the people, with the unity of the people, we will put an end to the colonial state and to the neo-liberal model.” *Id.*

4 The term “indigenous” is used throughout this Article to mean original or first nation. If other articles, essays or journalistic writings use the term “Indian,” it will be reprinted in that form.

5 Evo Morales Ayma embodies the undoing of 500 years of exploitation and marginalization. “The popular memory of struggles from indigenous anti-colonial revolts as well as the subsequent two centuries of Indian peasant resistance shaped and informed both Morales’ election and the manner in which he took possession of the presidency.” MARTIN EDWIN ANDERSON, *PEOPLES OF THE EARTH: ETHNONATIONALISM, DEMOCRACY, AND THE INDIGENOUS CHALLENGE IN “LATIN” AMERICA*, 100 (2010). Born in a mining village in the western Oruro Department of Bolivia, he herded llamas as a boy, later served in the Bolivian military after attending high school, and then emigrated to the Chapare region in eastern Bolivia to become a farmer with his family. *Id.* at 95. He became the leader of the coca growers union and helped found a national political party – the Movement Towards Socialism (Movimiento al Socialismo or “MAS”). *Id.* at 101. *See generally* MARTÍN SIVAK, *JEFAZO: RETRATO ÍNTIMO DE EVO MORALES* (2008) “Morales logró que su posición fuera la mayoritaria en el Congreso de la Confederación Sindical Única de Trabajadores Campesinos de Bolivia (CSUTCB) de 1994.” *Id.* at 125. He eventually was elected a member of the House of Deputies, the lower house of the Bolivian Congress in 1997 and ran for President in 2002, narrowly losing to Gonzalo Sánchez de Losada, the former President. *Id.* at 98-99. For the next several years, he became the opposition leader in Bolivia, increasingly gaining national support, forcing Sánchez de Losada and his successor Carlos Mesa from office, and eventually winning 54 percent of the vote in the December 2005 presidential election. *Id.* at 102-03.

6 *See* FRANCISCO PINEDA, *EVO MORALES: EL CAMBIO COMENZÓ EN BOLIVIA* 53 (2007). *But see* FORREST HYLTON & SINCLAIR THOMSON, *REVOLUTIONARY HORIZONS: PAST AND PRESENT IN BOLIVIAN POLITICS* 134 (2007): (“The ‘Heroes of the Chaco War Decree’ represented a partial break with the neoliberal past, though it did not go as far as earlier nationalizations in Bolivian history.”). *Id.*; *see also* Kathryn B. Botham, *Bolivia’s Legal Gamble: Negotiating Nationalization*, 26 WIS. INT’L L.J. 507, 508, 523 (2008) (proposing that Decree 28701 was “not nationalization at all.” Also stating, “Bolivia is not ‘nationalizing’ in a traditional sense but is ‘negotiating nationalization.’”).

“agrarian revolution” land reform plan by handing over roughly 9,600 square miles of state-owned land to poor indigenous people.⁷ Other programs included the introduction of indigenous-centric education programs,⁸ the expansion of growing areas to cultivate coca,⁹ and the continuation of decentralization programs in rural areas.¹⁰ Following the July 2, 2006 election of deputies, Morales established a Special Assembly to create a new constitution for the reestablishing of the State of Bolivia on August 6, 2006.¹¹ A New Constitution¹² with 411 articles was approved by Constituent Assembly deputies on December 9, 2007.¹³ The New Political Constitution for the State of Bolivia (hereinafter “the New Constitution of

7 Further land reform occurred on November 29, 2006 when a bill was passed by Bolivia’s Congress. *Bolivia Passes Land Reform Bill*, BBC NEWS, (Nov. 29, 2006, 8:06 GMT), <http://news.bbc.co.uk/2/hi/americas/6194310.stm>.

8 For an examination of the history of education reform in rural Bolivia, see Manuel E. Contreras, *A Comparative Perspective on Education Reforms in Bolivia: 1950-2000*, in PROCLAIMING REVOLUTION: BOLIVIA IN COMPARATIVE PERSPECTIVE 213 (Merilee Grindle & Pilar Domingo, eds., 2003); see also Brooke Larson, *Capturing Indian Bodies, Hearths and Minds: ‘El hogar campesino’ and Rural School Reform in Bolivia 1920s-1940s*, in PROCLAIMING REVOLUTION: BOLIVIA IN COMPARATIVE PERSPECTIVE 183 (Merilee Grindle & Pilar Domingo, eds., 2003).

9 See generally Will Reisinger, *The Unintended Revolution: U.S. Anti-Drug Policy and the Socialist Movement in Bolivia*, 39 CAL. W. INT’L L.J. 237, 279 (2009) (for an exploration of the Bolivian Government response to the U.S. war on drugs). See generally Cameron Ming, *Zero Coca, Zero Culture: Bolivia’s Struggle to Balance Cultural Identity and the Need for Economic Stability in the Midst of the Expiring Andean Trade Promotion and Drug Eradication Act*, 14 TULSA J. COMP. & INT’L L. 375 (2007).

10 Decentralization is not a new policy initiative in Bolivia.

Administrative decentralization was actively encouraged by the international development agencies at the same time it was favored by domestic groups for different reasons. For neoliberals it is part of the strategy to reduce the role of the public sector, while the more technocratically inclined advocate decentralization as a means to improve resource management and allocation. Others view decentralization as part of a more or less radical strategy for radicalization that will contribute to the empowerment of disadvantaged sectors of the population.

Willem Assies, *Indigenous Peoples and Reform of the State in Latin America*, in THE CHALLENGE OF DIVERSITY: INDIGENOUS PEOPLES AND REFORM OF THE STATE IN LATIN AMERICA 3-22, 10 (Willem Assies, Gemma van der Haar, & André J. Joekema eds., 2000). [hereinafter, Assies].

11 *Bolivia to Write New Constitution*, BBC NEWS (Mar. 7, 2006, 12:02 GMT), <http://news.bbc.co.uk/2/hi/americas/4781340.stm>; *Country Report: Bolivia 2007*, HUMAN RIGHTS FOUNDATION, 1 (2008), archived at https://web.archive.org/web/20131114014804/http://humanrightsfoundation.org/uploads/Bolivia_Communal_Justice_Report_.pdf [hereinafter HUMAN RIGHTS FOUNDATION].

12 CONSTITUCIÓN POLÍTICA DEL ESTADO PLURINACIONAL DE BOLIVIA Feb. 7, 2009, art. 138 (Bol.). [hereinafter 2009 Bolivian Constitution or New Constitution].

13 This occurred with much controversy as

opposing political parties and leaders dispute[d] the validity of the vote, arguing that the proposed constitution was not approved by the requisite two-thirds majority. They also took issue [] that the text was approved not in the seat of the [Constituent] Assembly itself, in the city of Sucre, but in the city of Oruro, and objected that no opposition deputies from the Constituent Assembly were present at the vote.

HUMAN RIGHTS FOUNDATION, *supra* note 11.

Bolivia”) was passed with 61% support in a national referendum on January 25, 2009, and contained many novel provisions intended to undo centuries of discrimination against and marginalization of Bolivia’s indigenous people.¹⁴ On February 9, 2009, President Morales promulgated the New Constitution at an event in the Aymara-dominated city of El Alto.

Bolivia’s indigenous population comprises more than two-thirds of the “total population of about eight million, the largest proportion in South America.”¹⁵ The majority of these people live below the poverty line,¹⁶ most earning less than two dollars a day.¹⁷ Since the Spanish conquest of the Americas, the indigenous people have been enslaved by their colonial masters and marginalized in the post-independence, or “national,” period.¹⁸

14 Matthew Taylor, *Evo Morales Hails ‘New Bolivia’ as Constitution is Approved*, THE GUARDIAN (Jan. 26, 2009, 4:57 A.M.), <http://www.theguardian.com/world/2009/jan/26/bolivia> (illustrating Evo Morales’ claim after the new constitution was adopted stating, “Here we begin to reach true equality.” In addition, “the president said the charter would ‘decolonise’ Bolivia by championing indigenous values lost since the Spanish conquest.”).

15 Donna Lee Van Cott, *A Political Analysis of Legal Pluralism in Bolivia and Colombia*, 32 J. LATIN AM. STUD. 207, 224 (2000) [hereinafter Van Cott, *Legal Pluralism*].

Bolivia is one of the poorest countries in Latin America and has one of its highest levels of inequality. The reduction in poverty rates experienced in the 1990s when Bolivia had modest but consistent growth rates, was reversed by external and internal shocks at the end of the millennium.... In addition, uneven distribution and poor quality of social services - particularly health and education - have disproportionately harmed indigenous and rural populations.

Understanding Children’s Work Project, *Trends in Children’s Employment and Child Labour in the Latin America and Caribbean Region*, at 1-2 (Nov. 2010), http://www.ucw-project.org/attachment/Bolivia_trends20110420_150241.pdf.

16 This is not new. “Bolivia has continually had one of the lowest per-capita incomes in Latin America, and her political history has bordered on continual trauma.” WILLIAM H. BRILL, *MILITARY INTERVENTION IN BOLIVIA: THE OVERTHROW OF PAZ ESTENSORO AND THE MNR 3* (1967) [hereinafter, BRILL].

17 Omar S. Arias & Magdalena Bendini, *Bolivia Poverty Assessment: Establishing The Basis for Pro-Poor Growth*, 89 EN BREVE 1, 1 (2006), <http://siteresources.worldbank.org/INTENBREVE/Newsletters/20943040/89-MAY06-BoliviaPA.pdf>; “Bolivia is one of the poorest and least developed countries in Latin America.” *The World Factbook: Bolivia*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/bl.html> (last updated Feb. 11, 2018) [hereinafter CIA Factbook]. In the 2009 United Nations Development Programme’s Human Development Report, Bolivia scored number 113 out of 182 countries with only Nicaragua (No. 124) and Haiti (No. 149) behind it. See UNITED NATIONS DEVELOPMENT PROGRAMME, U.N. HUMAN DEVELOPMENT REPORT 2009: OVERCOMING BARRIERS HUMAN MOBILITY AND DEVELOPMENT (2009), http://hdr.undp.org/sites/default/files/reports/269/hdr_2009_en_complete.pdf.

18 EDUARDO GALEANO, *OPENS VEINS OF LATIN AMERICA: FIVE CENTURIES OF THE PILLAGE OF A CONTINENT* 39 (Cedric Belfrage trans., Monthly Rev. Press 25th ed. 1997) (1971). “In three centuries Potosí’s Cerro Rico consumed 8 million lives. The Indians, including women and children, were torn from their agricultural communities and driven to the Cerro. Of every ten who went up into the freezing wilderness, seven never returned.” *Id.* Indigenous people have been historically excluded from Bolivian civic life. See generally *id.* at 39-46. According to former Bolivian Vice President Victor Hugo Cárdenas, “Bolivia has always had an exclusionary democracy, representing the paved streets of the cities while leaving rural Indians legally invisible. Native peoples no longer want to be the object of anthropological studies, but participants in constructing democracies.” Jack Epstein, *Reversing its History, Bolivia Gives Power to Indigenous People*, CHRISTIAN SCIENCE MONITOR, Feb. 16, 1995, <https://www.csmonitor.com/1995/0216/16071.html>.

“[T]he legal propositions advanced on behalf of the rights of possession asserted by the Spanish Crown and against the human rights of indigenous peoples included Divine right, treasure trove and the barbarism of the Indians.”¹⁹ Following independence, indigenous people were further subjected to forced labor, had restrictions put on their movements, and were marginalized from civil society during the respective national periods throughout the region.

[I]ndigenous people were generally regarded as infamous and noncitizens. The presumed modernity of the elites was bound up with a paternalism that extended from the household to the society at large. Bolivian leaders ... saw themselves as bringing light, civilization, and progress to barbarous and backward people.²⁰

Historically, most of the indigenous communities received little or no government support. As late as the 1930s, indigenous citizens were not welcome in the white sections of La Paz, the nation’s capital. Often, they were forced to bathe and change into “western” clothing before entering the city. A 1925 decree prohibiting indigenous people from areas near the main square was on the books until 1944.²¹

The New Political Constitution of the State of Bolivia attempts to reverse much of the historic injustice and systemic discrimination by, among other things, broadening the definitions of property to include communal ownership, extending limited autonomy to regional prefects, enshrining indigenous language and education rights, and reaffirming state control over Bolivia’s vast natural gas reserves.²² It is no surprise then that when President Morales, winding up his campaign to approve the new constitution in late January 2009, stated from the Presidential Palace, “After 500 years, we have retaken the Plaza Murillo!”²³

One of the more controversial elements of the New Political Constitution of the State of Bolivia is the implementation of traditional justice systems previously termed *usos y costumbres* and referred to by the Bolivian

19 Jeffrey N. Gesell, *Customary Indigenous Law in the Mexican Juridical System*, 26 GA. J. INT’L & COMP. L. 643, 646 (1997) (citing Silvio A. Zavala, *Las Instituciones Juridicas en la Conquista de America* 27-28 (1971)).

20 Rossana Barragán, “*The Spirit*” of Bolivian Laws: *Citizenship, Patriarchy and Infamy*, in HONOR, STATUS, AND LAW IN MODERN LATIN AMERICA 66, 80 (Sueann Caulfield et al., eds., 2005).

21 Epstein, *supra* note 18.

22 Mike Butler, *Bolivian Constitution a Model for NZ?*, BREAKINGVIEWS.CO.NZ (Mar. 11, 2012), <http://breakingviewsnz.blogspot.co.nz/2012/03/mike-butler-bolivian-constitution-model.html>.

23 Simon Romero, *Bolivians Ratify New Constitution*, N.Y. TIMES (Jan. 25, 2009), <http://www.nytimes.com/2009/01/26/world/americas/26bolivia.html>.

Government as *justicia comunitaria* (community justice).²⁴ Articles 190, 191, and 192 provide for community justice for the indigenous people and *campesinos* of Bolivia, a separate legal system that runs concurrently with the national legal system of the country or what is called “ordinary justice.” This bifurcated approach has long been a feature in Bolivia’s legal culture, albeit in a less formalized or constitutionally mandated way:

Despite a formal jurisprudential hegemony, state legal institutions are in practice weak in Bolivia, particularly outside of the few major cities, which has had the effect, among other things, of enabling law to develop primarily as a cultural and discursive system of representation, one which is imbricated with social lives and identities in such a way that ‘law’ embodies both the normative (systems of rules enforceable, and enforced by, locally legitimate authorities) *and* the nonnormative, in the sense that law, in addition to acting *as law*, also constitutes other key social categories.²⁵

This emerging system of indigenous custom is an example of legal pluralism and a manifestation of the plurilateral nature of the refounded state of Bolivia, as promoted by the Morales regime. Supporters view the constitutional recognition of community justice and its integration into Bolivia as part of the panoply of indigenous rights. “In part this derives from the legacy of colonial rule, when a separate, subordinate legal system for indigenous subjects – *la República de Indios* – existed alongside the colonists’ law.”²⁶ Many *indigenista* proponents of community justice system view its new constitutionally protected status as the best manner by which to respect traditional customs, to ensure self-determination, and to promote autonomy.²⁷

The centuries during which they were marginalized and isolated from state-sanctioned forms of dispute resolution, indigenous peoples had to resort to their own customs to resolve disputes. With the neoliberal state that Bolivia embraced under President Gonzalo Sánchez de Lozada, there

24 Centro de Investigación y Promoción del Campesinado, *La ley comunitaria en Bolivia*, Oct. 31, 2004, <http://www.cipca.org.bo/index.php/cipca-notas/cipca-notas-2004/361--sp-1641007672>.

25 MARK GOODALE, DILEMMAS OF MODERNITY: BOLIVIAN ENCOUNTERS WITH LAW AND LIBERALISM 24-25 (2009).

26 Rachel Sieder, *Introduction*, in MULTICULTURALISM IN LATIN AMERICA: INDIGENOUS RIGHTS, DIVERSITY AND DEMOCRACY 9 (Rachel Sieder ed., 2002).

27 See, e.g., Christopher J. Fromherz, *Indigenous Peoples’ Courts: Egalitarian Juridical Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples*, 156 U. PA. L. REV. 1341, 1373-74 (2008) (discussing that “[t]he constitutionalization of an indigenous judiciary is part of a larger movement for greater self-government among the indigenous peoples of Bolivia, a movement that is fundamentally interconnected with the development of democracy in Bolivia’s history.”).

was a noticeable increase in such recourse to self-help often expressed through mob violence: “The vigilante lynching of criminal suspects has become a common practice in the marginal *barrios* of Bolivian cities, with the majority of such incidents being reported in the southern zone of Cochabamba.”²⁸ The rules, language, and geographical barriers that existed made this a matter of self-help and self-preservation. Municipalization efforts during the 1990s, as part of the neoliberal project, along with other policies pursued as part of the Washington Consensus²⁹ also provided an impetus towards self-help mechanisms including those for dispute resolution.³⁰

The critics of community justice, however, are many. There are some practices that are glaring breaches of fundamental human rights protections. In addition to the lack of due process, the issue of a lack of judicial integrity also surfaces. Often the same person doing the judging is also the municipal authority, reducing the separation of powers to a historic relic. Moreover, there is no right to appeal. Corporal punishment, including the use of the whip, is commonplace.³¹ Women’s hair has been shaved in cases of alleged adultery.³² Communities have resorted to vigilantism and public lynching in the name of indigenous justice.³³

The most high-profile case of such mob violence occurred on March 7, 2009, when hundreds of indigenous peasants attacked and looted the home

28 Daniel Goldstein, *Flexible Justice: Neoliberal Violence and Self-help Security in Bolivia*, in GLOBAL VIGILANTES, 239, 244 (David Pratten & Atreyee Sen eds. 2008) [hereinafter Goldstein, *Flexible Justice*]; see also *Rape Suspect Buried Alive in Bolivia*, BBC NEWS (June 7, 2013), <http://www.bbc.co.uk/news/world-latin-america-22811105> (discussing that local indigenous residents in Bolivia tied up, threw inside and buried a 17-year-old man in an open grave next to the 35-year-old female victim in which he was accused of raping and murdering).

29 The Washington Consensus is the expression that came to explain the process of deregulation, privatization, lowering of tariff and other trade barriers and promotion of neo-liberal and free market economics. The protectionist policies of past decades, like import substitution and state-led national industrialization, were to be reversed and replaced by policies that opened markets to international competitors who would in turn promote economic growth investment, production, and efficiency. See John Williamson, *From Reform Agenda: A Short History of the Washington Consensus and Suggestions for What to Do Next*, FINANCE AND DEVELOPMENT, Sept. 2003, at 10; and Carol M. Rose, *Privatization – The Road to Democracy?*, 50 ST. LOUIS U. L.J. 691 (2006).

30 In exchange for the adoption by developing countries of certain rules and regulations concerning the functioning of markets and some strengthening of democratic institutions, the international financial community lent money to these nascent democracies in an attempt to encourage a set of “neoliberal” policies – the so-called Washington Consensus. Williamson, *supra* note 29, at 10.

31 Lucy Ash, *Bolivia Goes Back to the Whip*, BBC NEWS: BBC RADIO 4’S CROSSING CONTINENTS (Nov. 23, 2006), http://news.bbc.co.uk/2/hi/programmes/crossing_continents/6173268.stm.

32 Monte Reel, *Bolivia’s Burning Question: Who May Dispense Justice?*, WASH. POST (Feb. 2, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/01/AR2008020103426.html>.

33 Andres Schipani, *Bolivia Sees Rise in Mob Justice*, BBC NEWS (Apr. 19, 2008), <http://news.bbc.co.uk/2/hi/americas/7337173.stm>.

of Victor Hugo Cárdenas, an Aymara intellectual and former Vice-President of Bolivia, some 56 miles west of La Paz. Cardenas' wife, Lidia Catari, and other family members were injured in the attack.³⁴ "In the Cardenas case, indigenous Bolivians determined that the provision on land holdings gave them the green light to apply indigenous communal justice."³⁵ It was also clear that Cárdenas was being punished for leading the campaign to defeat the New Constitution in the national referendum of January 25, 2009.³⁶

This well-documented attack near Lake Titicaca was only one of many such extrajudicial lynchings that have occurred in Bolivia since Morales took power. On February 26, 2008, an angry mob held three police officers, suspected of corruption, and beat and tortured them for hours only to then hang them.³⁷ The Human Rights Foundation detailed forty-six such cases of mob violence in a report.³⁸ It is not surprising then that the foundation found that community justice represents "the dilution of state authority and the incorporation into law of an unenforceable, arbitrary system, a discourse that is used to justify vigilante violence and other human rights violations."³⁹

Such tension over the weaknesses in the rule of law is a longtime feature in Bolivian history.⁴⁰ When the countries of Latin America gained independence in the early part of the nineteenth century, it was important for the consolidation of those respective countries, that there be one, unitary law. "However, in practice a situation of legal pluralism – the overlapping coexistence of different legal and regulatory orders – has prevailed across

34 *Bolivia: Unequivocally Condemn Mob Violence*, HUMAN RIGHTS WATCH, (Mar. 12, 2009, 7:01 P.M.), <http://www.hrw.org/en/news/2009/03/12/bolivia-unequivocally-condemn-mob-violence>; see also Laz Paz and Santa Cruz, *The Permanent Campaign*, THE ECONOMIST (July 16, 2009), http://www.economist.com/world/americas/displayStory.cfm?story_id=14031312.

35 *Will the Rule of Law Apply to all Bolivians?*, MIGRATE FREEDOM HOUSE (Mar. 27, 2009), <https://migratefreedomhouse.wordpress.com/2009/03/27/will-the-rule-of-law-apply-to-all-bolivians/>.

36 U.S. Department of State, Bureau of Democracy, Human Rights and Labor, 2009 Country Reports on Human Rights Practices: Bolivia (Mar. 11, 2010), <https://www.state.gov/j/drl/rls/hrrpt/2009/wha/136102.htm>.

37 *Three Police Officers Lynched in Bolivia*, REUTERS (Feb. 27, 2008, 11:10 AM), <http://www.reuters.com/article/idUSN27429484> [hereinafter REUTERS, *Three Police Officers Lynched*]; see also *Andean Governance Briefs*, MIGRATE FREEDOM HOUSE (Feb. 27, 2008), <https://migratefreedomhouse.wordpress.com/2008/02/27/andes-governanc/>.

38 See generally Human Rights Foundation, *supra* note 11, at 2-4.

39 Trevor Kenney, *What is Community Justice in Bolivia*, U. LETHBRIDGE: U. NEWS COMMUNITY (Mar. 18, 2009), <https://www.uleth.ca/unews/article/what-community-justice-bolivia#.WJuvkhiZNDV>.

40 NANCY GREY POSTERO, *NOW WE ARE CITIZENS: INDIGENOUS POLITICS IN POSTMULTICULTURAL BOLIVIA* 9 (2007).

Conflict between Indians and the state is not new; it has been at the center of Bolivian politics since colonial times. To understand current struggles for Indian rights, it is therefore critical to understand the historical sediments, the outcomes of past conflicts that determine current distributions of power and influence.

Id.

the continent.”⁴¹

This Article shall explore how the New Political Constitution of the State of Bolivia and the legislation concerning community justice that has been proposed by the Bolivian Executive creates an indigenous justice system that violates the fundamental human rights that Bolivia has acceded by means of international treaties. Part II of this Article explores the long history of constitutional reforms in Bolivia and the manner in which indigenous peoples have struggled to be treated equally under Bolivian law and have developed their own customary laws.

Part III of this Article shall then detail the legal framework that the Morales administration has laid down for Bolivia and the legal foundations of the Bolivian Government’s plurilateral approach – one that is designed to redress the centuries of underdevelopment and the lack of inclusion of indigenous customary legal practices in the legal system of Bolivia.⁴² Part IV shall then examine the international legal obligations under international law to protect fundamental civil rights and to which Bolivia has acceded to and has implemented into the country’s domestic law. Part V concludes with an examination of the manner in which the new legal framework that the Morales administration was promulgated may violate those very international legal obligations to which Bolivia has agreed. The tension created by the implementation of a legal pluralism is explored and whether such a policy can truly redress half a millennium of indigenous marginalization. This Article explores the dangers of mob rule that may come with the poorly executed integration of indigenous problem-solving systems into the Western model of justice, which themselves are the mere vestiges of Spanish colonialism. Indigenous law may be the ruling law in many of the places where people live. It is often justice in rural communities, but with internal migration in Bolivia, these traditional practices are being enforced in more urban settlement areas. As the State has abdicated large tracts of land for other political players to have the monopoly of force, these are the natural self-help measures – straight out of the neo-liberal playbook – a privatization of sorts. Legal pluralism can bring about chaos as international legal obligations are routinely violated in the name of self-determination.⁴³

41 Sieder, *supra* note 26, at 9.

42 “Few vestiges of indigenous law survive (officially, at least) in Latin America.” Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STANFORD J. INT’L L. 65, 75. (1996).

43 “Despite representing an important step forward in the legal recognition of indigenous collective rights, the paradigm of official multiculturalism has been much criticized.” Rachel Sieder, *The Judiciary and Indigenous Rights in Guatemala*, 5 INT’L J. CONST. L. 211, 214 (2007) [hereinafter Sieder,

I. THE HISTORY AND USE OF INDIGENOUS CUSTOMARY LAW IN BOLIVIA

The exploitation and destruction of indigenous communities during the conquest of the Americas by Spain (and Portugal) has long been documented.⁴⁴ The diseases that the Europeans brought to the New World killed millions; those who survived were enslaved by forced labor, tributes and other taxes, and other regimes that robbed the peoples of the Continent of their resources, cultures, and civilizations.⁴⁵ Bolivia's mines – originally geared for the extraction of silver and then tin – brought untold riches to the conquistadores and suffering to the local people who toiled there.⁴⁶ Elsewhere, the conquistadores followed a different model:

Colonial domination in the highlands took a different path. There the Indian population was much greater, and the Inca empire had left a pre-existing system of indirect rule. The Spanish assumed control over this system, leaving land in the hands of the native peasants and the local governing power in the hands of caciques, local elites whose

Judiciary].

⁴⁴ The Spanish colonial powers provided Spaniards with land grants called *encomenderos*. “Although the *encomenderos* were officially prohibited from extracting Indian labor, they had enormous power over their charges and used their labor for their own interests.” POSTERO, *supra* note 40, at 27.

⁴⁵ *But see* Robert H. Jackson, *La raza y la definición de la identidad del “indio” en las fronteras de la América Española colonial*, 26 REVISTA DE ESTUDIOS SOCIALES 116, 117 (2007). Historically, Spanish policy towards South America

[A]ttempted to create stable native communities that were to play an integral role in the new colonial society as labor reserves and contributors to economic development and the treasury. . . . At the same time, the missionaries frequently preserved and perpetuated the authority of native leaders as a means of assuring social and political stability within the missions. . . . The Spanish created a colonial political system based upon indirect rule. Indigenous political leaders governed as representatives of the colonial state, and were held responsible for maintaining order in native communities and delivering tribute payments and labor.

46

The Spanish Crown created two types of compulsory laborers: the *yanacunas* and the *mitayos*. The *yanacunas* were exempted from *mita* service and were basically serfs or slaves permanently bound to large private estates where they worked the fields or served in the household of the landowner. The *mitayos* were Indians organized under the *mita* to provide low-paid or unpaid labor for a percentage of the year, working in the mines. The *mita* combined the Incan system of tribute labor with the Iberian medieval feudal system of obligatory labor and adopted it to the capitalistic needs of the New World entrepreneurs, particularly the mining industrialists.” WALTRAUD Q. MORALES, *A BRIEF HISTORY OF BOLIVIA* 27 (2003). “However it appeared in theory, the *mita* proved to be disastrous for the Indians, who were commonly forced to work beyond their terms of service if they survived its perils; they were not always paid, and when they were, their wages were far below free market levels; villages were commonly forced to send more than their allotted number of laborers, and more frequently than specified. A summons to labor in the mines came to be viewed as a virtual death warrant. Excessive labor under most adverse conditions, an inadequate diet, disease, accidents, and above all, what must have been spiritual suffocation contributed to soaring mortality among *mitayos*.”

R.C. Padden, *Editor's Introduction*, in *TALES OF POTOSÍ* xix (R.C. Padden, ed., 1975).

authority was inherited from their Incan nobility forebears.⁴⁷

The caciques, in turn, collected the taxes and delivered them to the Spanish Crown. Royal protection was traded for the tributary obligations, based on the *mita*, a pre-Columbian collective labor system.⁴⁸ As such, the indigenous communities were not treated equally and were in need of special protection, which inevitably meant the royal courts did not protect their limited rights.⁴⁹ It is not surprising then that Spanish law was viewed as an instrument of exploitation.⁵⁰ The indigenous population was seen as primitive and not subject to equal treatment under colonial rules:⁵¹ “They also had a particular legal-juridical status as ‘miserable’ individuals (*miserables*).”⁵²

But despite the relative relaxation of exploitation of the expanding rural Indian peasant population, that population remained bitterly opposed to its overlords. The unending exactions of local corregidores and hacendados, the demands of local corvée labor obligations which often went for private Spanish interests rather than state concerns, and the steady taxation which constantly forced all Indians into the marketplace were thoroughly resented.⁵³

Independence from Spain did not greatly change the situation, despite much posturing by regimes that emerged during the national period.⁵⁴

47 POSTERO, *supra* note 40, at 27.

48 See, e.g., Patrick Wieland, *Going Beyond Panaceas: Escaping Mining Conflicts in Resource-Rich Countries Through Middle Ground Policies*, 20 N.Y.U. ENVTL. L. J. 199, 232 (2013) (discussing that the “Spanish colonizers implemented the mita or compulsory work scheme in the mines, resulting in the exploitation of indigenous peoples.”).

49 “Their legal cases were to be expeditious, avoiding some of the usual juridical procedures, and they were represented in the courts by the Protector of Indians.” Barragán, *supra* note 20, at 79.

50 “Following upon the controversies provoked by the conquest, ‘Indians’ were declared free vassals not subject to servitude. Yet they paid tribute in recognition of the dominion of the Spanish kings and their role as protectors and administrators of the Indies.” *Id.*

51

[T]hough unremunerated personal service for private benefit was prohibited, they were obliged by the state to carry out a series of tasks in the mines, on haciendas, and in public works. This corvée labor obligation was justified because of their ‘limited capacities,’ the ‘benefit’ that Spanish intervention entailed for them, their similarity to ‘rustics’ in Spain, and their ‘more apt nature’ for labor.

Id.

52 *Id.* “This status was determined by their ‘imbecile nature’ and poverty, their recent conversion to Catholicism, their lesser capacity for rationality, and their “inability to govern themselves.” *Id.*

53 HERBERT S. KLEIN, *BOLIVIA: THE EVOLUTION OF A MULTI-ETHNIC SOCIETY* 74 (2d ed. 1992) [hereinafter KLEIN, *EVOLUTION*].

54

After independence, in keeping with the ostensibly egalitarian principles of liberalism, indigenous people had no specific juridical status in either the constitutions or legal codes (penal, civil, or procedural). They were not even named in these texts, suggesting that they were

Given the general absence of a specific legal status for indigenous people, the colonial position of the Protector of Indians, and thus the limited legal privileges of indigenous status, disappeared. But another body of laws that were more conjunctural in nature – the laws, decrees, orders, and resolutions – displays an abundance of specific dispositions referring to ‘Indians’ and reveals that in fact their legal situation was not altogether transformed. Among these dispositions, for example, was the legislation regulating the ‘indigenous contribution,’ a neocolonial form of tribute to the state. Despite initial attempts to abolish this differential tax, as a colonial vestige incompatible with enlightened liberal principles, the Bolivian state was fiscally unable to do without it.⁵⁵

During the national period, there remained much inequality before the law.⁵⁶ “The overall result of republican liberalism for the majority of Indians in the Andean region was a stunning loss of communal lands and deep cultural incursions, as Indians became subject of law and liberal bureaucratic regimes controlled by whites and mestizos.”⁵⁷ There was a great deal of residual racism that maintained the segregation between Bolivians of European ancestry and the indigenous communities: “A door was let open to equality, at least at a juridical level, but in order to attain equality and citizenship, indigenous people would have to undergo a process of ‘civilization.’”⁵⁸ Indigenous people would be kept on the outside of Bolivian society, marginalized as uncivilized, infamous, and illiterate.⁵⁹ Successive constitutions maintained this situation of inequality, making the democratic franchise dependent upon literacy.⁶⁰

considered along with all others in the categories of Bolivians and citizens.

Barragán, *supra* note 20, at 79-80.

⁵⁵ *Id.*

⁵⁶ “Despite the claims of modernity in the Bolivian legal codes, the laws were not based upon the assumption that society was composed of equal individuals.” *Id.* at 70-71.

⁵⁷ POSTERO, *supra* note 40, at 34.

⁵⁸ Barragán, *supra* note 20, at 80.

⁵⁹

Even if the codes did mark a change, adopting a foreign Spanish model implied an ongoing cultural and ideological if not direct colonial domination. I would assert that Bolivians followed the Spanish, rather than the Napoleonic, code because it allowed the maintenance of culturally engrained discrimination on the basis of reputation and social status, reserving citizenship for honorable and reputable men, as opposed to infamous and illiterate men, and civil rights to privileged women of good credit, not those of low or “unknown” reputation.

Id. at 79.

⁶⁰

By determining who exercised political and civil rights, the constitutions distinguished between those who were citizens and those who were merely of Bolivian nationality. Bolivians were simply all people born within the republic, while citizens were those Bolivians who were male, over twenty-one years of age or married, literate, and not domestic servants...In the case of

In 1874, a land reform ended the Indian tribute and made communal property illegal. This allowed for the commercial use of Indian lands and the beginning of the *latifundio* (or estate) landholding system.⁶¹ Eventually, “[t]he result was a confused legal system contested at every level by Indians who tried to defend their colonial livelihoods.”⁶² A civil war in 1898 did not change this situation for indigenous communities in Bolivia. The indigenous people, with rural peasants, pursued campaigns in the 1910s and 1920s to change the laws of the country to provide for laws and courts for indigenous peoples. The struggle for the rights of indigenous communities was motivated by a shared history of violence and the repeated failures by the Bolivian state to apply the law equally.

With the 1932 Chaco War, however, the debate over special laws and courts for indigenous people ended: “Ultimately Bolivia’s 1920s indigenista lawmakers failed to create a ‘special’ legal code for Indians; nor did they establish a patronato or indigenous tribunal.”⁶³ When Bolivia went to war in 1932 over the Chaco, indigenous people were cannon fodder.⁶⁴ At the end of the war, soldiers returned from the front to populate the cities and social mobilization soon followed. With poor healthcare facilities for the wounded and the inevitable social dislocation that resulted from the war, there was much public outcry. Military socialist presidents came in and out of power and by 1938, there was a constitutional convention which addressed, among other issues, the nation’s legal system. Notwithstanding public sentiment for change, there was a strong focus on national unity. As such, the “Indian problem” was seen by the convention delegates as the national problem.⁶⁵

Bolivia, the requirements for citizenship excluded the great majority of the population. The indigenous and mestizo majority spoke native languages that were oral, and they usually lacked Spanish literacy. Moreover, most could not exercise the political right to vote or be elected to office owing to their dependent status. Other criteria for social differentiation were sex and age. Because of their sex, women were not only excluded from citizenship, but they were not allowed to file accusations, except in cases in which they were directly and personally involved. Similarly excluded were minors and those whose occupation or profession did not yield a minimum annual income of three hundred pesos. Such requirements for citizenship were maintained in all Bolivian constitutions until 1938.

Id. at 71.

61 POSTERO, *supra* note 40, at 32.

62 *Id.* at 33-34.

63 LAURA GOTKOWITZ, *A REVOLUTION FOR OUR RIGHTS: INDIGENOUS STRUGGLES FOR LAND AND JUSTICE IN BOLIVIA 1880-1952* 68 (2007).

64 “Aymara and Quechua Indians and peasants filled the army’s rank and file and prevailed in the long lists of dead and wounded. Middle and upper-class men obtained easy exemptions from frontline duty or even from military service altogether; those who did serve were generally rearguard officers or doctors.” *Id.* at 104.

65 *Id.* at 115.

The 1938 Constitution provided for a state-managed economy but the convention delegates failed to pass binding legislation providing civil and human rights to Bolivia's indigenous peoples.⁶⁶ Some radical delegates to the constitutional convention had been so bold as to propose the abolishment of the involuntary personal servitude on haciendas and the establishment of a system of collective land ownership.⁶⁷ Even after the Second World War, there was still extreme inequality in the division of land, keeping the peasantry, an overwhelming percentage of which were indigenous, in a permanent state of subsistence.⁶⁸ The next two decades saw a series of reforms and the eventual overturning of those reforms by a conservative, repressive oligarchy.⁶⁹ Political instability was at an all-time high.

Between 1935 and 1952, Bolivia experienced five successful coups (1935, 1936, 1937, 1943, 1951); two successful urban insurrections (1946 and 1952); at least three large-scale bloody encounters between the army and labor groups (1942, 1947, 1950); and a brief civil war in 1949. In addition, against a background of political challenge and reprisal there were untold abortive coup plots, small-scale bloody and bloodless strikes and demonstrations, numerous political murders, and uncountable jailings and exilings. Political violence was definitely not new to Bolivian public life, but the quantity and quality of the violence during this period was.⁷⁰

With the chaos of the 1951 elections, a military junta (governing body) took power during a political vacuum, denying the Movimiento Nacionalista Revolucionario (MNR) the landslide victory it had surprisingly won.⁷¹ In reaction to this, on April 9, 1952, peasants, armed by

⁶⁶ *But see* Morales, *supra* note 46, at 112 (“The Busch convention stood out as a landmark of social progress and reform.”).

⁶⁷ *Id.* at 113.

⁶⁸

Controlling access to the best lands in all the zones of the republic, the hacenedados obtained their labor force by offering usufruct estate lands in exchange for labor. The Indians were required to supply seeds, tools, and in some cases even animals for this work, which left the owner with few capital inputs to supply. The Indians were even required to transport the final crop. The hacendado also required personal service to himself, his family, and his overseers. *Pongueaje* (personal service obligation) had been part of the work requirements of estate Indians since colonial times.

HERBERT S. KLEIN, *A CONCISE HISTORY OF BOLIVIA* 210 (2003). [hereinafter KLEIN, HISTORY].

⁶⁹ “[C]apitalist agro-industrial enterprise expanded rapidly throughout the region, permitting a new Eastern agricultural bourgeoisie to take over huge extensions of the best land. This effectively nullified the Agrarian Reform Law in this highly desirable region by generating a highly unequal distribution of land and capital.” Xavier Albó, *Bolivia: From Indian and Campesino Leaders to Councillors and Parliamentary Deputies*, in *MULTICULTURALISM IN LATIN AMERICA: INDIGENOUS RIGHTS, DIVERSITY AND DEMOCRACY* (Rachel Sieder ed.) 75 (2002).

⁷⁰ JAMES M. MALLOY, *BOLIVIA: THE UNCOMPLETED REVOLUTION* 323 (1970). [hereinafter MALLOY].

⁷¹ CHRISTOPHER MITCHELL, *THE LEGACY OF POPULISM IN BOLIVIA: FROM MNR TO MILITARY*

the MNR, took control of local governmental outposts and police duties as that law enforcement institution completely crumbled. Armed units of miners took over control of mining camps.⁷² The 1952 Revolution resulted after a broad alliance of a military government with the workers' parties, indigenous leaders, middle class students, and urban intellectuals was formed. The new regime set about making large-scale changes including universal suffrage by eliminating the literacy requirement for voting.⁷³ "In one stroke, the Indian peasant masses were enfranchised, and the voting population jumped from some two hundred thousand to just under one million persons."⁷⁴

The governing MNR under President Víctor Paz Estenssoro nationalized the mines without compensation,⁷⁵ dismantled the army replacing it with militias, and instituted an agrarian reform.⁷⁶ Work records of peasants were destroyed to eliminate all forms of peasant work obligations.

Such rapid changes in the governance structures of the country resulted in the collapse of some of the state institutions. This instability combined with new entitlements from social welfare programs to create inflation and economic instability.⁷⁷ The middle class was being severely injured by these events and threw its support behind the Bolivian Socialist Falangist Party (FSB), which to date had only been a minority political force in the country.⁷⁸ Notwithstanding the changes in Bolivian society, the indigenous communities became more conservative and focused on healthcare and securing their respective land titles, rather than their formal rights or

RULE 32 (1977).

⁷² See generally JAMES DUNKERLEY, *REBELLION IN THE VEINS: POLITICAL STRUGGLE IN BOLIVIA, 1952-82* (1984). [hereinafter DUNKERLEY].

⁷³ "The Bolivian National Revolution has not only given the Indian the land, it has made him a citizen." ROBERT J. ALEXANDER, *THE BOLIVIAN NATIONAL REVOLUTION* 80 (1958).

⁷⁴ KLEIN, *HISTORY*, *supra* note 68, at 212.

⁷⁵ James M. Malloy, *Revolutionary Politics*, in *BEYOND THE REVOLUTION: BOLIVIA SINCE 1952*, at 120 (James M. Malloy & Richard S. Thorn eds., 1971).

⁷⁶ *Id.* at 233-68. *But see* MALLOY, *supra* note 70, at 191 ("[I]t is no wonder that there was stubborn resistance both within and without the MNR to the idea of generalized land reform.").

⁷⁷

The takeover of the mines drained massive sums from the state coffers, and agrarian reform reduced agricultural deliveries to the cities drastically, thus necessitating massive food imports to prevent starvation. The only way to resolve all of these problems was to increase national currency. The result was one of the world's most spectacular records of inflation from 1952 to 1956. In that time the cost of living increased twentyfold, with annual inflation rates of over 900 percent.

KLEIN, *EVOLUTION*, *supra* note 53, at 236. "The specter of inflation haunted the National Revolution from the beginning...After 1952 the tendency of the value of the *boliviano* to decline got out of hand, and inflation assumed agonizing proportions." Alexander, *supra* note 73, at 201.

⁷⁸ MATTHEW CRAIN, *REPRESSION AND ACCOMMODATION IN POST-REVOLUTIONARY STATES* 150 (2000).

reclamation of their traditional justice system.

In fact, the indigenous communities did not play much of a role at all in the making of the revolution.⁷⁹ The indigenous peoples of Bolivia were not affected by the policies instituted by the MNR during the 1952 Revolution and thereafter.⁸⁰ Moreover many of the changes that were undertaken by President Víctor Paz Estenssoro, were short-lived as he was eventually overthrown by the army bringing to an end the many years of fundamental change in Bolivia started in 1952.⁸¹ General René Barrientos took power in 1964 beginning an eighteen-year period of military regimes brought to power by coups d'état.⁸²

During this time, the term "Indio" was abolished from the official language of the state.⁸³ The 1967 Bolivian Constitution, the country's fifteenth, did not refer to indigenous peoples or ethnic minorities. There is a reference "to community lands and *campesino* syndicates though."⁸⁴ The 1967 Bolivian Constitution was altered through a number of reform efforts, some of them haphazard in nature.

In 1971, the military government under General Hugo Banzer attempted to corporatize the labor movement in its suppression of labor discontent.⁸⁵ This policy of isolation also involved the heavy-handed tactics of military suppression of blockades and other protests by the indigenous communities.⁸⁶ All the while, Banzer "[P]aid lip service to the idea of popular participation through elections...."⁸⁷

Throughout the 1980s legislation "recognized the existence of

79 "Indian peasants played no role in the insurrection of 1952. Even with the significant expansion of the scope of conflict, the insurrection involved on all sides only a small part of the actual population of Bolivia." Malloy, *supra* note 70, at 164.

80 "The 1952 revolution addressed some of these injustices, with an agrarian reform program that gave land to Indian peasants. Nevertheless, Indians continued to suffer widespread economic and political discrimination." POSTERO, *supra* note 40, at 4.

81 DUNKERLEY, *supra* note 72, at 120.

82 DIRECTOR OF CENTRAL INTELLIGENCE, NATIONAL INTELLIGENCE ESTIMATE: THE SITUATION IN BOLIVIA, Number 92-67, Sept. 24, 1967 at 5, https://www.cia.gov/library/readingroom/docs/DOC_0000011780.pdf; see also U.S. DEPT. OF STATE, FOREIGN RELATIONS, 1964-1968, VOLUME XXXI, SOUTH AND CENTRAL AMERICA; MEXICO, <https://2001-2009.state.gov/r/pa/hof/frus/johnsonlb/xxxi/36271.htm>.

83 Erick D. Langer with Elena Muñoz, *Introduction*, CONTEMPORARY INDIGENOUS MOVEMENTS IN LATIN AMERICA xvi (Erick Detlef Langer & Elena Muñoz eds 2003).

84 DONNA LEE VAN COTT, THE FRIENDLY LIQUIDATION OF THE PAST: THE POLITICS OF DIVERSITY IN LATIN AMERICA 135 (Billie R. De Walt ed. 2000) [hereinafter VAN COTT, FRIENDLY LIQUIDATION].

85 "In dealing with the peasants, Banzer has not tried to duplicate Barrientos's policy of using the campesinos as an offstage support base to keep urban forces in line. Instead, he has sought to keep the rural majority neutralized and divorced from political activity." MITCHELL, *supra* note 71, at 127.

86 Albó, *supra* note 69, at 76.

87 TED ROBERT GURR, PEOPLE VERSUS STATES: MINORITIES AT RISK IN THE NEW CENTURY 180 (2000). In the end "the Banzer regime was part of the general trend toward Right-oriented authoritarian regimes that developed in Latin America during the 1960s and 1970s." JAMES M. MALLOY & EDUARDO GAMARRA, REVOLUTION AND REACTION: BOLIVIA, 1964-1985 108 (1988).

indigenous customary law, declared the Indians not responsible for their actions because of their primitive state, and placed them under protection of the state.”⁸⁸ Throughout the 1980s, however, leftist intellectuals, popular organizations, anthropologists, and the emerging indigenous leadership began a discourse about the “pluricultural” nature of Bolivia’s society and state, and how a comprehensive constitutional reform process might be achieved.⁸⁹

There was a move away from protecting indigenous rights at the collective level, to protecting indigenous rights of the individual indigenous groups.⁹⁰ Groups began to think of themselves as Guaraní, Quechua, and Aymara rather than as indigenous groups as a whole. It was then that Guaraní communities in the eastern lowlands of the country began political mobilizations.⁹¹ The Guaraní linked with a non-governmental organization. They worked toward a national project to refine the role of the state as well as the relationship that indigenous people had with the state.⁹² By the 1990s there were a series of mobilizations by other indigenous organizations. One such march (the March for Territory and Dignity) occurred in 1990 against incursions by logging companies, inspired a renewed debate among Bolivia’s intellectuals and policymakers as to the causes of Bolivia’s political instability, and led to the creation of nine indigenous territories by decree.⁹³

During the administration of Jaime Paz Zamora, which ran from 1989 to 1993, through the administration of Gonzalo Sánchez de Lozada (1993-

88 See VAN COTT, *FRIENDLY LIQUIDATION*, *supra* note 84, at 135.

89 *Id.*

90 “In the Andean context, it had been customary for Indians seeking to gain the status of being *mestizo* to forsake their own communities and reject their Native heritage. The individual who did so, however, found himself ‘part of a despised ‘cholo’ minority in a world dominated by urban upper classes to which he cannot aspire.” ANDERSON, *supra* note 5, at 96.

91

In the 1980s the indigenous peoples of eastern Bolivia organized themselves into new political movements. These movements have led, for the first time in the history of eastern Bolivia, to the development of pan-Indian and intra-ethnic organizations. These groups have now a large constituency and receive funding to implement their own projects. For the Bolivian Guaraní the struggle for their rights has led to a process of empowerment, and the political vindications of native peoples have led to major transformations of the state.

Silvia María Hirsch, *The Emergence of Political Organizations among the Guaraní Indians of Bolivia and Argentina: A Comparative Perspective*, in *CONTEMPORARY INDIGENOUS MOVEMENTS IN LATIN AMERICA* 81, 82 (Erick D. Langer & Elena Muñoz eds., 2003). Two of these political organizations were the “CIDOB, a pan-Indian confederation that groups the indigenous peoples of eastern Bolivia; and the Asamblea del Pueblo Guaraní, an intra-ethnic organization composed only of Guaraní Indians.” *Id.* at 83.

92 *Id.* at 89.

93 Assies, *supra* note 10, at 15.

1997) there was a flurry of law-making to appease the growing indigenous movements.⁹⁴ Bolivia attempted to redefine its relations with native peoples by sanctioning new laws (including the Ley de Participación Popular (“LPP”) and Ley de Reforma Educativa) that recognized the ethnic pluralism of the country and gave greater autonomy to indigenous peoples.⁹⁵

Suddenly, Bolivia looked progressive compared to some of its neighbors. The country was among the first signatories of the International Labour Organization’s Convention No. 169.⁹⁶ In the convention, the term “lands” may include the concept of territories that goes beyond the control of natural resources therein.⁹⁷ The major change in the country’s constitutional regime for indigenous rights in 1994 was contained in Article 171 (Part III), which read:

The natural authorities of the indigenous and peasant communities may exercise the functions of administration and application of their own norms as an alternative solution to conflicts, in conformity with their customs and procedures, as long as they are not contrary to this constitution and the laws. The law will make these functions compatible with the attributions of the Power of the State.⁹⁸

The previous Bolivian Constitution actually allowed for these mechanisms and the results of their justice procedure. Article 171 of the Constitución Política del Estado stated:

The social, economic and cultural rights of Indigenous Peoples are officially recognized, respected and protected, particularly those relative to their rights to the use and sustainable exploitation of their traditionally-owned land and resources, and those relative to their

⁹⁴ Van Cott, *Legal Pluralism*, *supra* note 15, at 225.

⁹⁵ Hirsch, *supra* note 91, at 83.

The Sánchez de Lozada administration (1993-1997), in which Aymara leader Victor Hugo Cárdenas became vice-president, undertook a ‘second generation’ of reforms which included a reform of the Constitution and a policy of decentralization, municipalization, and participation which basically took shape in the 1994 *Ley de Participación Popular*. Whereas until then only some twenty municipalities had effectively existed in the country, the new law increased the number to over 300. At the same time the distribution of tax revenues was changed in favor of the municipalities and they were given a series of responsibilities.

Assies, *supra* note 10, at 11.

⁹⁶ Albó, *supra* note 69, at 77. Laurie Sargent, *The Indigenous Peoples of Bolivia’s Amazon Basin Region and ILO Convention No. 169: Real Rights or Rhetoric?*, 29 U. MIAMI INTER-AM. L. REV. 451, 460 (1998).

⁹⁷ Assies, *supra* note 10, at 15.

⁹⁸ VAN COTT, FRIENDLY LIQUIDATION, *supra* note 88, at 176; *see also* Constitución Política de la República de Bolivia de 1967 con Reformas de 1994 y Texto Concordado de 1995, art. 171. [hereinafter 1967 Constitution with 1994 reforms and 1995 agreed text].

identity, values, languages, customs and institutional structures.⁹⁹

Article 171 further provided:

The social, economic and cultural rights of indigenous peoples [of Bolivia] are recognized, respected and protected in the standard of the law, especially those relative to communal lands of origin, guaranteeing the use and supporting the sustainable utilization [of] natural resources, their identity, values, languages, customs and institutions.

The State recognizes the juridical personality of indigenous and rural communities and of rural associations and syndicates.

The natural authorities of indigenous and rural communities may exercise the functions of administering and applying their own rules as an alternative solution to conflicts, in accordance with their customs and procedures, [provided that] they are not contrary to this Constitution and the laws. The Law [will homologate] these functions ... with the prerogatives of the Powers of State.¹⁰⁰

Moreover, “[t]he 1994 constitutional reforms acknowledge Bolivia as a ‘multiethnic, pluricultural society’ and allow[ed] the indigenous nations to assume ownership of traditional lands.”¹⁰¹ The 1993 Law of Constitutional Reform drew language about indigenous rights from the 1991 Colombian Constitution.¹⁰²

There was, however, a strong reaction during the mid-1990s in congressional circles about the addition of indigenous rights to Bolivian law.¹⁰³ This could have been the reason that Title 1 of the Code failed to list such rights, leaving it until Article 28. That Article 28 provided for the primacy for individual human rights demonstrates the regard for which

99 “Se reconocen, respetan y protegen en el marco de la Ley, los derechos sociales, económicos y culturales de los pueblos indígenas que habian en el territorio nacional, especialmente los relativos a sus tierras comunitarias de origen, garantizando el uso y aprovechamiento sostenible de los recursos naturales, a su intencidad, valores lenguas, costumbres e instituciones.” Constitución Política de la República de Bolivia de 1967 con Reformas de 1994 y Texto Concordado de 1995, art. 171.

100 VAN COTT, FRIENDLY LIQUIDATION, *supra* note 84, at 176; *see also* 1967 Constitution with 1994 reforms and 1995 agreed text, *supra* note 98.

101 TED ROBERT GURR, PEOPLE VERSUS STATES: MINORITIES AT RISK IN THE NEW CENTURY 180 (2000).

102 Donna Lee Van Cott, *Constitutional Reform in the Andes: Redefining Indigenous-State Relations*, in MULTICULTURALISM IN LATIN AMERICA: INDIGENOUS RIGHTS, DIVERSITY AND DEMOCRACY 45, 53 (Rachel Sieder ed., 2002). [Hereinafter Van Cott, *Constitutional Reform*]

103 *Id.*

Bolivian Congress held traditional indigenous practices.

“At the end of 1994, the first one hundred children graduated from a pilot program of bilingual education in Aymara, Quechua or Guarani, and Spanish. The President reaffirmed his commitment to teaching all children in both their native language and Spanish.”¹⁰⁴ In 1995, Bolivia held its first-ever nation-wide municipal elections. Indigenous and campesino candidates won 28.6 percent of municipal council seats.¹⁰⁵

The Sánchez de Lozada administration ushered in a program of state modernization which recognized the multicultural nature of Bolivia and promoted greater participation by grass-roots organizations in its attempts to enshrine decentralization.¹⁰⁶ But the constitutional reforms were undertaken without the creation of a directly elected constituent assembly, for fear of empowering the indigenous and campesino populations too much.¹⁰⁷ “Bolivia has a long history of constituent assemblies, usually convoked by dictators to legitimate and institutionalize their rule. Constituent assemblies or national conventions previously, since 1826, had spawned fourteen new constitutions.”¹⁰⁸

Indigenous groups took advantage of a program by the national government called the Popular Participation Law (“LPP”),¹⁰⁹ which sought to increase democracy in the country, by forming municipalities that offer indigenous groups greater opportunities for self-determination.¹¹⁰ “The U.S. Agency for International Development [] invest[ed] fourteen million dollars between 1995 and 2003 to support the popular participation process.”¹¹¹

The reforms did not live up to the aspirations of the indigenous people for territorial and political autonomy,¹¹² as there were no specific functions, nor independent means to raise taxes to support sub-mayors in the newly

104 Steven E. Hendrix, *Advancing Toward Privatization, Education Reform, Popular Participation, and Decentralization: Bolivia's Innovation in Legal and Economic Reform, 1993-1997*, 14 ARIZ. J. INT'L & COMP. L. 679, 697 (1997).

105 Van Cott, *Constitutional Reform*, *supra* note 102, at 58.

106 *Id.* at 53.

107 Sieder, *supra* note 26.

108 VAN COTT, FRIENDLY LIQUIDATION, *supra* note 84, at 132. “The number of constitutions that Bolivia has had – a total of eleven in the nineteenth century – reflects attempts by different presidents to legitimize themselves through a symbolic refounding of the republic.” Barragán, *supra* note 20, at 67.

109 Participación Popular, Ley No. 1551 (Apr. 20, 1994) (Bol.), <http://www.del.org.bo/info/archivos/ley%201551.pdf> [Popular Participation Law].

110 Hendrix, *supra* note 104, at 704.

111 *Id.* at 706.

112 Van Cott, *Constitutional Reform*, *supra* note 92, at 55. “Although the political reforms of the 1990s promised to make access to political institutions easier for all Bolivian citizens...the legacy of racism was recontextualized but not erased by those reforms. Racism continues to structure and limit participation, making it impossible for many Bolivians to exercise their political rights.” POSTERO, *supra* note 40, at 6.

recognized indigenous districts.¹¹³ But the reforms did assist in securing collective property rights, with which indigenous peoples could construct their identities and try to establish autonomy.¹¹⁴ In 1995, the Government formed a “National Committee for the International Decade of Indigenous Peoples” to plan, evaluate, coordinate, and publicize programs to increase self-determination, and to set goals and objectives.”¹¹⁵ “[T]here is a vigilance committee for each city that is typically comprised of a locally selected representative from each municipal district.”¹¹⁶ Vigilance committee members are often selected by the communities themselves in accordance with local customs.¹¹⁷

In sum, Bolivian indigenous organisations were unable to link constitutional recognition of their authorities and territories to a meaningful level within the political and territorial administration, that is, a level at which functional powers and state resources would be accessible (the only gains made in this respect related to the exercise of customary law and the administration of bilingual educational programmes).¹¹⁸

Some collective ownership over lands was recognized.¹¹⁹ Many of these changes paralleled the changes that other Latin American countries had undertaken.¹²⁰

The regime following Sánchez de Lozada – that of former dictator General Hugo Banzer - gave the LPP a much lower priority. Instead of focusing on multiculturalism, the Banzer regime focused on economic approaches to reducing systemic poverty in Bolivia. The Banzer regime also dismantled the governmental apparatus to promote decentralization, pushing it instead to a commission (and not a vice-ministry). Agrarian land reforms based on the constitutional reforms and a 1996 agrarian law were

113 Van Cott, *Constitutional Reform*, *supra* note 102, at 55.

114

The LPP fulfilled some of the functions of a policy of recognition in that it addressed centuries of discrimination by naming indigenous people as citizens and in the process fueled their expectations of participation. This remained mostly symbolic, however, because the LPP did not produce a meaningful redistribution of resources or radically challenge the structured inequalities of power...the law was not part of a democratizing effort intended to benefit the poor. Rather, it was part of an overarching strategy on the part of a neoliberal government that intended the reforms as a palliative for the larger structural adjustments it imposed.

POSTERO, *supra* note 40, at 15.

115 Hendrix, *supra* note 104, at 704.

116 *Id.* at 705.

117 *Id.*

118 Van Cott-*Constitutional Reform*, *supra* note 102, at 57.

119 Servicio Nacional de Reforma Agraria, Ley No. 1715 (Oct. 18, 1996) (Bol.) [National Service for Agrarian Reform Law].

120 Fromherz, *supra* note 27, at 1375 n.165.

slowed down, thereby satisfying the landowning elite of Bolivia's lowlands, one of whom was Banzer himself.¹²¹

In addition to these economic reforms, President Banzer turned his attention to criminal and indigenous justice matters. Under Law No. 1970, the Bolivian Congress republished the Code of Criminal Procedure on March 25, 1999. A new Article 28 provided, in part, that:

[A] criminal action will be concluded when the crime or offense is committed within an indigenous or peasant community by one of its members against another, and its natural authorities will have resolved the conflict in conformity with their Indigenous Customary Law, whenever said resolution is not contrary to the fundamental rights and personal guarantees established by the Constitution.¹²²

Indigenous justice had finally been recognized in the laws of Bolivia. But notwithstanding

[t]his provision on 'community justice,' despite its unheralded eventual appearance, had been the subject of intense controversy within the Bolivian Congress ever since the possibility of adding an 'indigenous rights' provision to Bolivian law had been raised during the presidency of Gonzales Sánchez de Lozada during the mid-1990s. The most common line of critique was anchored in a thinly veiled racist discourse that contrasted the supposed 'savagery' of 'Indian law' with the nobility of Bolivia's constitution.¹²³

It was clear that over the decades, indigenous customary law was still viewed as inferior to the laws imported from Europe, and that Bolivia's ratification of the International Labour Organization Convention on Indigenous and Tribal Peoples, Convention No. 169 of 1989 ("ILO Convention No. 169")¹²⁴ meant little in practice. By the time Gonzalo Sánchez de Lozada was elected for a second term in 2002, the controversy over the export of natural gas from Bolivia to the United States through Chile became the hot button issue that upset the indigenous communities.¹²⁵ It was not long before the continued popular uprising against Sánchez de

121 Van Cott-*Constitutional Reform*, *supra* note 102, at 57.

122 Goodale, *supra* note 25, at 17.

123 *Id.*

124 Int'l Labour Org. [ILO], Convention No. 169, *Concerning Indigenous and Tribal Peoples in Independent Countries* (Sept. 5, 1991), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.

125 "[T]he faces on the front lines of the 2003 demonstrations were overwhelmingly indigenous, especially in El Alto, where most of the violence occurred. Indian pride in the results of the gas war was palpable." Postero, *supra* note 40, at 4; *see also* BENJAMIN DANGL, *THE PRICE OF FIRE: RESOURCE WARS AND SOCIAL MOVEMENTS IN BOLIVIA* 75-90 (2007).

Lozada's second administration ended with the embattled President resigning, fleeing the country, leaving the Vice-President, Carlos Mesa, to be sworn in to lead the government. Evo Morales, a member of Bolivia's Congress, and very close runner up in the Presidential elections of 2002 won a landslide victory (54% of the vote) in the elections of December 2005, ushering a new era for Bolivia. He became the first president of indigenous background to assume the presidency. And the changes that would follow – from nationalization of the hydrocarbons industry to the implementation of indigenous justice mechanisms – would revolutionize Bolivia and chart a new course for indigenous self-determination throughout the developing world.

II. CHANGES IN BOLIVIA'S LEGAL FRAMEWORK UNDER THE MORALES GOVERNMENT

A. The New Political Constitution of the State of Bolivia

During President Evo Morales Ayma's first term as President of Bolivia, he advocated the enactment of a New Constitution that would reconcile the differences of the indigenous population. The Constitution of the Plurinational State of Bolivia was enacted on February 7, 2009 by President Evo Morales.¹²⁶ The controversial part of the New Constitution of Bolivia revolves around rights for the indigenous population and what this means for the people of Bolivia. Despite its length, there remain a number of questions regarding the status of the indigenous population as a self-autonomous body. Thus, it is important to outline the pertinent parts of the New Constitution of Bolivia in order to analyze how they may conflict with Bolivia's international obligations.

The theme of the New Constitution is clear throughout the 411 articles: the recurring role of the government and strengthening of indigenous rights. Bolivia is formally introduced as a plurinational country; a country with a "plural composition" of different peoples of ethnic backgrounds.¹²⁷ Immediately after introducing the new plurinational nature of Bolivia, the New Constitution declares the self-autonomy of the indigenous population.¹²⁸ Adamant in recognizing the rights of the indigenous, the New Constitution states that they are a separate autonomous group but are still

¹²⁶ 2009 Bolivian Constitution, *supra* note 12, at Preámbulo.

¹²⁷ *Id.* at art. 1.

¹²⁸ *Id.* at art. 2.

required to abide by the New Constitution of Bolivia.¹²⁹ These indigenous peoples and the non-indigenous peoples are all considered to be Bolivians under the New Constitution.¹³⁰ The rights of the indigenous people are formally delineated in its own chapter in the New Constitution.¹³¹ Article 30 encourages the indigenous to preserve their traditional and cultural identity.¹³² In particular, under Bolivian law, indigenous people are allowed to formulate and exercise their own political, legal, and economic systems.¹³³ The question that begs to be answered is how the relationship between the Bolivian legal system and the indigenous legal system evolves. How will the Bolivian government reconcile the differences between the two legal systems? Moreover, how much regulation will the government provide for indigenous self-autonomy? For example, the New Constitution of Bolivia encourages the indigenous people to continue using traditional medicine.¹³⁴ However, the law (assuming Bolivian law) will be a regulator of traditional medicine to ensure the quality of the service.¹³⁵

Moreover, the New Constitution of Bolivia corroborates with the international human rights treaties that Bolivia has ratified thus far: the fundamental right to life guarantees against torture and slavery,¹³⁶ right to work in decent conditions and to have decent living conditions,¹³⁷ and right to self-determination in regards to political affiliation,¹³⁸ cultural affiliation,¹³⁹ religion,¹⁴⁰ and even sexual orientation.¹⁴¹

The New Constitution of Bolivia outlines the due process rights of all detained persons¹⁴² and the rights to communicate with a public defender.¹⁴³ Even indigents are protected; sanctions of all types must be actually based on a law existing prior to the commission of the punishable act.¹⁴⁴ Also, only a competent judicial authority has the jurisdiction to execute these

129 *Id.* at art. 3.

130 *Id.*

131 *See id.* at *Titulo dos, Capitulo cuarto [Title II, Chapter IV]*.

132 *See id.* at art. 30.

133 *Id.* at art. 30(14).

134 *Id.* at art. 42.

135 *Id.* at art. 42(3).

136 *Id.* at art. 15.

137 *Id.* at art. 46-48.

138 *Id.* at art. 26.

139 *Id.* at art. 21.

140 *Id.* at art. 21(3).

141 *Id.* at art. 14(2). “The plurinational Bolivia that emerges from the text of the constitution is a profoundly liberal one based on intercultural respect, human rights, and the rule of law.” Postero, et al., *Bolivia’s Challenge to “Colonial Neoliberalism,”* in *NEOLIBERALISM INTERRUPTED: SOCIAL CHANGE AND CONTESTED GOVERNANCE IN CONTEMPORARY LATIN AMERICA* 25, 44 (Mark Goodale & Nancy Postero eds, 2013) [hereinafter *POSTERO, NEOLIBERALISM*].

142 2009 Bolivian Constitution, *supra* note 12, at art. 115(2).

143 *Id.* at art. 73.

144 *Id.* at art. 116(2).

sanctions.¹⁴⁵ But this begs the question of what the qualifications of a competent judicial authority are. Further, if the New Constitution of Bolivia recognizes two legal systems that may simultaneously be in place,¹⁴⁶ then are both the modern and indigenous legal systems instruments of a competent judicial authority?

The New Constitution of Bolivia unequivocally declares the existence of three judicial courts: the Court of Ordinary Jurisdiction, the Agro-Environmental Court, and the Rural Native Indigenous Jurisdiction.¹⁴⁷ Though the Court of Ordinary Jurisdiction and the indigenous jurisdiction share the same hierarchy,¹⁴⁸ the court that defends all constitutional guarantees is the Plurinational Constitutional Court.¹⁴⁹ Thus, this suggests that the government exhibits authority that far exceeds that of the indigenous courts.¹⁵⁰ Further, the indigenous courts are allowed to apply their own principles and customs to the legal system.¹⁵¹ However, they must abide by all the fundamental freedoms guaranteed by the New Constitution of Bolivia.¹⁵² Otherwise, the Constitution's guarantee of indigenous rights does exist: aside from the rights mentioned previously, the indigenous population can create a self-governing entity and create laws and statutes in accordance to the New Constitution of Bolivia.¹⁵³

145 *Id.* at art. 117(1).

146 *Id.* at art. 119(1). Cf. Anna Barrera, *Turning Legal Pluralism into State-Sanctioned Law: Assessing the Implications of the New Constitutions and Laws in Bolivia and Ecuador*, (German Institute for Global and Area Studies Research Programme: Legitimacy and Efficiency of Political Systems, Working Paper No. 176, Aug. 2011, at 12) (comparing the manner in which Bolivia and Ecuador have addressed the challenges posed by the official recognition of the coexistence of a plurality of legal orders since the adoption of their latest respective constitutions and exploring the new challenges that come to the fore):

Bolivia has also established a long list of legal areas for which indigenous authorities may not undertake adjudication, including public and private international law (crimes against humanity, crimes affecting the security of the state, terrorism, trade), criminal law (corruption, the trafficking of human beings, arms, or drugs), or tariff law.

147 2009 Bolivian Constitution, *supra* note 12, at art. 179(1).

148 *Id.* at art. 179(2).

149 *Id.* at art. 179(3).

150 *Bolivia Judge Vote: Void Ballot Papers Dominate Poll*, BBC NEWS (Oct. 17, 2011), <http://www.bbc.com/news/world-latin-america-15330703>. In his effort to encourage democracy in the judicial system, President Morales initiated the first ever ballot election of top judges. *Id.* Some indigenous people responded by spoiling their ballots or leaving it blank. *Id.*

151 2009 Bolivian Constitution, *supra* note 12, at art. 190.

152 *Id.*

153 *Id.* at art. 292.

One might also wonder why the material competence of indigenous authorities remains confined to legal issues that they “traditionally” used to address. Considering the highly dynamic and flexible nature of indigenous legal practices – which has facilitated their adaptation to the living conditions and evolution of indigenous communities for centuries – it seems inappropriate that indigenous authorities are now viewed as incapable of finding

These indigenous rights, as declared by the New Constitution of Bolivia, still give pause because there are specific limits addressing the problem of the recent community justice efforts championed by the indigenous people. Instead, there is a general declaration of the Plurinational Constitutional Court's supremacy that is elected by all peoples of Bolivia.¹⁵⁴ Specifics are, however, left out, leaving it for the Constitutional Court to interpret at a later date.

Under the New Political Constitution of the State of Bolivia, "Bolivia's 36 indigenous tribes will be given 'priority' over citizens of European descent when the revenue from these gas fields is distributed."¹⁵⁵ Moreover, in order to work in the civil service, government employees must speak Spanish in addition to one of the 36 indigenous languages of the country. The New Constitution allowed Morales to seek a second consecutive five-year term and gave him the power to dissolve Congress. The previous Constitution had limited presidents to a single term. Other changes to the Constitution furthered indigenous rights, strengthened state control over Bolivia's natural resources, and enforced a limit on the size of private landholdings.

On January 25, 2009, the people of Bolivia voted in a national referendum to approve the New Political Constitution of the State of Bolivia, which was overwhelmingly passed.¹⁵⁶ Some 59% of the people voted in favor of the new social pact for the country.¹⁵⁷ But the majority of voters around Bolivia's so-called expanded *Media Luna* (Half Moon) – the departments of Santa Cruz, Beni, Tarija, Pando and Chuquisaca – long bastions of separatist sentiment, voted to reject the new Constitution.¹⁵⁸

B. *The Vice-Ministry of Community Justice and the Implementation*

adequate solutions for the recent or future problems of their constituents.

Barrera, *supra* note 146, at 13.

¹⁵⁴ 2009 Bolivian Constitution, *supra* note 12, at art. 196.

¹⁵⁵ Gareth Rubin, *Bolivia Faces Crisis as Evo Morales Wins Referendum*, THE TELEGRAPH (Jan. 26, 2009, 3:13 PM), <http://www.telegraph.co.uk/news/worldnews/southamerica/bolivia/4346584/Bolivia-faces-crisis-as-Evo-Morales-wins-referendum.html>.

¹⁵⁶ Hannah Strange, *Evo Morales Wins Vote on Constitution in Bolivia*, THE TIMES (Jan. 26, 2009, 12:01 AM), <http://www.thetimes.co.uk/tto/news/world/americas/article1999270.ece>.

¹⁵⁷ Matthew Taylor, *Evo Morales Hails 'new Bolivia' as Constitution is Approved*, THE GUARDIAN (Jan. 26, 2009), <https://www.theguardian.com/world/2009/jan/26/bolivia>.

¹⁵⁸ Rubin, *supra* note 155. "Right wing critics, especially the lowlands civic committees and their militants, call Morales an authoritarian and liken him to Venezuela's Chávez." POSTERO, NEOLIBERALISM, *supra* note 141, at 51. See also LINDA C. FARTHING & BENJAMIN H. KOHL, *EVO'S BOLIVIA: CONTINUITY AND CHANGE* 45 (2014): "[T]he regional passion for autonomy has also led some *media luna* residents to no longer see themselves as Bolivians but rather as *campesinos* (lowlanders) or *Cruceños* (from Santa Cruz)."

of Indigenous Customary Law

The Bolivian Vice-Ministry of Community Justice¹⁵⁹ has worked to “legally recognize and regulate ancient indigenous community justice practices.”¹⁶⁰ This Ministry was formed in 2006 by President Evo Morales and he appointed an indigenous Andean, Vellentin Ticona, to the Ministerial post.¹⁶¹ Assuming his duty as Minister, Ticona took the initiative to meet with various leaders of the National Counsel of the Ayllus, Markas, and Qullasuyu indigenous communities to put together workshops and seminars in an effort to “create a consensus among indigenous groups as to how the community justice regulations should look.”¹⁶² Minister Ticona publically stated his desire to restructure the current justice system in order to make community justice options a possible alternative to the current system.¹⁶³ In response to this new program, the majority Movement to Socialism (MAS) Congress responded favorably.¹⁶⁴

The traditional justice mechanisms in the new “Plurinational State of Bolivia” have not undergone radical changes. However, perhaps symbolically, the social transformation of the Plurinational State became a formal political expression that sets the stage for the democratic cultural revolution of the Morales Administration.

In late 2006, a bill was drafted to assure the recognition of the indigenous-ancestral-communitary justice (a political-indigenous unit based in the actual occupied territory) and campesino-communitary justice, the latter which is fundamentally a land labor union conflict-solving system. The bill recognized the indigenous or the campesinos’ right to political and judicial self-government. However, this self-government can only act in observance of the fundamental rights of the New Constitution of Bolivia (approved by referendum on January 25, 2009).¹⁶⁵ Judicial indigenous-campesino authorities can take actions in solving conflicts between citizens (no matter the ancestral or political status) only if the conflict occurred

159 The “Viceministerio de Justicia Indígena Originaria Campesina” or the Vice-Ministry of Indigenous, Original Peoples, and Farmworkers Justice.

160 *Bolivia: Morales establishes new Ministry of Community Justice*, CULTURAL SURVIVAL, (last visited Feb. 10, 2018), <http://www.culturalsurvival.org/news/bolivia-morales-establishes-new-ministry-community-justice>.

161 *Id.*

162 *Id.*

163 *Id.* “[A] process through which theft, land conflicts, marital conflicts, or more serious crimes, are adjudicated and sanctioned by community councils.” *Id.*

164 *Id.*

165 Ley de Justicia Comunitaria de los pueblos indígenas-originarios y comunidades campesinas, MPR-DGGP N°. 393/2006, Dec. 31, 2006.

inside the indigenous-campesino territorial unit.¹⁶⁶

The law - “Ley de Justicia Comunitaria de los pueblos indígenas- originarios y comunidades campesinas” - was passed into law on December 29, 2010,¹⁶⁷ and makes the new legal system mandatory for indigenous and campesino communities.¹⁶⁸ Article 10 of the law, titled “Carácter Obligatorio” provides that:

The indigenous jurisdiction for the indigenous and campesinos that reside in their communities, where they have been produced and where authorities exist and customary procedures are known by their own uses and customs. The decisions of the authorities and indigenous and campesino communities in the exercise of their own customary law are mandatory and must be respected and accepted by the parties to a conflict, and all the previewed authorities in the Bolivian juridical order. (author’s translation)¹⁶⁹

At the writing of this Article, there have been no serious studies to document any standards and procedures for the resolution of conflicts in indigenous or campesino communities in Bolivia. Nor were there any academic, political, or judicial debates about this bill. No real studies were undertaken but several opinion pieces have been published.¹⁷⁰

¹⁶⁶ *Id.* at art. 8.

¹⁶⁷ Ley No 073 de Deslinde Jurisdiccional de 29 de diciembre de 2010, sobre la administración de justicia ordinaria y justicia indígena. *See Bolivia aprobó una peligrosa ley de justicia indígena*, INFOBAE AMERICA, June 8, 2010, <http://www.infobae.com/2010/06/09/1000393-bolivia-aprobo-una-peligrosa-ley-justicia-indigena/>.

¹⁶⁸ Ley de Justicia Comunitaria de los pueblos indígenas- originarios y comunidades campesinas, MPR-DGGP N°. 393/2006, Dec. 31, 2006, art. 6.

¹⁶⁹ INSTRUMENTOS INTERNACIONALES Y DOCUMENTOS ANDINOS SOBRE ADMINISTRACIÓN DE JUSTICIA INDÍGENA, ART. 10 CARÁCTER OBLIGATORIO, <http://portal.uasb.edu.ec/UserFiles/369/File/PDF/CentrodeReferencia/Temasdeanálisis2/administracionyjusticiaindigena/documentos/anteproyectobolivia.pdf>.

La jurisdicción indígena es obligatoria para los indígenas y campesinos que residan en sus comunidades, en donde se haya producido el hecho y en donde existan autoridades indígenas y procedimientos consuetudinarios reconocidos por sus usos y costumbres. Las decisiones de las autoridades de los pueblos y comunidades indígenas-campesinas, en ejercicio de su propio Derecho Consuetudinario, son obligatorias y deben ser respetadas y acatadas por las partes intervinientes en el conflicto, y por toda autoridad prevista en el ordenamiento jurídico boliviano.

¹⁷⁰ Jorge Machicado, *Conductas reprobadas y penas en la comunidad*, LA RAZON, Sept. 24, 2013, http://www.la-razon.com/index.php?url=/la_gaceta_juridica/Conductas-reprobadas-penas-comunidad_0_1912008866.html. *See also* Idón Moisés Chivi Vargas, *La Jurisdicción Indígena Originaria Campesina desde la perspectiva de la descolonización del derecho*, BOLPRESS.COM, Jan. 14, 2010, <http://www.bolpress.com/?Cod=2010011413>. The Bolivian government provided a report to the United Nations on its efforts to protect and promote the rights of indigenous peoples, but without fully detailing the traditional justice system being implemented. INFORME DEL GOBIERNO DEL ESTADO PLURINACIONAL DE BOLIVIA SOBRE LOS DERECHOS DE LOS PUEBLOS INDÍGENAS, Jan. 2011, http://www.un.org/esa/socdev/unpfii/documents/session_10_Bolivia.pdf (last visited on Mar. 5, 2017).

The most important reform in the Bolivian legal system recognized the political traditions among campesinos and indigenous populations as territorial units. Thus, indigenous or campesinos communities can be upgraded from districts to municipalities as well as to sub-regions. Moreover, they can all begin to experiment with self-government, allowing the influence and control of the nine regions in Bolivia to increase while diminishing the relation to state institutions.

On August 2, 2009, President Morales ruled by decree that until August 23, all the indigenous communities interested in being activated as a self-governing unit must make a formal request to the National Electoral Court (Plurinational Electoral Organ) for a local referendum when the option of indigenous autonomy status is tested.¹⁷¹ The new geopolitical units became thirty-seven extra competencies. Those competencies were described in a law for autonomies and decentralization presented in July 2010 by the Decentralization Ministry.¹⁷² Legislative projects have been structured (only by the Executive) without a political or technical debate that was inherited by the Bolivian Congress in order to reshape the Plurinational State.

The objective of the institutionalization and regulation of legal pluralism is not simply to recognize indigenous jurisdiction; it aims to reduce the backlog in the national system and provide for a cheaper and swifter administration of justice. Furthermore, in various countries the incorporation of indigenous jurisdiction reflects an attempt to eliminate other forms of extra-institutional conflict resolution and violence.¹⁷³

In other words, community justice policies are meant to curtail vigilantism, not to encourage it.¹⁷⁴ According to the Vice-Minister of Community Justice in 2009, such justice “is a system of norms and procedures that regulate the social life of the indigenous peoples and contain

171 Decreto Supremo N° 231, Aug. 2, 2009, <http://www.lexivox.org/norms/BO-DS-N231.xhtml>.

172 Decreto Supremo N° 0802, July 19, 2009, http://anterior.gacetaoficialdebolivia.gob.bo/normas/verGratis_gob/139034.

173 Assies, *supra* note 10, at 13.

174 For Leila Chirayath, Caroline Sage and Michael Woolcock, (referring mostly to African countries), customary systems of law have been “seeded into communities by national or regional governments for a variety of reasons: . . . preempting *vigilantism* in communities that feel marginalized by existing procedures.” Leila Chirayath et al., *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems*, 9 (2005), http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf.

some principles that are not contemplated in ordinary justice.”¹⁷⁵ The distinctive elements are that “the justice of this type is free, public, preventive, oral, reparatory and immediate.”¹⁷⁶

In the aftermath of the high-profile lynching of three off-duty police officers in Epizana, Deputy Interior Minister Ruben Gamarra told Reuters that “community justice has nothing to do with lynchings. “It’s to resolve minor disputes between neighbors. In no way does it mean physical punishment, much less an assassination.”¹⁷⁷ Clearly, things remain in flux and uncertainty surrounds where competencies lie. Simultaneously, there are increasing trends towards the use and execution of indigenous justice in Bolivia, particularly in the Cochabamba and Santa Cruz Departments. The lynch mob fills the vacuum left by the state, where it is unwilling or unable to exact justice. For Professor Daniel Goldstein, this form of self-help is directly attributable to the neoliberal economic model embraced in the 1990s during the first presidency of Gonzalo Sánchez de Lozada.¹⁷⁸ The lynchings are “ritual expressions of belonging that act to render the actors visible to the state and call attention to the neoliberal state’s neglect of their rights as citizens.”¹⁷⁹

Police corruption also leads to vigilantism, further weakening the monopoly of force that the Bolivian state should exercise.

The extortion committed against crime victims and their families by the national police represents another form of Bolivian privatization, in this case the privatization of public functions by the very personnel charged with their execution. Police corruption converts the public administration of justice into a private resource that maintains both individual police officers, and, ironically, the police institution

175 “De acuerdo con el viceministro del área, Valentín Ticona, esta justicia ‘es un sistema de normas y procedimientos que regulan la vida social de los pueblos indígenas y contiene algunos principios que no contempla la justicia ordinaria’” (translation by author). *Justicia Comunitaria Cambia de Nombre Para Mejorar Imagen*, EJU: POLÍTICA (Mar. 30, 2009, 10:02 A.M), <http://eju.tv/2009/03/justicia-comunitaria-cambia-de-nombre-para-mejorar-imagen/>.

176 “En su opinión, estos elementos distintivos son que ‘la justicia de este tipo es gratuita, pública, preventiva, oral, reparadora e inmediata.’” (translation by author). *Id.*

177 Reuters, *Three Police Officers Lynched*, *supra* note 37.

178 See generally Daniel M. Goldstein, “*In our own Hands*”: Lynching, Justice and the Law in Bolivia, in 30 AMERICAN ETHNOLOGIST 22-43 (2003) (“[J]ust a few weeks prior to his forced resignation in 2003, President Sanchez de Lozada responded to increasingly strident calls for improved ‘citizen security’ in Bolivia by announcing a plan (never implemented) to create ‘anti-crime gangs’ (*pandillas anticrimen*) in various Bolivian cities. These gangs, officially known as ‘youth citizen security brigades’ (*brigadas juveniles de seguridad ciudadana*), would have consisted of young people who would patrol certain zones of the city, confronting other, criminal youth gangs and somehow preventing them from committing crimes.”). Goldstein-Flexible Justice, *supra* note 28, at 259.

179 POSTERO, *supra* note 40, at 18.

itself.¹⁸⁰

The proliferation of private security guards, so pervasive in other parts of Latin America, is part of this trend.¹⁸¹ In the region, long are the memories of surveillance societies that came with secret police files, torture, and disappearance or exile. In the aftermath of military dictatorships, societies are left scarred by the wholesale slaughter of their citizens. With the military having less of a governance role more recently, the people, dispossessed by the globalization process, take to the streets in protests, resulting in violence, destruction, and petty theft. Multinational corporations and the international financial institutions are increasingly viewed as the enemies, often viewed as the foreign investors who increase the prices for basic services on which everyone depends.¹⁸²

Neoliberal violence, including physical violence produced by the military, police personnel, private security guards, and lynch mobs, and the structural violence of poverty and insecurity, are all grounded in the reforms of the neoliberal state and the cultural logic of privatization, flexibility, and self-help that accompanies them.¹⁸³

The wholesale rejection of the Western tradition of criminal procedure and the battle against the anti-corporatist agendas are conflated into a general narrative that rejects Western or developed countries' ideas, aid programs, and development strategies and a retrenchment into exercises of the right of self-determination with some legal basis for the actions.¹⁸⁴

180 Goldstein, *Flexible Justice*, *supra* note 28, at 256.

181 Katherine Corcoran, *Private firms filling Latin America's security gap*, SAN DIEGO UNION-TRIB., Nov. 26, 2014, <http://www.sandiegouniontribune.com/sdut-private-firms-filling-latin-americas-security-gap-2014nov26-story.html>. Adam Blackwell, *The Unregulated and Threatening Growth of Private Security in Latin America*, Wilson Center Latin American Program (June 2015),

<https://www.wilsoncenter.org/sites/default/files/Private%20Security%20in%20Latin%20America.pdf>.

182

Time and time again global institutions such as the World Bank and the International Monetary Fund (IMF) advised and coerced Bolivia to make their theory Bolivia's practice. Successive governments, led by a small and affluent national elite, adopted the rules wholesale, out of both ideology and self-interest. They privatized public water systems and the nation's valuable gas and oil reserves into foreign corporate hands. They sold off state-owned businesses, also to foreign companies. They cut public spending and raised taxes in order to pay off foreign debt.

Jim Shultz, *Conclusion: What Bolivia Teaches Us*, in *DIGNITY AND DEFIANCE: STORIES FROM BOLIVIA'S CHALLENGE TO GLOBALIZATION* 291, 291-2 (Jim Shulte & Melissa Crane Draper eds., 2008).

183 Goldstein, *Flexible Justice*, *supra* note 28, at 259.

184

In its visceral, inescapable visual immediacy, vigilante lynching in Cochabamba is a kind of spectacle, a performance whose audience includes both potential criminals and the state itself. For people long excluded from the official realms of political and social life and unable to have their demands registered by the legally constituted authorities, taking 'justice' into their own

The next part of this Article explores Bolivia's legal obligations under international human rights treaties and the manner in which parts of the indigenous justice system may breach some of these provisions.

III. BOLIVIA'S INTERNATIONAL LEGAL OBLIGATIONS

Bolivia's steps toward modernization over the last century include its participation in international treaties and covenants regarding human rights. However, these international obligations may come into conflict with the obligations it owes its indigenous peoples. The Bolivian Government, under President Evo Morales, will have to buffer the increasing tensions between modern obligations and ancient tribal justice. The two different types of international obligations outlined here are those signed within the Americas and those that include the rest of the global community. Part A includes the relevant Inter-American treaties that Bolivia has signed, ratified, and deposited. Part B includes the relevant international treaties that create obligations to which the Bolivian Government must adhere. Part C is an outline of the parts of the new Bolivian Constitution that pertain to human, women, political, and economic rights issues. Finally, Part D attempts to summarize the reality of the Constitutional effect on the indigenous population.

C. Treaties of the Americas

1. American Convention on Human Rights

The American Convention on Human Rights (hereinafter "the American Convention" or "IACHR") was established in San Jose, Costa Rica in 1969.¹⁸⁵ However, the treaty did not enter into force until July 18, 1976. Bolivia ratified the treaty on June, 20, 1979. Further, the country also declared adherence to the treaty in a formal letter in 1993.¹⁸⁶ The earliest treaty of its kind, the IACHR is a predecessor to the international treaties to which Bolivia would later accede.

hands is a dramatic way to capture the attention of an inattentive audience.

DANIEL M. GOLDSTEIN, *THE SPECTACULAR CITY: VIOLENCE AND PERFORMANCE IN URBAN BOLIVIA* 25 (2004).

¹⁸⁵ Organization of American States, American Convention on Human Rights ("Pact of San Jose, Costa Rica" (B-32)), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, <http://www.oas.org/juridico/English/treaties/b-32.html> [hereinafter *The American Convention*].

¹⁸⁶ See Organization of American States, American Convention on Human Rights Pact of San Jose, Costa Rica, Treaty Reference Guide, <http://www.oas.org/juridico/English/sigs/b-32.html> (last visited Feb. 7, 2013).

Though the treaty advocates abolishing capital punishment, it recognizes that many signatories to the treaty have yet to abolish the death penalty. Instead, the treaty places restrictions on the types of crimes that can be punishable by death.¹⁸⁷ The death penalty cannot be inflicted for political offenses or any common crimes.¹⁸⁸ Moreover, only adults over the age of eighteen can be punished with the death penalty.¹⁸⁹

The treaty requires signatory parties to treat prisoners with dignity.¹⁹⁰ Cruel, inhuman, or degrading punishment or treatment is forbidden.¹⁹¹ The treaty forbids slavery yet allows forced labor if authorized by competent judicial authorities.¹⁹² An individual's due process rights are also fully protected under the treaty.¹⁹³

Only after adhering to the American Convention did Bolivia sign several other international treaties submitted to the United Nations. These international agreements echo much of what the American Conventions strive to achieve. Thus, the conflicts that arise from Bolivia's obligations to the international treaties will also be found in the American Convention. Because there are more international agreements than American conventions, this paper will delineate these conflicts in Part D instead.

2. *American Convention to Prevent and Punish Torture*

The American Convention to Prevent and Punish Torture (hereinafter "the American Torture Convention") was adopted at Cartagena de Indias in Colombia by the Organization of American States in 1985.¹⁹⁴ The agreement came shortly after the adoption of the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (hereinafter "CAT") and is essentially the same in its objectives. Bolivia signed the American Torture Convention the day of its adoption, but it was not until November 2006 that the country ratified the treaty.¹⁹⁵ In contrast, Bolivia ratified the CAT in 1999.¹⁹⁶ Because of the similarities between

187 The American Convention, *supra* note 185, art. 4, ¶ 2.

188 *Id.* art. 4, ¶ 4.

189 *Id.* art. 4, ¶ 5.

190 *Id.* art. 5.

191 *Id.*

192 *Id.* art. 6.

193 *Id.* art. 7-11.

194 Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67, <http://www.oas.org/juridico/English/treaties/a-51.html> [hereinafter Prevent and Punish Torture].

195 See Inter-American Convention to Prevent and Punish Torture, Treaty Reference Guide, <http://www.oas.org/juridico/English/signs/a-51.html>. (last visited Feb. 7, 2013).

196 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 12, 1984, 1465 U.N.T.S. 85 (entered into force May 12, 1999),

the two agreements, the CAT will delineate the issues Bolivian law faces in the new era.

D. Other International Treaties and Sources

1. Rome Statute of the International Criminal Court

The basic foundation for human rights is reflected in the establishment of the International Criminal Court (hereinafter “ICC”). The Rome Statute of the International Criminal Court (hereinafter “the Rome Statute”) was adopted on July 17, 1998 to promote justice for international war crimes such as genocide and other crimes against humanity.¹⁹⁷ Embedded in the Rome Statute is the delineation of what constitutes a crime against humanity and the treatment of those who are charged with crimes against humanity (in addition to crimes of aggression, war crimes and genocide). The criminal law and procedure established by the Rome Statute is reflected in many States’ domestic constitutions. Bolivia signed the treaty in on July 17, 1998 and officially ratified the statute in June 27, 2002.¹⁹⁸

The New Political Constitution of the State of Bolivia, which was adopted by national referendum on January 29, 2009, reflects Bolivia’s adherence to the definition of genocide in the Rome Statute. The Rome Statute defines genocide as:

“any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; and (e) forcibly transferring children of the group to another group.”¹⁹⁹

In order to adhere to the Rome Statute, Bolivia began to draft the implementation of the statute in its legislation in October of 2005.²⁰⁰

<http://treaties.un.org/Pages/showDetails.aspx?objid=080000028003d679> [hereinafter Convention against Torture].

¹⁹⁷ Rome Statute of the Int’l Crim. Court, July 17, 1998, 2187 U.N.T.S. 3, <http://treaties.un.org/doc/Publication/UNTS/Volume%202187/v2187.pdf> [hereinafter, Rome Statute].

¹⁹⁸ Rome Statute, United Nations Treaty Collection, Full Text and Details, <http://treaties.un.org/Pages/showDetails.aspx?objid=0800000280025774> (last visited Feb. 7, 2013).

¹⁹⁹ Rome Statute, *supra* note 197, art. 6.

²⁰⁰ Coalition for the International Criminal Court, Anteproyecto de Ley de Adecuación Normativa al ECPI [Bolivia Draft International Criminal Court (ICC) Implementation Bill], http://www.iccnw.org/documents/Bolivia_DraftImplementationBill_Oct05.pdf.

According to the New Bolivian Constitution: “The crimes of genocide, offenses against humanity, treason, and war crimes are not extinguishable.”²⁰¹

2. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – including the Optional Protocol*

Bolivia signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment²⁰² on February 4, 1985 and signed its accession on April 12, 1999.²⁰³ In addition to the adherence of the original CAT, Bolivia also signed a declaration establishing the acknowledgment of the Committee Against Torture on February 14, 2006.²⁰⁴ This separate declaration is optional under Article 21 of the Convention. This declaration allows Bolivia to enforce the provisions of the Convention against any other State that has made the same declaration.²⁰⁵ Other States may, likewise, enforce the provisions of the convention against Bolivia as well.²⁰⁶ Bolivia also signed the Optional Protocol of the CAT on May 22, 2006 and ratified the protocol on May 23, 2006.²⁰⁷

The CAT defines torture as any act in which severe pain or suffering is intentionally inflicted on a person to either obtaining a confession or information from him, or to punish him.²⁰⁸ The CAT also requires each signed party “to take effective legislative, administrative, judicial or other measures to prevent acts of torture.”²⁰⁹ CAT also requires that the act of torture constitutes a criminal offense.²¹⁰ The Bolivian Penal Code reflects its support for the convention through subtle wording regarding torture and

201 2009 Bolivian Constitution, *supra* note 12, art. 111.

202 Convention against Torture, *supra* note 196.

203 *Id.*

204 *Id.*

205 *Id.*

206 *Id.*

207 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 18, 2002, 2375 U.N.T.S. 1, <http://treaties.un.org/Pages/showDetails.aspx?objid=080000028003d68b>.

208 Convention against Torture, *supra* note 196, art. 1. See Richard P. Shafer, *Construction and Application of United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment*, 184 A.L.R. Fed. 385 (2003) (explaining the definition of torture in the CAT and the application of torture, including the observation that the death penalty does not constitute as torture).

209 Convention against Torture, *supra* note 196, art. 2(1).

210 *Id.* art. 4.

cruel punishment.²¹¹ The code is defined as a progressive prison system that aims for social rehabilitation, not for obtaining information, confession, or a means of punishment. Prisoners who are illiterate will be taught a basic education.²¹²

Similar to many modern legal systems, the Bolivian Penal Code also has discrete sentences for mayhem and murder, including the following: when a person creates any danger of damage, he is liable for imprisonment of one to four years.²¹³ Homicide in general may be punished with five-twenty years imprisonment,²¹⁴ while murder requires at least thirty years of imprisonment.²¹⁵ Parricide, the murder of a parent, is also condemned to at least thirty years.²¹⁶

The Bolivian Penal Code provides that crimes of homicide result in adequate imprisonment sentences. More specifically, the Bolivian Penal Code is dotted with references to a rehabilitating criminal prison system. Under Chapter III, Article 47, those who are convicted of crimes are not deprived of basic human rights.²¹⁷

Despite cooperation and steps toward modernization, Bolivia is careful not to complicate itself with treaties that may later create conflicts of interest. An amendment to CAT in 1992 allowed one State to petition for a new amendment to the CAT. If the proposed amendment is passed with a two-thirds vote, then all States who signed the original CAT would also be bound by the amendment.²¹⁸ Bolivia has yet to sign the amendment, and thus is not bound by any amendments proposed by any party to the Convention.

3. *Convention on the Elimination of All Forms of Discrimination against Women – including Optional Protocol*

Entered into force in 1989, the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter “CEADW”)

211 Código Penal Boliviano. Sancionado por el Decreto Ley N° 10426, de 23 de agosto de 1972. Incluye modificaciones según Ley N° 1768 de modificaciones al Código Penal y actualización según Ley 2494 de 04 de agosto de 2003, http://www.oas.org/juridico/MLA/sp/bol/sp_bol-int-text-cp.html [hereinafter the Bolivian Penal Code].

212 *Id.* art. 47.

213 *Id.* art. 208.

214 *Id.* art. 251.

215 *Id.* art. 252.

216 *Id.* art. 253.

217 *Id.* art. 47.

218 Amendments to articles 17 (7) and 18 (5) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Sept. 8, 1992 (not yet entered in force), <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9-a.en.pdf>.

represented advancement of women's rights.²¹⁹ Bolivia signed the treaty on May 30, 1980 and later ratified it on June 8, 1990.²²⁰ The treaty aimed to end discrimination against women, including modifying social and cultural norms of men and women to eliminate the idea of inferiority or superiority of one gender over the other.²²¹ To eliminate prejudices, both sexes have to be treated the same.

The Bolivian Penal Code makes it a crime to abandon a pregnant woman,²²² and imprisonment for this crime varies from six months to three years.²²³ However, if the abandonment results in the crime of abortion, infanticide, abandonment or exposure of the newborn, then imprisonment is between one to five years.²²⁴ As implied previously, and unlike the United States, abortion is a crime throughout the country.²²⁵ The convention is silent on the matter of abortion.

4. *International Covenant of Civil and Political Rights*

The International Covenant on Civil and Political Rights (hereinafter "ICCPR") served to replicate and further expand the ideals of the Universal Declaration of Human Rights.²²⁶ Adopted and open for ratification on December 16, 1966, Bolivia did not accede to the ICCPR until August 12, 1982.²²⁷ Aside from repeating the essential human freedoms, the ICCPR delineated inalienable due process rights of each individual. By signing the treaty, the State guarantees that each person within its jurisdiction has competent judicial, administrative, and legislative rights.²²⁸ The covenant also reinstates the treaties regarding torture and cruel punishment and slavery.²²⁹

219 Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, <http://treaties.un.org/doc/Publication/UNTS/Volume%201249/volume-1249-I-20378-English.pdf>. [hereinafter CEADW].

220 United Nations Treaty Collection, CEADW, Treaty Reference Guide, <http://treaties.un.org/Pages/showDetails.aspx?objid=080000028000309d> (last visited Feb. 7, 2013).

221 CEADW, *supra* note 219, art. 5.

222 The Bolivian Penal Code, *supra* note 211, art. 250.

223 *Id.*

224 *Id.*

225 *Id.* art. 263.

226 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> [hereinafter ICCPR].

227 United Nations Treaty Collection, International Covenant on Civil and Political Rights, Treaty Reference Guide, <http://treaties.un.org/Pages/showDetails.aspx?objid=0800000280004bf5> (last visited Feb. 10, 2018).

228 ICCPR, *supra* note 226, at art. 2(3).

229 *Id.* art. 7-8.

Bolivia's acceptance of the Covenant is reflected in the country's Penal Code, which prohibits sentencing of a person of any penalty without being heard by a court and judged under the country's Criminal Procedure Code.²³⁰ It is a constitutional guarantee that there be no condemnation without trial and due process.²³¹ Moreover, aligning with the ICCPR and other treaties mentioned above, a person who is convicted or indicted of an offense is entitled to be treated with due respect as a human being.²³²

Capital punishment may only be carried out by a court of competent jurisdiction.²³³ However, the Covenant's view on a "competent" court is absent in a state where the indigenous peoples may carry out their own legal authority. If capital punishment is given to an indigent, the ICCPR grants the individual a right to seek pardon or commutation.²³⁴ The ICCPR's clarity in the gravity of capital punishment stems from the inherent belief that a human has the inherent right to life that is protected by law.²³⁵

Along the lines of human rights, the ICCPR forbids any interpretation of the Covenant that gives a group of people the right to perform an activity that is aimed at the destruction of any of the rights provided by the covenant.²³⁶ Moreover, there can be no restriction against the human rights recognized by the ICCPR despite contradictions from the State's law, conventions, regulations or custom.²³⁷ These contradictions to human rights are also those that this Article strives to determine. The ICCPR claims certain human rights as superior to those rights delineated by the State's own laws. However, in recent Bolivian history, the law has been rapidly strengthening the rights and competence of the Bolivian indigenous people.²³⁸ The Bolivian Criminal Procedure Code now recognizes the differences in the customary practices of the indigenous groups scattered throughout Bolivia.²³⁹ In a discrete article, the code allows the resolution of a dispute between members of an indigenous tribe using custom so long

230 Código de Procedimiento Penal No. 1970, art. 1, Ley del 25 de Marzo de 1999 [Criminal Procedure Code No. 1970, art. 1, Law of Mar. 25, 1999] http://www.oas.org/juridico/MLA/sp/bol/sp_bol-int-text-cpp.html [hereinafter CPC].

231 ICCPR, *supra* note 226, art. 1.

232 *Id.* art. 5.

233 *Id.* art. 6(2).

234 *Id.* art. 6(4).

235 *Id.* art. 6(1).

236 *Id.* art. 5.

237 *Id.* art. 5(2).

238 *See*, G.A. Res. 61/295 at 2, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007), http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/61/295&referer=/english/&Lang=E (parties of the United Nations formally recognize that indigenous people share all inherent and fundamental human rights; Bolivia voluntarily signed the declaration despite the document being non-binding) [hereinafter "DRIP"].

239 CPC, *supra* note 230, art. 28.

as it does not contradict the fundamental rights provided by the government.²⁴⁰ The passing of the New Bolivian Constitution only furthers confusion of how the government may reconcile its international obligations and its obligation to its citizens.

5. *Convention on the Rights of the Child*

The Convention on the Rights of the Child (hereinafter “CRC”) recognizes the importance of ensuring a child’s welfare.²⁴¹ Bolivia became one of the signatory parties on July 25, 1990.²⁴² Article III of the CRC requires signed parties to ensure that each child under its jurisdiction receives the “protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her [] [when enacting] all appropriate legislative and administrative measures.”²⁴³

Its protection of children’s rights is adapted into the penal code, making it a crime for certain child-related offenses. All parents have a preliminary duty of care for their children in which they must provide primary age children with educational instruction.²⁴⁴ Neglect is also a punishable crime. If a parent abandons a child of twelve years and younger, the parent is punished with imprisonment between three months to two years.²⁴⁵ A significant step toward modernization, the Bolivian Penal Code also penalizes sexual relations with a child under seventeen years old.²⁴⁶

6. *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*

The Supplementary Convention to the 1926 Abolition of Slavery entered into force on September 7, 1956.²⁴⁷ The Supplementary Convention aims to eliminate slavery in all States that have signed the original Convention.²⁴⁸ Even in a State where slavery is not eliminated, it is a crime to force another

²⁴⁰ *Id.*

²⁴¹ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, <http://treaties.un.org/doc/Publication/UNTS/Volume%201577/v1577.pdf>.

²⁴² *Id.* pmb1. n1.

²⁴³ *Id.* at art. 3(2).

²⁴⁴ The Bolivian Penal Code, *supra* note 211, at art. 249.

²⁴⁵ *Id.* at art. 278.

²⁴⁶ *Id.* art. 318.

²⁴⁷ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3, <http://www.ohchr.org/Documents/ProfessionalInterest/slaverytrade.pdf>.

²⁴⁸ *Id.* at art. 1.

person into a servile status as punishment or for any reason.²⁴⁹ Bolivia formally accepted the treaty on October 6, 1983.²⁵⁰

In the Bolivian Penal Code, Bolivia makes it a crime to reduce a person to slavery or similar status.²⁵¹ The penalty is two to eight years in prison.²⁵² Furthermore, any person who deprives another of personal liberty is liable for imprisonment of six months to two years.²⁵³ This distinct violation against slavery or servile status will later run into conflict with indigenous customs and practices that allow submitting a violator to servile status.

7. *International Covenant on Economic, Social and Cultural Rights*

At the forefront of the government's attempt to reconcile indigenous judicial customs with international standards is the growing division among ethnic Bolivians on economic and social issues. When the International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR")²⁵⁴ was opened for signature on December 16, 1966, the rights of indigenous people were not considered in the Covenant's coverage. However, the United Nations does recognize that indigenous peoples have the right to all fundamental protections.²⁵⁵ Keeping the importance of that notion, this Article provides some prominent regulations outlined by the ICESCR that ensures every individual has the freedom to enjoy his or her economic, social, and cultural rights.

Among the Covenant's governing economic rights, the ICESCR ensures that each individual has safe work conditions, sustainable work costs, and a decent living to provide means of sustenance.²⁵⁶ Moreover, each individual has the right to join labor unions to ensure the economic rights recognized by the ICESCR.²⁵⁷ However, the reality of this may be compromised by the type of work and racial tensions experienced by Bolivia's indigenous population.

²⁴⁹ *Id.* at art. 5.

²⁵⁰ United Nations Treaty Collection, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XVIII-4&chapter=18&Temp=mtdsg3&clang=_en.

²⁵¹ The Bolivian Penal Code, *supra* note 211, at art. 292.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, <http://treaties.un.org/doc/Publication/UNTS/Volume%20993/volume-993-I-14531-English.pdf> [hereinafter ICESCR].

²⁵⁵ See DRIP, *supra* note 238, pmb1.

²⁵⁶ ICESCR, *supra* note 254, at art. 7.

²⁵⁷ *Id.* at art. 8.

Prior to the international recognition of women's rights, the ICESCR recognized that "special protection should be accorded to mothers during a reasonable period before and after childbirth."²⁵⁸ Akin to maternity leave, mothers should be accorded with a salary for the duration before and after childbirth.²⁵⁹ In furthering social rights, the ICESCR recognizes the importance of education in cultivating a free society.²⁶⁰ Moreover, primary education is compulsory and free for both sexes.²⁶¹ It is also required that everyone have equal access to a higher education.²⁶²

Though adopted at the same time as the ICCPR, the ICESCR is much shorter in length. Perhaps because the ICESCR serves as a much more generalized guideline, the economic, social, and cultural obligations for a developing country are vastly different from that of a developed country. Thus, the Economic and Social Council of the United Nations mandates that each signed party furnish reports outlining the implementations of ICESCR into its legislature.²⁶³ Further, reports are to be furnished at different stages and times decided by the Council for each signatory party.²⁶⁴ Bolivia's last response to the Economic and Social Council was in April 2008 in a report to complement its latest periodic report submitted earlier in January 2007.²⁶⁵ In that report, Bolivia formulated its plan to "decolonize the justice system."²⁶⁶ The government is aware of the ethnic tensions that arise from the lack of a pluralistic justice system.²⁶⁷

Thus, the New Constitution of Bolivia aims to promote a greater participation from all people, especially those who have been traditionally marginalized.²⁶⁸ The plan also seeks to remodel the method of administering justice because the current legal system is colonial and thus, outdated.²⁶⁹ An important recognition concerns indigenous people and the

258 *Id.* at art. 10(2).

259 *Id.*

260 *Id.* at art. 13.

261 *Id.* at art. 13(2)(a).

262 *Id.* at art. 13(2)(c).

263 *Id.* at art. 17.

264 *Id.*

265 U.N. ECON. & SOC. COUNCIL [ECOSOC], *Implementation of the International Covenant on Economic, Social and Cultural Rights: consideration of reports submitted by States parties in accordance with article 16 of the International Covenant on Economic, Social and Cultural Rights: Replies by the Government of Bolivia to the list of issues (E/C.12/BOL/Q/2) to be taken up in connection with the consideration of the combined second, third and fourth periodic reports of Bolivia concerning the rights referred to in articles 1-15 of the International Covenant on Economic, Social and Cultural Rights*, E/C.12/BOL/Q/2/Add.1 (30 April 2008), <http://www.refworld.org/docid/48d0c36c2.html>.

266 *Id.* at art. 103 ¶21(a).

267 *Id.*

268 *Id.*

269 *Id.* at art. 103 ¶21(b).

customary justice system. Although the plan advocates the use of an indigenous justice system as an alternative means to settling disputes, it is also silent on the issue of criminal matters.²⁷⁰

8. *United Nations Declaration on the Rights of Indigenous Peoples*

Though not a binding instrument, the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter “DRIP”) was adopted by 143 Member States of the United Nations on September 13, 2007.²⁷¹ The DRIP served as a standard of achievement to be pursued for each Member State.²⁷² Bolivia has recognized these rights and is especially adamant in implementing it in the country’s Political Constitution of the Plurinational State of Bolivia.²⁷³

A recurring theme in the DRIP is the call for indigenous peoples to achieve self-determination or self-autonomy.²⁷⁴ But in promoting self-government, much like Bolivia is facing now, there is conflict between the State and the indigenous self-government. Hence, the DRIP urges the State to consult and cooperate with the indigenous peoples before it adopts and implements legislative or administrative measures that may affect the indigenous.²⁷⁵ Simultaneously, DRIP also clarifies its stance that although the indigenous population should maintain their distinctive customs and judicial systems, they also have to adhere with international human rights standards.²⁷⁶ Ideally, the DRIP will eventually provide for cooperation between the State and the indigenous government as conflicts are to be resolved by considering both international human rights and indigenous legal systems.²⁷⁷

International Labour Organization Convention No. 169²⁷⁸ carried the

²⁷⁰ *Id.* at art. 103 ¶24(a)(ii).

²⁷¹ 143 states voted in favor, while there were 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). Declaration on the rights of indigenous peoples, United Nations Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx> (last visited on Aug. 18, 2017).

²⁷² See DRIP, *supra* note 238. Indeed, DRIP served as a standard of achievement to be pursued for each Member State.

²⁷³ See 2009 Bolivian Constitution, *supra* note 12, at *Título dos, Capítulo cuarto [Title II, Chapter IV]*. *An entire chapter on indigenous due process rights is delineated in the New Constitution of Bolivia.*

²⁷⁴ See DRIP, *supra* note 238, at art. 2 (indigenous peoples have the right to autonomy when they exercise their self-determination right); *Id.* at art. 34 (“indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs...”).

²⁷⁵ *Id.* at art. 19.

²⁷⁶ *Id.* at art. 34.

²⁷⁷ *Id.* at art. 40.

²⁷⁸ ILO, PROGRAMME TO PROMOTE ILO CONVENTION NO. 169 - INTERNATIONAL LABOUR

“basic theme of the right of indigenous peoples to live and develop by their own designs as distinct communities.”²⁷⁹ This Convention helped precipitate many constitutional reforms around Latin America in the last two decades of the twentieth century. ILO Convention No. 169 is the most definitive and accepted international legal instrument to provide the underpinnings for legal pluralism. Reforms that provided for collective land rights, traditional language and cultural rights, and justice practices were integrated into the constitutional regimes of a variety of countries around the region. ILO Convention No. 169 “generally enjoins [the] states to respect indigenous peoples’ aspirations in all decisions affecting them.”²⁸⁰ The Convention requires governments to promote indigenous peoples’ own institutions and initiatives and upholds “the right of indigenous peoples to live and develop by their own designs as distinct communities.”²⁸¹

The strongest doctrinal argument for international legal recognition of claims by indigenous groups to some form of juridical self-determination comes from the United Nations Declaration on the Rights of Indigenous Peoples.²⁸² This instrument focuses on indigenous societies as the holders of rights, since the survival of Indigenous Peoples requires the recognition and protection of core rights to self-determination, lands, resources, and cultural integrity – rights that flow from the nature of an indigenous society

STANDARDS DEPARTMENT, INDIGENOUS & TRIBAL PEOPLES’ RIGHTS IN PRACTICE: A GUIDE TO ILO CONVENTION No. 169, at 81-2 (2009), http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_106474.pdf [hereinafter ILO Convention No. 169]. “Indigenous peoples’ right to retain and develop their own social, economic, cultural and political institutions is a fundamental right under international human rights law.” *Id.* at 49. “The existence of such institutions is also a core element in the description of indigenous peoples.” *Id.* “Article 1(1) of the Convention No. 169 identifies indigenous people as those who have retained some or all of their own social, economic, cultural and political institutions, irrespective of their legal status.” *Id.* Moreover, “an effective implementation of internationally recognized indigenous peoples’ rights [] requires that customs, customary law and legal systems of indigenous people are recognized and acknowledged [.]” *Id.* at 81. Though, “indigenous customs cannot be justified if these are in violation of fundamental human rights.” *Id.* at 82; *see also* Michael Blakeney, *Protecting The Spiritual Beliefs Of Indigenous Peoples--Australian Case Studies*, 22 PAC. RIM L. & POL’Y J. 391, 414 (2013). “The International Labour Organization (“ILO”) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, which had entered into force on September 5, 1991 called attention to the distinctive contribution of indigenous peoples to cultural diversity and affirmed the right of indigenous peoples to self-identification.” *Id.* *See generally* Abigail Griffith, *Struggles in Latin America over rights of Indigenous and national priorities*, SPERO NEWS (June 21, 2010), <http://www.speroforum.com/a/35271/Struggles-in-Latin-America-over-rights-of-Indigenous-and-national-priorities> (stating that “the ILO agreement establishes a template of basic rights for indigenous groups.”).

279 S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT’L & COMP. L. 1, 7 (1991).

280 *Id.* at 7.

281 *Id.*

282 Gesell, *supra* note 19, at 654.

and preserve its cultural and social cohesion.²⁸³ The Declaration addresses, at several points, the rights of indigenous peoples to some forms of juridical self-determination and recourse to customary legal systems. Article 5 of the Declaration states:

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.²⁸⁴

The Declaration further provides that:

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.²⁸⁵

9. American Declaration of the Rights of Indigenous Peoples

A final international legal instrument, although only “soft law,” that addresses the substantive rights of indigenous groups to their own juridical systems is the American Declaration of the Rights of Indigenous Peoples, which was adopted under the auspices of the Organization of American States on June 15, 2016²⁸⁶ The American Declaration states in Article XXII(1) that:

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.²⁸⁷

At the State and inter-State levels, there is to be integration of Indigenous justice systems, for Article XXII(2) of the American Declaration states that “indigenous law and legal systems shall be recognized and respected by the national, regional and international legal systems.”²⁸⁸ Article XXII(3) of the

²⁸³ *Id.*

²⁸⁴ DRIP, *supra* note 238, art. 4.

²⁸⁵ *Id.* at art. 34.

²⁸⁶ American Declaration of the Rights of Indigenous Peoples, (adopted at the third plenary session, held on June 15, 2016), <http://www.narf.org/wordpress/wp-content/uploads/2015/09/2016oas-declaration-indigenous-people.pdf> [hereinafter “American Declaration”].

²⁸⁷ *Id.* at art. XXII(1).

²⁸⁸ *Id.*, art XXII(2). For changes over the years concerning the American Declaration, *see* Draft

Declaration also states that

[t]he matters referring to indigenous persons or to their rights or interests in the jurisdiction of each state shall be conducted so as to provide for the right of the indigenous people to full representation with dignity and equality before the law. Consequently, they are entitled, without discrimination, to equal protection and benefit of the law, including the use of linguistic and cultural interpreters.²⁸⁹

In addition, Article XIII(3) of the American Declaration provides that:

Indigenous people have the right to the recognition and respect for all their ways of life, world views, spirituality, uses and customs, norms and traditions, forms of social, economic and political organization, forms of transmission of knowledge, institutions, practices, beliefs, values, dress and languages, recognizing their inter-relationship as elaborated in this Declaration.²⁹⁰

The framers of the American Declaration clearly intended that the Indigenous peoples would have the right to participate in the incorporation of indigenous legal systems into the organizational structures of the states.²⁹¹

As noted above, Bolivia has many human rights obligations under international treaty law as well as those evidenced in various international and regional declarations. Yet the Bolivian Government, through its New Constitution and evolving legal order is also committed to providing increasing autonomy for its indigenous peoples.²⁹² Often these two tendencies create much conflict.

Human rights are thus at odds with more forms of cultural relativism. Relativism is often invoked to set unique cultures apart from other influences, to preserve the vestiges of human differences. It strikes

American Declaration on the Rights of Indigenous Peoples, OAS, <http://www.oas.org/en/iachr/indigenous/activities/declaration.asp>.

²⁸⁹ American Declaration, *supra* note 286, at art. XXII(3).

²⁹⁰ *Id.* at art XIII(3).

²⁹¹ *Id.*, art. XIV(2).

²⁹²

Where indigenous peoples are concerned, the issues of political and legal pluralism which, to be sure, are only some aspects in the bundle of features that constitute 'indigenesness,' are intimately related to the question of territory. Though the notion of territory often tends to be reduced to rights to a habitat and its natural resources, a broader understanding would encompass the effective scope and scale of self-government and autonomy in its various dimensions.

Assies, *supra* note 10, at 18.

to show that human integrity is so closely connected to cultural belief and practice that judgment can stem only from ethnocentric views and standards. Reform cannot be imposed without cultural unraveling and social catastrophe. Human rights universalism, by contrast, implied not just a tool to be used in defense of cultures but a selective critique of them based upon antirelativist standards, standards derived from philosophical and legal traditions alien to many distinct societies. An implication of this view is that by seeking shelter in human rights, indigenous leaders are unintentionally invoking a form of universalism poised to bring about as much, or more, cultural change as protection.²⁹³

The law that established *justicia comunitaria*, like the New Constitution of Bolivia, which preceded it, is vague and replete of operational details, either through poor drafting or by design. As such, we can see how *justicia comunitaria*, although on paper an ideal to which to aspire in pluralistic societies like Bolivia, can be less a panacea and more a major challenge to basic human rights like equality before the law, and the right to due process. It can also become an impediment to basic law and order in the wake of communities resorting to mob violence.

IV. THE TENSION BETWEEN INDIGENOUS CUSTOMARY LAW AND BOLIVIA'S INTERNATIONAL LEGAL OBLIGATIONS

A. Some Direct Threats to the Separation of Powers, Due Process and Other Fundamental Human Right

The very fundamentals of due process are less protected under *justicia comunitaria*. There are omissions of some fundamental human rights – like the right to life, the right not to be tortured, and the right of the defendant to have counsel and to hear the evidence and charges of which he or she is being accused.

That *justicia comunitaria* allows for corporal punishment should give us pause. That criminal sanction should involve an actual physical punishment of a human being seems archaic. One can argue that a lynching, the whipping of someone, or the cutting of one's hair are all violations of human rights.²⁹⁴

The Washington D.C. based non-governmental organization, the Human Rights Foundation (“HRF”), expressed its concern that the new Bolivian

293 RONALD NIEZEN, THE ORIGINS OF INDIGENISM: HUMAN RIGHTS AND THE POLITICS OF IDENTITY 143 (2003)

294 HUMAN RIGHTS FOUNDATION, *supra* note 11.

constitution grants equal standing to that *justicia comunitaria*:

Enshrining this system within the Bolivian constitution would hinder individual rights otherwise guaranteed by both the existing constitution and international treaties to which Bolivia is signatory. HRF seeks to alert raise awareness about the contradictions contained within the constitutional framework. While numerous critics of the Morales government equate communal justice with lynching (a practice that has dramatically increased since 2005), HRF does not consider communal justice, as understood by the Bolivian government, to be lynching. However, the fact remains that individuals carrying out lynching often claim to be doing so under the system of communal justice.²⁹⁵

There is no due process. For the Human Rights Foundation, the Bolivian authorities are advised to “draft and introduce legislation regulating the administration of communal justice and limiting its scope.”²⁹⁶ The HRF urges that in order for the communal justice process to exist, it should incorporate the “[d]ue process presumption of innocence, the right to defence [sic] counsel, the right to an impartial jury, the right to appeal, and other basic guarantees of rule of law.”²⁹⁷ It is not surprising then that the HRF concludes that:

The government must ensure that ordinary justice takes precedence over any communal justice system in the country. There should be an established procedure whereby ordinary judges and authorities may review communal justice cases on behalf of victims seeking redress.²⁹⁸

There is an unclear role set out for the Plurinational Tribunal, let alone sources for its operation. The New Constitution contains “glaring contradictions.”²⁹⁹ One instance is that, “it provides for a Plurinational Tribunal that can hear and resolve *only* conflicts of competence between ordinary and communal justice jurisdictions.”³⁰⁰ Moreover, although “the Plurinational Tribunal cannot revise rulings or sentences, [] it can determine whether particular rulings or sentences were issued by the proper legal

295 *Id.*

296 *Id.*

297 *Id.*

298 *Id.*

299 *Id.*

300 *Id.*

authorities (ordinary or communal judges).³⁰¹

The Plurinational Tribunal seats an equal number of representatives from both the communal and ordinary justice systems.³⁰² However, the qualifications differ between the two justice systems:

[W]here representatives of the ordinary justice system must be lawyers with at least eight years of working experience and a proven track record, communal justice representatives need only to have practiced as authorities within their system. No other qualifications are required.³⁰³

Moreover, “Article 192 of the [] [new] constitution [of Bolivia] establishes that communal justice decisions will be directly executed and will not be subject to review by any other judicial authorities.”³⁰⁴ This is hugely important and in direct contradiction of democratic theory dating back to the Enlightenment.³⁰⁵ There is a danger that President Morales has backed the Plurinational Tribunal with his own ideologically-aligned jurists.³⁰⁶ Under the circumstances, it is important that community “justice rulings be subject to review by ordinary courts.”³⁰⁷

“Ley de Justicia Comunitaria de los pueblos indígenas-originarios y comunidades campesinas” was passed by Bolivia’s Plurinational Assembly provides for a mandatory community justice system that features neither procedural nor substantive due process.³⁰⁸ These impugned provisions completely disregard “an individual’s right to be adequately notified of charges or proceedings [against him or her as well as the right], to be heard at these proceedings, to be represented by adequate legal counsel, to retain a transcript of proceedings, and to appeal judgments in ordinary courts”³⁰⁹ – all rights which Bolivia has enshrined in previous criminal and procedural laws and to which Bolivia has acceded as part of its commitment to international human rights conventions and customary international law. Victims can expect immediate punishment subsequent to announced rulings from communal judges,³¹⁰ without recourse to appeal, another miscarriage

301 *Id.*

302 *Id.*

303 *Id.*

304 *Id.*

305 See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1960).

306 See José María Monzón, *The Constitution as a Post-Colonial Discourse: An Insight into the Constitution of Bolivia*, 12 SEATTLE J. FOR SOC. JUST. 839 (2014).

307 HUMAN RIGHTS FOUNDATION, *supra* note 11.

308 Ley de Justicia Comunitaria de los pueblos indígenas-originarios y comunidades campesinas, MPR-DGGP N°. 393/2006.

309 HUMAN RIGHTS FOUNDATION, *supra* note 11.

310 *Id.*

of justice. This has led to much pre-procedure public outcry for quick justice as citizens resort to lynching and other extrajudicial punishments against those even suspected of a crime.

For the new Bolivian justice system to successfully implement its legal pluralism agenda, it will be extremely important for the Bolivian authorities to make a distinction between customary law and vigilantism. Too often these waters are muddied.³¹¹

B. Justicia Comunitaria: Sources and Process

There is a distinct lack of sources or processes that provide for predictability and fairness as well as notice for the citizens of Bolivia. There is no formal notification of rules, nor are there consistent institutions to enforce the rules. There are no established judicial procedures. There are unwritten norms that exist in each community in which community justice is practiced. No case law exists to provide sources for the justice system nor does any codified system for the adjudication of cases exist.³¹²

Because of this paucity of sources, there has been a direct connection between *justicia comunitaria* and vigilantism and mob rule. Indeed “for many Latin American jurists, ‘custom’ remains associated with barbarism.”³¹³ Community justice or indigenous justice is a common concept as it pertains to a system of self-government used by many indigenous peoples prior to the arrival of Europeans in the Americas.³¹⁴ Bolivia, a country comprised mostly of indigenous Bolivians,³¹⁵ has

311 Such rights of indigenous justice are also confused when claimed by revolutionary *Senderistas*, the Shining Path guerrillas in Peru. “When Shining Path guerrillas occupy peasant villages, they conduct popular trials and execute people in plazas claiming to carry out ‘popular justice.’” Enrique Mayer, *Peru in Deep Trouble: Mario Vargas Llosa’s “Inquest in the Andes” Reexamined*, in *REREADING CULTURAL ANTHROPOLOGY* 184-85 (George E. Marcus ed., Duke University Press 1992).

312 *But see* Alejandro Mansilla Arias, *El Derecho Indígena y Las Pautas para la Conformación de una línea jurisprudencial constitucional en Bolivia*, CUADERNOS ELECTRÓNICOS DE FILOSOFÍA DEL DERECHO, n° 10/2004, <https://www.scribd.com/document/157321127/Mansilla>.

313 Sieder, *supra* note 26, at 10.

314 *See generally* Gonzalo Aguilar, Sandra Lafosse, Hugo Rojas & Rébecca Steward, South/North Exchange of 2009 - *The Constitutional Recognition of Indigenous Peoples in Latin America*, PACE INT’L L. REV. Online Companion, Sept. 2010, at 91 (stating that “as behavioral norms have been traditionally created by indigenous peoples and been applied in a regular manner for a period of time, legal anthropologists refer to them as customary indigenous law.”) [hereinafter Aguilar]; John A. Mills, Note, *Legal Constructions of Cultural Identity in Latin America: An Argument Against Defining “Indigenous Peoples,”* 8 TEX. HISP. J.L. & POL’Y 49, 52-62 (2002) (illustrating the oppressive colonizing efforts by the Europeans toward indigenous peoples of Latin America).

315 According to the ILO, “Bolivia has the highest percentage of indigenous peoples in Latin America (62% according to UNDP, 2006). Of the indigenous peoples, it is estimated that the majority are Quechua (50.3%) and Aymara (39.8%). To a lesser degree, although distributed across extensive territories, are lowland peoples such as the Chiquitano (3.6%) and Guaraní (2.5%). The departments of

recognized and encouraged the use of indigenous self-governments, including an indigenous legal system.³¹⁶ However, the New Constitution of Bolivia is unclear when indigenous self-government intrudes on human rights to which the Bolivian State has claimed to adhere to in the last century.

The media in Bolivia has generally been very critical of community justice from the very first incidents, which involved lynching.³¹⁷ Since 2005, there has been a steady increase in lynching and lynch mob attacks against suspected criminals, accused sexual abusers, and even a corrupt government official in Bolivia.³¹⁸ These lynchings are done in areas of the city where mostly the indigenous and also the poorest, Bolivians live.³¹⁹ Global media outlets have described this lynching as a form of village justice or lynch law that is a typical custom of indigenous Bolivians.³²⁰

Recognizing this potential problem and spurred by global media, HRF responded with a scathing country report on Bolivia in January 2008.³²¹ At the time, the HRF cited Bolivian media outlets as sources of indigenous brutality. For Professor Daniel M. Goldstein, the HRF report contains a “basic error that invalidates its conclusions: The HRF report mistakes lynching and other forms of vigilante violence for community justice.”³²²

La Paz, Cochabamba, Potosí, Oruro and Chuquisaca have the highest indigenous concentration.”
Bolivia, ILO,
http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/sitestudiocontenlelements/wcms_con_txt_itp_reg_bol_en.pdf (last visited Feb. 10, 2018). Cf. Other statistics vary: According to the CIA Factbook, “44% of respondents in a 2001 national census indicated feeling part of some indigenous group, predominantly Quechua or Aymara.” CIA Factbook, *supra* note 17.

³¹⁶ 2009 Bolivian Constitution, *supra* note 12, at art. 30(14).

³¹⁷ See generally Helen Popper, *Lynchings Raise Specter of Mob Justice in Bolivia*, REUTERS (Jun. 29, 2007), <http://www.reuters.com/article/latestCrisis/idUSN29282058> (stating that there have been sixty-three lynch mob attacks in both 2006 and 2007); Chris Kraul, *Mob Rule Taints Bolivia Indigenous Law*, L.A. TIMES, (Feb. 1, 2009), <http://articles.latimes.com/2009/feb/01/world/fg-bolivia-justice1> (discussing that incidents of mob rule are rising as the Bolivian State continues to recognize indigenous rights).

³¹⁸ *Brutal linchamiento*, EL DEBER.COM, May 17, 2017, <http://www.eldeber.com.bo/opinion/Brutal-linchamiento-20170516-0096.html> [Brutal Linchamiento]. Reed Lindsay, *Bolivian peasants turn to lynch law*, GUARDIAN, Sept. 18, 2004, <https://www.theguardian.com/world/2004/sep/19/bolivia>. *Desconocidos linchan al alcalde de una aldea indígena en Bolivia*, EL MUNDO, June 15, 2004, <http://www.elmundo.es/elmundo/2004/06/15/internacional/1087322198.html>. Micaela Villa, *En 2014 hubo 35 linchamientos en Bolivia, 10 personas murieron*, LA RAZON, Dec. 13, 2014, http://www.la-razon.com/ciudades/Saldo-linchamientos-Bolivia-personas-murieron_0_2179582074.html.

³¹⁹ See Reed Lindsay, *Bolivian Peasants Turn to Lynch law*, THE GUARDIAN, Sept. 19, 2004, <http://www.theguardian.com/world/2004/sep/19/bolivia> (Aymara peasants and urban slum dwellers protesting against corrupt government officials have been on the rise).

³²⁰ Brutal Linchamiento, *supra* note 318.

³²¹ HUMAN RIGHTS FOUNDATION, *supra* note 11.

³²² Daniel M. Goldstein, *Response to Human Rights Report on Bolivia*, SPERO NEWS (Feb. 1, 2008), <http://www.speroforum.com/site/article.asp?idarticle=14155>.

For Professor Goldstein, community justice is not lynching. Instead, lynching is a form of vigilante justice adopted by people who were frustrated by the lack of government action.³²³ These same people are mostly poor, indigenous Bolivians who took matter into their own hands. The terminology used in the media that this vigilante justice is synonymous with community justice is misleading and inaccurate. Fueling this inaccuracy is the lack of a codified system for community justice. The indigenous customs are simply not written and are more of a tradition rather than a formal legal system.

Further, Goldstein explains that there is no extreme violence or death penalty in community justice. Instead, the greatest form of punishment is exile from the community. “Community justice emphasizes reconciliation and rehabilitation,” explains Goldstein.³²⁴ For Goldstein, “community justice promotes the ‘reeducation’ of community members who violate collective norms and rules, and the reincorporation of these offenders back into the community.”³²⁵ Thus, although indigenous people may participate in lynching, it is certainly not an example of what community justice entails. In an opinion piece a few years later, the Vice-Minister of Indigenous Justice made clear that lynchings were contrary to the New Constitution of Bolivia and Law No. 073.³²⁶

Indigenous Bolivians are still Bolivians under the New Constitution of Bolivia. This is corroborated by the insistence under the New Constitution that none of the legislation listed in the document was meant to take away any basic fundamental human rights.³²⁷ The New Constitution is a reflection of massive urbanization and migrations from productive fields and mines. The majority of Bolivians are indigenous and many of them live in urban cities or their respective outskirts. Even if the State encourages a form of self-government for indigenous people, its intention was not to allow indigenous customs and traditions to supersede the laws codified by the State. Moreover, some of the some of the punishments mirror what the State would have meted out in the first place.³²⁸

323 *Id.*

324 *Id.*

325 *Id.*

326 Isabel Ortega Ventura (Viceministra de Justicia Indígena Originario Campesina), *La Justicia Indígena Frente Al Linchamiento*, June 20, 2012, <http://www.justicia.gob.bo/index.php/noticias/notas-de-prensa/780-la-justicia-indigena-frente-al-linchamiento> (reprinted from Suplemento Animal Político del diario La Razón, July 17, 2012).

327 2009 Bolivian Constitution, *supra* note 12, at art. 3.

328 “Regimes eschewing legal pluralism, then, face the near certainty of violating hallmarks of indigenous punishment systems by implementing systems largely reliant on prison sentences for serious crimes.” Lindsay Short, *Tradition Versus Power: When Indigenous Customs and State Laws Conflict*,

Instead, the enshrinement of indigenous values is a practical means to promote compromise and cooperation within the country. The New Constitution shows indigenous support and conversely, the indigenous are supportive of the New Constitution of Bolivia because it demonstrates respect for their customs and shows that the customs are regarded positively. Community justice is elevated to a recognized and enforced system of law, running parallel to the more Western-based legal system, as implemented by the Spanish colonial authorities and fortified during Bolivia's post-Independence national period.

V. CONCLUSION

A. *Legal Pluralism and Legal Monism*

A consequence of the Enlightenment Period, legal monism has come to be understood as “the idea that there must be one and only one centralized hierarchical legal system in each state” and has long “dominated the political and legal imagination of the West.”³²⁹ Human rights literature has long documented the forms of pluralism through which alternative forms of justice can be understood.³³⁰

Legal pluralism has been broadly defined as a set of independent and coexisting institutionalized legal systems that are followed within a single “social arena.”³³¹ In the context of this Article, legal pluralism signifies the existence of multiple legal systems; an official legal system largely influenced by former colonizing powers, running parallel with the more traditional or customary laws of indigenous peoples.³³²

15 CHI. J. INT'L L. 376, 391 (2014).

329 Daniel Bonilla Malonado, *Extralegal Property, Legal Monism, and Pluralism*, 40 U. MIAMI INTER-AM. L. REV. 213, 213 (2009).

330 KAMARI MAXINE CLARKE, FICTIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA 232 (2000); *see also* Nafay Choudhury, *Reconceptualizing Legal Pluralism in Afghanistan*, 1 SELECTED PROC. THIRD ANN. CAN. L. STUDENT CONF. 21 (2010).

331 Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 375 (2008).

332 Raquel Yrigoyen Fajardo, *Legal Pluralism, Indigenous Law, and the Special Jurisdiction in the Andean Countries*, BEYOND LAW, 2004, at 32, 33, <https://www.jfce.jus.br/images/esmafe/material-didatico/2010/legalPluralism.pdf>.

Classical legal pluralism was confined in two ways: geographically, it concerned only the interplay of Western and non-Western laws in colonial and postcolonial settings; conceptually, it treated the indigenous nonstate law as subordinate to the official law of the state as introduced by the colonizing power. The new legal pluralism extends the concept to Western societies and the interplay between official and unofficial law more generally.

Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 243, 245 (2009).

But legal pluralism is by no means a recent phenomenon. Forms of legal pluralism have been recorded since the mid-and late medieval periods in Europe, when different types of legal systems such as local customs and feudal laws were implemented simultaneously.³³³ Diverse courts that adjudicated distinct legal issues such as guild courts, merchant courts, and church courts that applied laws based on the merits of the case, and also based on a person's status, descent, occupation, or citizenship dotted the continent.³³⁴ Centuries went by before government bureaucracies made up of legal professionals oversaw the implementation of laws as forms of regulating social life. There was a gradual shift from different legal systems that ran independently alongside each other to a more commonly accepted and uniform state law. As such, laws outside of the official state-based system did not disappear, but lost its equal status and autonomy.³³⁵ Instead of a pluralistic system that enforced community social norms, laws became about achieving social objectives, mirroring attempts at reformist movements underway in Europe.³³⁶ As more centralized and structured legal systems developed, certain groups that exercised unofficial legal systems – like those administered by indigenous peoples and campesinos – became underrepresented in the ordinary state law and were thus relegated to lower standing in the mainstream social sphere.

During this shift, colonizing powers dealt with how to extend the reaches of their country's domain by establishing laws and reconciling them with the local laws and practices of the native populations that they encountered.³³⁷ Local indigenous leaders commonly led “customary courts” for minor community disputes and these cases were adjudicated autonomously - unless certain practices were deemed too offensive by the colonizers' standards.³³⁸ Of course, this clash of sources of laws and practices was not peaceful, as indigenous systems were uprooted. Notwithstanding the clashes, indigenous authorities were used as intermediaries between colonizers and native populations as a means of obtaining cooperation and control over native communities. The extent of injustices committed by colonizers to control indigenous communities will

333 See Jean-Louis Halpérin, *The Concept of Law: A Western Transplant?*, 10 THEORETICAL INQUIRIES L. 333, 335 (2009) (providing a brief overview of the development of legal systems from medieval times).

334 See generally Tamanaha, *supra* note 331, at 378-86.

335 See Halpérin, *supra* note 333, at 345 (providing an anthropological view on the construction of unofficial law and Westernized common law).

336 Tamanaha, *supra* note 331, at 381.

337 See generally *id.* at 409-11.

338 *Id.* at 407-08.

not be discussed here, but the forceful attempts at assimilation help explain the temporary decline of legal pluralism during colonization. The subjugation and social stigmatization of indigenous groups continued long after the post-colonial period. Legal pluralism had been absorbed by the growingly popular Westernized system of a more unified and codified legal structure.³³⁹

During the twentieth century, following growing support for indigenous rights and the rising desire to make up for past injustices, the idea of implementing separate governments that followed indigenous customary laws began to develop in some regions.³⁴⁰ The former attempts at assimilation had failed; the problem of indigenous groups had not disappeared, but these policies had bred social and economic deterioration in many regions, making it necessary to build a new framework that integrated indigenous rights and laws.

By the mid-twentieth century, some states recognized limited aspects of indigenous self-regulation, “usos y costumbres” or customary law, but it was generally not autonomous from state law.³⁴¹ For instance, before constitutional reform, some Andean communities allowed customary law as a secondary source, in effect only if there was an absence of ordinary law and the two were never to conflict.³⁴² As recently seen in Bolivia, the state government sanctioned customary law not only as a secondary source, but as its own legal system in indigenous communities, which may even contradict with ordinary state law.³⁴³ This autonomy makes the case in Bolivia different from many forms of pluralistic legal systems, because in other countries, the ordinary government trumps the indigenous governments through oversight and national legislation.

This shift toward legal pluralism has attempted to reverse the centuries long history of indigenous subjugation primarily by: (1) Recognizing indigenous people as independent political actors instead of political subjects, thus combating the idea of cultural inferiority; and (2) formally acknowledging cultural diversity and the right of indigenous groups to have

339 “And, as Delmas-Marty argues, this is why harmonization processes are so important for the development of *pluralism*: ‘they enable the rapprochement of different systems which, without striving for uniformity, may be characterized precisely by its less rigid hierarchy due to the recognition of national margins of appreciation.’” Moritz Hartmann, *Review Essay: “Lost in Disordered Clouds: Transnational Legal Pluralism and the Regulation of Global Asymmetries” – Mireille Delmas-Marty’s Ordering Pluralism (2009)*, 11 *GERMAN L.J.* 1025, 1031 (2010).

340 See generally Debra L. Donahue, *Education and Cooperative Management of Tribal Natural Resources*, 42 *TULSA L. REV.* 5 (2006) (exploring the struggles for self-governance, self-determination and their ties to resource management).

341 *Id.*; NICOLE FABRICANT, *MOBILIZING BOLIVIA’S DISPLACED: INDIGENOUS POLITICS & THE STRUGGLE OVER LAND* 88 (2012).

342 Fajardo, *supra* note 332, at 35.

343 *Id.*

autonomous authority.³⁴⁴ Thus, these promising changes are attempts to discard traditional modes of political suppression and open a new path for indigenous communities to exert control over their legal and social systems, while balancing the protection of individual rights. However, this new path of having the ordinary justice system run alongside community justice or customary legal systems comes with its own set of challenges³⁴⁵ and is still in its infancy in other countries.

Perhaps we have to rethink the whole administration of justice. An Africanist wrote about legal pluralism on that continent:

[W]e need to think more precisely about the meaning and enactment of justice and politics in local contexts – how it should work, whom it should include, and whom it excludes. We must rethink the conditions within which we envisage justice in the first place and expand the basis on which we locate political beings. For it is limiting to assume that “the law” – rule of law, criminal law, national law – is the only way that justice can be achieved, especially because justice itself is not a thing but a set of relations through which people establish norms of acceptability.³⁴⁶

B. Conflicts in a Legally Pluralistic State

There are many differences in the ways that indigenous legal systems and ordinary legal systems view crime, punishment, and individual rights. For instance, merging religious views and rituals with the justice system, as community justice entails, is a point of divergence with regular national justice, which aims to remain secularized.³⁴⁷ Also, in the system of “ordinary justice,” codification is preferred, but in community justice, the

³⁴⁴ *Id.* at 33.

³⁴⁵ The debate about the effectiveness and understanding of legal pluralism is still ongoing. See generally Richard Nobles, et al., *Using Systems Theory To Study Legal Pluralism: What Could Be Gained?*, 46 *LAW & SOC'Y REV.* 265 (2012); William Twining, *Normative and Legal Pluralism: A Global Perspective*, 20 *DUKE J. COMP. & INT'L L.* 473 (2010); Tamanaha, *Understanding Legal Pluralism*, *supra* note 331. Franz Von Benda-Beckmann, *Who's Afraid Of Legal Pluralism?*, 47 *J. LEGAL PLURALISM & UNOFFICIAL L.* 37 (2002); Simon Roberts, *Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain*, 42 *J. LEGAL PLURALISM & UNOFFICIAL L.* 95 (1998); Brian Z. Tamanaha, *The Folly of the “Social Scientific” Concept of Legal Pluralism*, 20 *J. L. SOC'Y* 192 (1993); Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 *CARDOZO L. REV.* 1443 (1992); Sally Engle Merry, *Legal Pluralism*, 22 *LAW & SOC'Y REV.* 869 (1988); John Griffiths, *What Is Legal Pluralism?*, 24 *J. LEGAL PLURALISM & UNOFFICIAL L.* 1 (1986).

³⁴⁶ Clarke, *supra* note 330, at 147.

³⁴⁷ Enrique A. Mier Cueto, *Las Prácticas Jurídicas Aymaras Desde una Perspectiva Cultural*, in *JUSTICIA COMUNITARIA: EN LOS PUEBLOS ORIGINARIOS DE BOLIVIA*, 61, 63 (2003).

decisions are made on a case-by-case basis, which means the result cannot be neatly codified.³⁴⁸

The ordinary justice systems – normally more aligned with Western systems – strive toward consistent administration of justice by emphasizing retribution and applying an adversarial process.³⁴⁹ On the other hand, indigenous systems tend to be more flexible in adjudicating cases in a way that appropriately resolves a specific case at hand based on what restores harmony to the community based on the current state of affairs.³⁵⁰

Another conflict arises in regard to social norms. Indigenous and Western legal systems each have distinct cultural meanings and values, such as what is considered a minor crime or what constitutes a crime at all.³⁵¹ For instance, some public disturbances, religious transgressions, or gossip are considered criminal according to some indigenous groups, but generally would not in Westernized legal systems.³⁵² Also, informal justice systems prioritize restoring social harmony following conflicts over protecting due process or individual rights.³⁵³ The community emphasis presents differences in goals and affects the acceptable forms of punishment in the two justice systems. Punishment for a crime under community justice ordinarily included exiling the perpetrator from his community, shaming, lashings, or exposure to harsh elements, some actions that might be construed as torture under Westernized legal systems.³⁵⁴ This contrasts with ordinary justice, which strives to abide by international standards for protection of human rights and due process.

This harkens back to the early days of the 1952 Revolution in Bolivia:

In the first days of the revolutionary epoch, a kind of official normative schizophrenia was introduced into Bolivian public life and was to tear at the insides of the MNR and weaken its ability to reorganize the country. There was a serious contradiction between the MNR's tying of itself to old norms and institutions and the often-violent process by which the social and economic foundations of

348 *But see* "Oral cultures are being defended by the mechanisms of bureaucracy and law – formal, written rules and procedures." NIEZEN, *supra* note 278, at 27.

349 Brynna Connolly, *Non-State Justice Systems and the State: Proposals for a Recognition Typology*, 38 CONN. L. REV. 239, 242 (2005).

350 *See generally* Aguilar, *supra* note 314, at 85 (claiming that "any attempt to standardize or fix customary laws as a written norm seriously damages their adaptive quality").

351 Tracy Ulltveit-Moe, *Amnesty International and Indigenous Rights: Congruous or Conflict?*, 31 AM. INDIAN L. REV. 717, 728 (2007).

352 *Id.*

353 Connolly, *supra* note 349, at 241.

354 Ulltveit-Moe, *supra* note 351, at 726.

those norms and institutions were dismantled.³⁵⁵

The actions at the time were ex post facto justified as “revolutionary justice.”³⁵⁶ This is not unlike how “justicia comunitaria” is being used to justify the political intimidation of opposition figures like former Vice-President Victor Hugo Cárdenas or the public lynching of suspected criminals in the Morales era.

Whereas the search for greater sensitivity of the judicial system to cultural differences involves improved, that is ‘equal,’ access to the existing legal system, the claim for recognition of jurisdiction according to indigenous peoples’ own laws and procedures challenges the modern state in its claim to exclusive jurisdiction sustained in the ideology of universalism and equality before the law. In terms of human rights, debate revolves around the relation between individual and collective rights.³⁵⁷

There is a danger of competing jurisdictions in situations of legal pluralism. At what time does the indigenous system of justice reign and over what matters and at what time does the “ordinary” system of justice prevail? How do the governing authorities ensure equality before the law? In the end, this may create a parallel reality of sorts – one legal system stuck in a modern age, based on fundamental human rights as prescribed by the myriad international treaties signed, ratified, and deposited by Bolivia, and the other based on an ephemeral, yet traditionally and wholly subscribed to, set of principles.³⁵⁸ Moreover, when it comes to Aymara, Quechua, or

355 Malloy, *supra* note 70, at 170.

356

Instead of claiming the advent of a totally new era which, through revolutionary action, would define and legitimate its own normative world, the MNR harked to a past understanding of right, while presiding over a process that aimed direct attacks at the heart of the past. Thus, official justice and revolutionary justice collided, resulting in a situation in which there was neither justice nor any understanding of what would constitute justice. Justice became a thing to be defined locally through power, more often than not by force; as effective power came to vary widely throughout the country, so too did notions of the justice or the right. Such a situation is, almost by definition, intrinsic to those processes we call revolution; in Bolivia, this was exacerbated by an official clinging to a set of abstraction in the fact of a reality that was violently sweeping away the solidity which underpinned them.

Malloy, *supra* note 70, at 170-71.

357 Assies, *supra* note 10, at 17-8.

358

There is also opposition to legal pluralism as a facilitator of specific disfavored elements of indigenous law that are seen to violate human rights standards. The argument goes that legal pluralism could be used as a sort of catchall provision, allowing any sort of punishment or practice in the name of maintaining cultural plurality.

Short, *supra* note 328, at 392 (2014). Professor Frederic Megret has also written that “condemnations of legal pluralism based merely on disapproval of particular features of minority law are conceptually quite weak.” Frederic Megret, *Is There Ever a “Right to One’s Own Law”? An Exploration of Possible*

Guaraní justicia comunitaria, these are peoples whose communities exist in more than one nation-state.³⁵⁹

The challenges that changing times and competing influences present are not new: “[L]aw in Bolivia has both embodied and constituted a whole range of other social categories; for example, gender relations, relations of production, religious practice, and even social identity itself.”³⁶⁰ This results in an obvious tension, explaining why there are protests seemingly daily as the center of La Paz gets shut down by one group or another.

For centuries, Bolivian law has contended with contrasting and competing influences. Some of these tendencies push Bolivia towards modernity, such as the laws needed to ensure compliance with the World Trade Organization or other international conventions that facilitate mostly extractive, industry-related business. Other influences have pushed the country in the opposite direction - to Bolivians’ past by fusing older, more traditional indigenous techniques.

The elasticity of law in Bolivia has been its most defining characteristic, which becomes all the more important in light of the fact that law is officially prefigured and thus formally closed to all nonlegal cultural, political, and economic imperatives.³⁶¹

It is no surprise then that the Bolivian Government has been accused of unfair treatment of the indigenous populations,³⁶² even from Evo Morales, an indigenous leader. Although he is indigenous by background and carried the banner of indigenous rights in his lead up to the presidency and while in the Office of the President, human rights violations against indigenous

Rights Foundations for Legal Pluralism, 45 *ISR. L. REV.* 3, 5-6 (2012).

³⁵⁹ “[T]here are norms and practices that apply or have force in more than one jurisdiction, but without any transcendent authority. We might call *parallel* norms. They apply to more than one country or jurisdiction, but on a voluntary basis, so to speak.” Friedman, *supra* note 42, at 69.

³⁶⁰ Goodale, *supra* note 25, at 24.

³⁶¹ *Id.* at 25.

³⁶² *Identity In An Era Of Self-Determination*, 7 *ASIAN-PAC. L. & POL’Y J.* 38, 51 (2006) (“International human rights law, however, is increasingly perceived as a vehicle to achieve justice for indigenous groups, including redress for past wrongs committed in the process of colonialism, and efforts to correct present unfair treatment”); *Special Rapporteur on the Rights of Indigenous Peoples: Introduction*, OHCHR, <http://www.ohchr.org/en/issues/ipeoples/srindigenouspeoples/pages/sripeoplesindex.aspx> (last visited Feb. 10, 2018) (stating that “Indigenous peoples across the world experience the consequences of historical colonization and invasion of their territories, and face discrimination because of their distinct cultures, identities and ways of life”).

people³⁶³ have taken place during his three administrations.³⁶⁴

Critics of traditional indigenous justice in Bolivia have expressed some great concern with the new laws being recognized and enforced around communities throughout the country. For these critics, the mob violence has become associated with *justicia comunitaria* after capturing international attention in 2005, when a mayor was lynched and no culprit was criminally prosecuted. The international media was quick to name the lynching as a product of community or indigenous justice that is typified by its brutality and savagery.³⁶⁵ Instead, community justice is rehabilitative, and lynching is an inaccurate example of community justice.³⁶⁶

363 See Annual Report 2012, AMNESTY INTERNATIONAL 81, <https://www.amnestyusa.org/files/air12-report-english.pdf> (last visited Feb. 11, 2018) (conveying the tensions between the indigenous population and the Morales government in 2012, due to the government's effort to construct a road through indigenous territory. When confronted by indigenous protestors claiming that the Morales government was violating their constitutional rights by constructing this road, many were injured by "tear gas and truncheons" by the Bolivian police. The Morales government eventually cancelled the project and the deputy police who ordered the police operation that caused the injuries was put under house arrest); *Bolivian President Evo Morales Expels USAID*, BBC NEWS (May 1, 2013), <http://www.bbc.co.uk/news/world-latin-america-22371275> (stating that "[h]e [Evo Morales] was re-elected by a landslide in 2009, but has since faced protests from indigenous communities angered by the construction of a major road through their territory, and by police and army officers demanding better pay"); *Bolivia's Indigenous People Join Fight to Save Gran Chaco Wilderness*, GUARDIAN (July 8, 2013), <http://www.theguardian.com/world/2013/jul/08/bolivia-indigenous-people-gran-chaco-wilderness> (stating that the Morales government "had shown no interest" in supporting conservation efforts to preserve the threatened Gran Chaco region, Bolivia's largest national park which houses several indigenous populations); *Protests Challenge Ecuador Indigenous Summit*, BBC NEWS (June 26, 2010), <http://www.bbc.co.uk/news/10419958> (explaining that the summit "promises to build societies that respect the rights of Latin America's indigenous people, as well as those of African descent." The Bolivian indigenous effort to give a written statement to President Morales during the summit, however, was silenced, as they were "held back by police.").

364 There may very well be a fourth administration for President Morales, as he considers making an illegal bid for re-election. Andrés Oppenheimer, *This is no joke: Bolivian ruler invokes his "human right" to stay in power*, MIAMI HERALD, Oct. 5, 2017, <http://www.miamiherald.com/news/local/news-columns-blogs/andres-oppenheimer/article176991121.html>.

365

The Spanish-speaking urban culture of Bolivia, if not based completely on the exploitation of the Indian, did, at the least, demand his relinquishment of the ability to posit a different culture in the geographic reality of Bolivia. The Spanish-speaking ("civilized") culture was born through conquest and continued by means of subjugation. The relationship of the national Spanish culture to the local Indian cultures continued to be one of colonialism. As in all such cases, this relationship was pervaded with mutual hate, distrust, and fear projected in racial terms. Indio ("Indian") was a word which conjured the image of a subhuman (uncivilized) being, locked in ignorance and bent on violent revenge.

Malloy, *supra* note 70, at 190.

366 See DANIEL M. GOLDSTEIN, *OUTLAWED: BETWEEN SECURITY AND RIGHTS IN A BOLIVIAN CITY* 186 (2012), supporting the notion that "lynching is not community justice in the classic sense" stating that, "After every lynching event, politicians and left-leaning intellectuals are quoted in newspapers drawing the distinction"; Franz Chávez, *Lynch Mobs Hide Behind 'Community Justice' in Bolivia*, INTER PRESS SERVICE NEWS AGENCY (Dec. 9, 2013), <http://www.ipsnews.net/2013/12/lynch->

Remaining questions that are worth exploring include: whether the treatment of women within the indigenous population violates the international treaty against discrimination of women, or whether whipping constitutes a form of torture that violates human rights? Moreover, should an outsider look at the indigenous community as a fully functional entity or a community of kin? In the latter situation, would it also make sense, then, to regard whipping as similar to parents when they discipline their children? Questions like these remain unanswered by the Bolivian State and will continue to do so until the legislature actually enacts laws that will clarify the ambiguity reflected in the New Constitution. For now, the New Constitution of Bolivia serves as a reflection of the State's recognition of the indigenous population as Bolivians.

Not only is there a need for a broader understanding of what constitutes "indigenoussness," there are criticisms of the implementation of indigenous law in Bolivian legislation. The legislative package was opposed by Human Rights Watch and with former Bolivian Presidents.³⁶⁷ Since the implementation of indigenous law in the New Constitution of Bolivia, with the self-determination movements coming out of Santa Cruz and other departments around Bolivia, the issues will only get more complicated.³⁶⁸

mobs-invoke-community-justice-bolivia/ (referring to lynching as "vigilante justice in impoverished rural and urban areas that has nothing to do with indigenous community justice, which the perpetrators invoke to justify their actions." According to the Departmental prosecutor, Freddy Rorrigo, "Lynching is murder, and it cannot be permitted under the concept of community justice, because it has nothing to do with it; it is a summary execution that violates constitutional principles and due process.")

367 Mabel Azcui, *La Polémica 'Refundación' del Sistema Judicial Boliviano*, EL PAIS (May 6, 2010), http://www.elpais.com/articulo/internacional/polemica/refundacion/sistema/judicial/boliviano/elpepuint/20100507elpepuint_4/Tes.

368 See Helena DeMoura, *Four Bolivian Regions Declare Autonomy From Government*, CNN News (Dec. 15, 2007, 10:54 PM), <http://www.cnn.com/2007/WORLD/americas/12/15/bolivia.unrest/index.html>. The article illustrates that

[C]ouncil representatives vowed to legitimize the so-called autonomy statutes through a referendum that would legally separate the natural-gas rich districts from President Evo Morales' government. The move also aims to separate the states from Bolivia's new constitution which calls for, among other things, a heavier taxation on the four regions to help finance more social programs.

Id.; *Bolivia's Lower House Approves Indigenous Justice Law*, BBC NEWS (June 9, 2010), <http://www.bbc.co.uk/news/10270787>. Opposition parties claim that such recognition of indigenous justice law when it comes to settling "disputes according to their own cultural values" can lead to mob rule. *Id.* A month prior to the vote, "four policemen were lynched by an Andean clan in the name of indigenous justice." *Id.*; see also Abigail Griffith, *Struggles in Latin America Over Rights of Indigenous and National Priorities*, SPERO NEWS (June 21, 2010), <http://www.speroforum.com/a/35271/Struggles-in-Latin-America-over-rights-of-Indigenous-and-national-priorities>. Four police officers were lynched in the Amazonian region of Bolivia in May 2010. *Id.* This article claims that the "lack of a clearly defined process to mediate often hostile interactions between indigenous custom and Western law has left room for tension, conflict, and violence to brew between indigenous people and the state." *Id.*; see also *Two Bolivian Broadcast Journalists Killed*, FREEDOM HOUSE (Feb. 29, 2012), <http://www.freedomhouse.org/article/two-bolivian-broadcast->

C. Legal Pluralism in Other Countries

Bolivia is not the only country to attempt folding indigenous norms and mechanisms into the state-based legal system.³⁶⁹ Colombia, Ecuador, Mexico, Nicaragua, Paraguay, Venezuela, and Peru, have similarly also traveled down this path.³⁷⁰ Guatemala, too, has had its experiences with integrating indigenous justice,³⁷¹ but it is more difficult given that indigenous rights were part of the thirty-five year civil war that ravaged the country.³⁷² Activists for indigenous rights have called for traditional practices to be integrated into a newly reformed judicial system in

journalists-killed (detailing how siblings from the Aymara ethnic group, both broadcast journalists, were killed unexpectedly). According to Freedom House, “[t]hreats and attacks against the news media occurred with increasing regularity in the last two years.” *Id.*; see, e.g., Rick Kearns, *New Indigenous Community Justice Sanctions Criticized in Bolivia*, INDIAN COUNTRY (Dec. 11, 2012), <http://indiancountrytodaymedianetwork.com/article/new-indigenous-community-justice-sanctions-criticized-bolivia-146222> (describing the struggle between community justice as seen in a particular indigenous Bolivian tribe, the Qhapaq Uma Suya of La Paz, who announced that in their district they will use chemical castration on rapists and amputate the hands of thieves who have stolen three or four times, versus a contrary perception from other national indigenous leaders who oppose these particular acts).

³⁶⁹ Aguilar, *supra* note 314, at 61-2.

³⁷⁰ *Id.* at 61. “Five Latin American constitutions spell out in general terms peoples’ right to self-determination: Colombia, Ecuador, Mexico, Nicaragua, and Paraguay. However, except in the case of Mexico, none of the constitutions explicitly recognizes the right to self-determination for indigenous peoples.” *Id.* Moreover, it is also “possible to find constitutional norms that also recognize the living norms and organizations that are fixed by indigenous peoples through their customs, including internal forms of governance and/or mechanisms to resolve their controversies through institutions and procedures that they define. This situation exists within the Constitutions of Bolivia, Colombia, and to some extent in Ecuador, Mexico, Nicaragua, Paraguay, Peru, and Venezuela. *Id.* at 87; Van Cott, *Legal Pluralism*, *supra* note 15, at 207 (stating that “Bolivia, Columbia, Ecuador, Mexico, Nicaragua, Paraguay and Peru – adopted or modified constitutions to recognize the multiethnic, multicultural nature of their societies”); Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 TEX. L. REV. 1587 n.21 (2011) (stating that the “application of justice by indigenous communities according to their customary law, but within limits that harmonize the state jurisdiction with the indigenous jurisdiction.” Such constitutions include Bolivia, Ecuador, Paraguay, Peru and Venezuela).

³⁷¹ See CONSTITUCIÓN DE 1985 CON LAS REFORMAS DE 1993 [CONSTITUTION] Nov. 17, 1993, arts. 58, 66 (Guat.), http://www.right2info.org/resources/publications/laws-1/guatemala_constitution_eng; Aguilar, *supra* note 314, at 87 (explaining that the Constitution of the Republic of Guatemala “simply recognize[s] the existence of indigenous customs, including in some occasions that the customs will be respected, protected and/or promoted”).

³⁷² Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 86 (1999).

In Guatemala, on December 29, 1996, ‘the guns may have finally fallen silent.’ The peace accord signed that day between the government and the *guerrilleros*, many of them Maya Indians, proclaimed to put an end to this country’s long, bloody, and ‘forgotten’ civil war which left at least 100,000 persons killed, 40,000 disappeared, about 250,000 children orphaned, and more than one million people driven from their homes. The final accords signed guarantee, *inter alia*, Indian rights and land reform.

Id. at 86.

Guatemala, a Central American country whose citizens are overwhelming are indigenous.³⁷³ These calls have had limited success.³⁷⁴ “[D]espite some notable advances, the quality of ordinary justice remained extremely poor and highly likely to exclude indigenous people.”³⁷⁵

Outside of Latin America, there has been much movement as well. In spite of the inherent conflicts of a legally pluralistic state, countries such as Canada³⁷⁶ and New Zealand,³⁷⁷ among others, have officially recognized indigenous governments and are still trying to define what rights fall under these jurisdictions. As seen in some legally pluralistic states, there are many positive results to implementing unofficial state systems, particularly in many rural places and developing countries where the official system is largely incapacitated due to infrastructure and problems with legitimization.³⁷⁸ Community justice or the implementation of indigenous self-governance, however, are still contentious and experimental in places

373 See MICHAEL J. PFEIFER, *THE ROOTS OF ROUGH JUSTICE: ORIGINS OF AMERICAN LYNCHING* 90 (2011), (illustrating a scholar’s perspective arguing “that the actions of Guatemalan lynchings take meaning as grassroots justice by disenfranchised indigenous populations [...] [who are] angered by slow, unrepresentative, and ineffectual state courts, [and are] deprived by the erosion of traditional nonviolent indigenous forms of dispute mediation”);

Id. See generally ILO Convention No. 169, *supra* note 278, at 84 (stating that “Indigenous peoples’ marginalized position is often reflected in their limited access to justice. Not only do they have a special risk of becoming victims of corruption, sexual and economic exploitation, violations of fundamental labour rights, violence, etc., but they also have limited possibilities for seeking redress.”).

374 *Guatemala’s Indigenous Seek Recognition for Justice System*, VOA (Feb. 15, 2017), <https://www.voanews.com/a/guatemala-indigenous-seek-recognition-of-justice-system/3726790.html>.

Recognition of Indigenous Justice System Stalls in Guatemala, TELESUR.COM (Feb. 16, 2017), <https://www.telesur.com/english/news/Recognition-of-Indigenous-Justice-System-Stalls-in-Guatemala-20170216-0023.html>.

375 Sieder, *Judiciary*, *supra* note 43, at 227.

376 See John Borrows, *Indigenous Legal Traditions In Canada*, 19 WASH. U. J.L. & POL’Y 167, 173-74 (2005) (stating that “Canada itself [] includes common law, civil law and indigenous legal traditions. These legal customs are constitutionally recognized. Canada is a juridically pluralistic state, and draws on many sources of law to sustain order throughout the land”) [hereinafter Borrows]; Claire Charters, *Do Maori Rights Racially Discriminate Against Non Maori?*, 40 VICT. U. WELLINGTON L. REV. 649, 660 (2009) (stating that “[t]he Canadian Constitution protects aboriginal and treaty rights,” *citing* to section 35 of the Canadian Constitution).

377 See Charters, *supra* note 376, at 659 (detailing that New Zealand recognizes Maori political rights; though, it does so in a very “soft way, far from models that recognize degrees of Indigenous peoples’ autonomy or self-government”).

378 Connolly, *supra* note 349, at 240.

like Canada,³⁷⁹ Australia,³⁸⁰ and New Zealand,³⁸¹ requiring more studies to determine successful strategies.

These “informal” justice systems share some characteristics, including: generally being less expensive and more efficient to operate than Western legal systems, dependence on voluntary participation by community members, a focus on restorative justice, and the ability to engender more trust than official systems that communities perceive as corrupt.³⁸² Moreover, basic legal issues facing pluralistic systems include: (1) whether

379 See Paul Joffe, *UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation*, 26 NAT'L J. CONST. L. 121, 157 (2010) (arguing that the Canadian government's conduct toward its indigenous population is “untenable and incompatible with constitutional and international obligations,” and that the process of reconciliation with its indigenous population is “likely to be a long one”); Brandi Morin, *Where Does Canada Sit 10 Years After the UN Declaration on the Rights of Indigenous Peoples?*, CBCNEWS (Sept. 13, 2017), <http://www.cbc.ca/news/indigenous/where-does-canada-sit-10-years-after-undrip-1.4288480>; Borrows, *supra* note 376, at 174:

[W]hile civil and common law traditions are generally recognized nationwide [in Canada], this is not always the case with indigenous legal traditions. Yet, indigenous legal traditions can have great force and impact in peoples' lives despite their lack of prominence in broader circles. Indigenous legal traditions are a reality within Canada and should be more effectively recognized as such.

380 See Emma Rogers, *Aust Adopts UN Indigenous Declaration*, ABCNET (Apr. 2, 2009, 12: 33 AM), <http://www.abc.net.au/news/2009-04-03/aust-adopts-un-indigenous-declaration/1640444>. See also SUMMARY NO. 8, AUSTRALIAN HUMAN RIGHTS COMMISSION, THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, <https://www.humanrights.gov.au/declaration-rights-indigenous-peoples>: “Australia voted against the Declaration when it was adopted by the General Assembly in 2007. In 2009, the Australian Government formally endorsed the Declaration and have made other steps to advance the rights of Aboriginal and Torres Strait Islander peoples. However, there is a need for a holistic and coordinated approach to giving full effect to the Declaration.” (emphasis added); Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 WASH. L. REV. 1133 n.67 (2012) (stating that the Australian Aboriginal people could not legally occupy their lands until *Mabo v. Queensland* was decided in 1992); Dylan Lino, *The Politics of Inclusion: The Right of Self-Determination, Statutory Bills of Rights and Indigenous Peoples*, 34 MELB. U. L. REV. 839, 840-57 (2010) (providing a perspective that discourages the Australian government from recognizing the indigenous right of self-determination in its statutory bill of rights, first, because there are material inadequacies with how the Australian human rights consultation committees consult with indigenous populations when considering to implement the indigenous right to self-determination and, second, because this manner of recognition will allow for unilateral state control over this right); Blakeney, *supra* note 278, at 426-27 (according to an expert panel, “Aboriginal cultures need to receive greater constitutional protection” when it relates to protecting their spiritual beliefs).

381 Blakeney, *supra* note 278, at 412. The indigenous people of New Zealand have taken part in declaratory activism asserting their rights, one of which is urging existing governments and international agencies to recognize that the indigenous population should be able to control and protect the dissemination of their customary knowledge. *Id.* Some argue that, “the culmination of this declaratory activism was the United Nations Declaration on the Rights of Indigenous Peoples.” *Id.* at 413. See also Danielle M. Conway, *Indigenizing Intellectual Property Law: Customary Law, Legal Pluralism, And The Protection Of Indigenous Peoples' Rights, Identity, And Resources*, 15 TEX. WESLEYAN L. REV. 207, 214-15 (2009) (illustrating the struggles that the Maori indigenous groups have endured to assert their sovereignty, self-determination, and autonomy); Charters, *supra* note 376, at 659.

382 Connolly, *supra* note 349, at 241.

indigenous jurisdiction should be mandatory or optional, letting parties choose between indigenous and state courts; and (2) what happens when crimes or disputes involve both indigenous and non-indigenous parties? To reconcile these problems, one can analyze how legal pluralism has been implemented in other countries and borrow strategies.³⁸³

Regardless, this is something the Americas, like much of the world, will have to address in the coming years as indigenous groups continue to claim their internationally promulgated and nationally adopted rights. Bolivia is at ground zero of the battle to embrace indigenous practices in a pluralistic, modern sovereign state. But the integration of such traditional mechanisms into a Western-based justice system challenges modern human rights protections in the name of promoting self-determination.³⁸⁴

383

[W]hatever the broader political motivations for the wave of multicultural reforms advanced during the 1990s, the fact that indigenous peoples' collective rights are now recognized as part of the block of constitutional norms in many countries has potentially opened up a new role for the judiciary in the defense of those rights.

Sieder, *Judiciary*, *supra* note 43, at 215.

384

Human rights advocates face the challenges of how to understand power dynamics within legally plural constellations of governance, and how best to support women—and men—in their struggles for more equitable and less violent relations and for human dignity.

Rachel Sieder, *Legal Pluralism and Indigenous Women's Rights in Mexico: The Ambiguities of Recognition*, 48 N.Y.U. J. INT'L L. & POL. 1125, 1126 (2016).

ANNEX: POLITICAL CONSTITUTION OF THE PLURINATIONAL STATE OF BOLIVIA (2009)³⁸⁵ (Select Provisions)

PREAMBLE

In ancient times mountains arose, rivers moved, and lakes were formed. Our Amazonia, our swamps, our highlands, and our plains and valleys were covered with greenery and flowers. We populated this sacred Mother Earth with different faces, and since that time we have understood the plurality that exists in all things and in our diversity as human beings and cultures. Thus, our peoples were formed, and we never knew racism until we were subjected to it during the terrible times of colonialism.

We, the Bolivian people, of plural composition, from the depths of history, inspired by the struggles of the past, by the anti-colonial indigenous uprising, and in independence, by the popular struggles of liberation, by the indigenous, social and labor marches, by the water and October wars, by the struggles for land and territory, construct a new State in memory of our martyrs.

A State based on respect and equality for all, on principles of sovereignty, dignity, interdependence, solidarity, harmony, and equity in the distribution and redistribution of the social wealth, where the search for a good life predominates; based on respect for the economic, social, juridical, political and cultural pluralism of the inhabitants of this land; and on collective coexistence with access to water, work, education, health and housing for all.

We have left the colonial, republican and neo-liberal State in the past. We take on the historic challenge of collectively constructing a Unified Social State of Pluri-National Communitarian law, which includes and articulates the goal of advancing toward a democratic, productive, peace-loving and peaceful Bolivia, committed to the full development and free determination of the peoples.

³⁸⁵ POLITICAL CONSTITUTION OF THE PLURINATIONAL STATE OF BOLIVIA (2009), CONSTITUTEPROJECT.ORG, https://www.constituteproject.org/constitution/Bolivia_2009.pdf (translated by Max Planck Institute).

We women and men, through the Constituent Assembly (Asamblea Constituyente) and with power originating from the people, demonstrate our commitment to the unity and integrity of the country.

We found Bolivia anew, fulfilling the mandate of our people, with the strength of our Pachamama and with gratefulness to God.

Honor and glory to the martyrs of the heroic constituent and liberating effort, who have made this new history possible.

ARTICLE 1

Bolivia is constituted as a Unitary Social State of Pluri-National Communitarian Law (Estado Unitario Social de Derecho Plurinacional Comunitario) that is free, independent, sovereign, democratic, intercultural, decentralized and with autonomies. Bolivia is founded on plurality and on political, economic, juridical, cultural and linguistic pluralism in the integration process of the country.

ARTICLE 3

The Bolivian nation is formed by all Bolivians, the native indigenous nations and peoples, and the inter-cultural and Afro-Bolivian communities that, together, constitute the Bolivian people.

ARTICLE 30

I. A nation and rural native indigenous people consists of every human collective that shares a cultural identity, language, historic tradition, institutions, territory and world view, whose existence predates the Spanish colonial invasion.

II. In the framework of the unity of the State, and in accordance with this Constitution, the nations and rural native indigenous peoples enjoy the following rights:

1. To be free.
2. To their cultural identity, religious belief, spiritualities, practices and

customs, and their own world view.

3. That the cultural identity of each member, if he or she so desires, be inscribed together with Bolivian citizenship in his identity card, passport and other identification documents that have legal validity.

4. To self-determination and territoriality.

5. That its institutions be part of the general structure of the State.

6. To the collective ownership of land and territories.

7. To the protection of their sacred places.

8. To create and administer their own systems, means and networks of communication.

9. That their traditional teachings and knowledge, their traditional medicine, languages, rituals, symbols and dress be valued, respected and promoted.

10. To live in a healthy environment, with appropriate management and exploitation of the ecosystems.

11. To collective ownership of the intellectual property in their knowledge, sciences and learning, as well as to its evaluation, use, promotion and development.

12. To an inter-cultural, intra-cultural and multi-language education in all educational systems.

13. To universal and free health care that respects their world view and traditional practices.

14. To the practice of their political, juridical and economic systems in accord with their world view.

15. To be consulted by appropriate procedures, in particular through their institutions, each time legislative or administrative measures may be foreseen to affect them. In this framework, the right to prior obligatory consultation by the State with respect to the exploitation of nonrenewable

natural resources in the territory they inhabit shall be respected and guaranteed, in good faith and upon agreement.

16. To participate in the benefits of the exploitation of natural resources in their territory.

17. To autonomous indigenous territorial management, and to the exclusive use and exploitation of renewable natural resources existing in their territory without prejudice to the legitimate rights acquired by third parties.

18. To participate in the organs and institutions of the State.

III. The State guarantees, respects and protects the rights of the nations and the rural native indigenous peoples consecrated in this Constitution and the law.

ARTICLE 31

I. The nations and the rural native indigenous peoples that are in danger of extinction, in voluntary isolation and not in contact, shall be protected and respected with respect to their forms of individual and collective life.

II. The nations and the rural native indigenous peoples that live in isolation and out of contact enjoy the right to maintain themselves in that condition, and to the legal definition and consolidation of the territory which they occupy and inhabit.

ARTICLE 42

I. It is the responsibility of the State to promote and guarantee the respect for, and the use, research and practice of traditional medicine, rescuing ancestral knowledge and practices created from the thinking and values of all the nations and the rural native indigenous peoples.

II. The promotion of traditional medicine shall include the registry of natural medicines and of their curative properties, as well as the protection of their knowledge as intellectual, historic, cultural property and as patrimony of the nations and the rural native indigenous peoples.

III. The law shall regulate the practice of traditional medicine and shall guarantee the quality of service.

ARTICLE 98

I. Cultural diversity constitutes the essential basis of the Pluri-National Communitarian State (Estado Unitario Social de Derecho Plurinacional Comunitario). The inter-cultural character is the means for cohesion and for harmonic and balanced existence among all the peoples and nations. The intercultural character shall exist with respect for differences and in conditions of equality.

II. The State takes strength from the existence of rural native indigenous cultures, which are custodians of knowledge, wisdom, values, spiritualities and world views.

III. It shall be a fundamental responsibility of the State to preserve, develop, protect and disseminate the existing cultures of the country.

ARTICLE 100

I. The world views, myths, oral history, dances, cultural practices, knowledge and traditional technologies are patrimony of the nations and rural native indigenous peoples. This patrimony forms part of the expression and identity of the State.

ARTICLE 119

I. During the legal process, the parties in conflict enjoy equal opportunities to exercise the faculties and rights that may help them, whether in an ordinary process or by rural native indigenous process.

ARTICLE 178

I. The power to impart justice emanates from the Bolivian people and is based on the principles of independence, impartiality, juridical security, publicity, probity, promptness, being free of charge, legal pluralism, being

inter-cultural, equity, service to society, citizen participation, social harmony and respect for rights.

ARTICLE 179

I. The judicial function is singular. Ordinary jurisdiction is exercised by the Supreme Court of Justice, the departmental courts of justice, the sentencing courts and the judges; the agro-environmental jurisdiction is exercised by the Agro-Environmental Court and judges; and the rural native indigenous jurisdiction is exercised by their own authorities. There shall be specialized jurisdictions regulated by the law.

II. Ordinary jurisdiction and rural native indigenous jurisdiction enjoy equal status.

III. Constitutional justice is imparted by the Pluri-National Constitutional Court (Tribunal Constitucional Plurinacional).

IV. The Council of Judges is part of the Judicial Organ (Organo Judicial).

ARTICLE 190

I. The nations and native indigenous rural peoples shall exercise their jurisdictional functions and competency through their authorities, and shall apply their own principles, cultural values, norms and procedures.

II. The rural native indigenous jurisdiction respects the right to life, the right to defense and other rights and guarantees established in this Constitution.

ARTICLE 191

I. The rural native indigenous jurisdiction is based on the specific connection between the persons who are members of the respective nation or rural native indigenous people.

II. The rural native indigenous jurisdiction is exercised in the following areas of personal, material and territorial legal effect:

1. Members of the nation or rural native indigenous people are subject to this jurisdiction whether they act as plaintiffs or defendants, claimants or accusers, whether they are persons who are denounced or accused, or are appellants or respondents.

2. This jurisdiction hears rural native indigenous matters pursuant to that established in a law of Jurisdictional Demarcation.

3. This jurisdiction applies to the relations and juridical acts that are carried out, or the effects of which are produced, within the jurisdiction of a rural native indigenous people.

ARTICLE 192

I. Each public authority or person shall obey the decisions of the rural native indigenous jurisdiction.

II. To secure compliance with the decisions of the rural native indigenous jurisdiction, its authorities may request the support of the competent bodies of the State.

III. The State shall promote and strengthen rural native indigenous justice. The law of Jurisdictional Demarcation shall determine the mechanisms of coordination and cooperation between rural native indigenous jurisdiction and ordinary jurisdiction and agro-environmental jurisdiction and all the recognized constitutional jurisdictions.

ARTICLE 196

I. The Pluri-National Constitutional Court (Tribunal Constitucional Plurinacional) assures the supremacy of the Constitution, exercises constitutional control, and safeguards respect for and enforcement of constitutional rights and guarantees.

II. As criteria to be applied in its interpretive role, the Pluri-National Constitutional Court shall give preference to the intent of the constituent assembly as demonstrated in its documents, acts and resolutions, as well as the literal tenor of the text.

ARTICLE 197

I. The Pluri-National Constitutional Court shall consist of Judges elected on the basis of pluri-nationality, with representation from the ordinary system and the rural native indigenous system.

II. The substitute Judges of the Pluri-National Constitutional Court shall not receive remuneration, and shall assume functions only in the case of the absence of the titled Judge or for other reasons established by law.

III. The composition, organization and functions of the Pluri-National Constitutional Court shall be regulated by law.

ARTICLE 199

I. To become a Judge of the Pluri-National Constitutional Court, in addition to the general requisites to become a public servant, one must be thirty five years of age and have specialized or credited experience of at least eight years in the disciplines of Constitutional law, Administrative law or Human Rights law. For purposes of determining merit, experience as a native authority under its system of justice shall be taken into account.

II. The candidates for the Pluri-National Constitutional Court shall be proposed by organizations of civil society and the nations and rural native indigenous peoples.

ARTICLE 202

In addition to those established by law, the powers of the Pluri-National Constitutional Court, are to hear and resolve the following:

1. As the court of jurisdiction in the matters of pure law concerning the unconstitutionality of laws, Autonomous Statutes, Constitutional Charters, decrees and every type of ordinance and non-judicial resolution. If the case is of abstract character, only the President of the Republic, Senators, Deputies, Legislators and the maximum authorities of the autonomous territorial entities may present it to the court.

2. The conflicts of jurisdiction and powers among the organs of popular power.
3. The conflicts of jurisdiction between the Pluri-National government and the autonomous and decentralized territorial entities, and between the latter.
4. The appeals of fees, taxes, rates, licenses, rights or contributions that are created, modified or suppressed in violation of that set forth in the Constitution.
5. The appeals of resolutions of the Legislative Organ, when its resolutions affect one or more rights, regardless of who might be affected.
6. The review of the actions of Liberty, Constitutional Protection, Protection of Privacy, Popular actions and those for Compliance. This review shall not impede the immediate and obligatory application of the resolution that decided the action.
7. The legal consultations of the President of the Republic, of the Pluri-National Legislative Assembly, the Supreme Court of Justice or the Agro-Environmental Court on the constitutionality of proposed bills. It is obligatory to comply with the decision of the Constitutional Court.
8. The legal consultations of the rural native indigenous authorities on the application of their juridical norms as applied in a concrete case. Compliance with the decision of the Constitutional Court is obligatory.
9. The review of the constitutionality of international treaties prior to their ratification.
10. The constitutionality of the procedure of partial reform of the Constitution.
11. The conflicts of authority between the rural native indigenous jurisdiction and ordinary and agro-environmental jurisdiction.
12. The direct appeals of nullity.

I. The organization and functioning of the organizations of the nations, rural native indigenous peoples, and citizen associations and political parties must be democratic.

II. The internal election of the leaders and the candidates of the citizen associations, and of the political parties, shall be regulated and supervised by the Pluri-National Electoral Organ, which shall guarantee the equal participation of men and women.

III. The nations and rural native indigenous peoples may elect their candidates according to their own democratic communitarian norms.

ARTICLE 289

Rural native indigenous autonomy consists in self-government as an exercise of free determination of the nations and rural native indigenous peoples, the population of which shares territory, culture, history, languages, and their own juridical, political, social and economic organization or institutions.

ARTICLE 290

I. The formation of rural native indigenous autonomy is based on ancestral territories, currently inhabited by those peoples and nations, and pursuant to the will of their population as expressed through consultation, in accordance with the Constitution and the law.

II. The self-governance of the rural native indigenous autonomies is exercised according to their norms, institutions, authorities and procedures, in accordance with their authority and competences, and in harmony with the Constitution and the law.

ARTICLE 291

I. The rural native indigenous autonomies are rural native indigenous territories and the municipalities and regions that adopt that character, pursuant to that established in the Constitution and the law.

II. Two or more rural native indigenous peoples can form a single rural native indigenous autonomy.

ARTICLE 292

Each rural, native, or indigenous autonomy shall draft its Statute according to its own norms and procedures, in conformity with the Constitution and the law.

ARTICLE 293

I. The indigenous autonomy, based on consolidated indigenous territories and those undergoing that process and once consolidated, shall be formed by the express will of the population through consultation, as the only necessary requisite, pursuant to their own norms and procedures.

II. If the establishment of an indigenous originary peasant autonomy affects the boundaries of municipal districts, the indigenous originary peasant nation or people and the municipal government must agree on a new district demarcation. If it affects municipal boundaries, a procedure for its approval shall be conducted by the Pluri-National Legislative Assembly, following the fulfillment of the special requirements and conditions provided for by statute.

III. Statute shall establish the minimum population requirements and other modalities for the constitution of an indigenous peasant farmer autonomy.

IV. To constitute an indigenous originary peasant autonomy extending to territories in one or more municipalities, statute shall determine the articulation, coordination and cooperation mechanisms for the exercise of its government.

ARTICLE 296

The government of the rural native indigenous autonomies is exercised through their own norms and forms of organization, with the name that corresponds to each town, nation or community, as established in their

statutes and subject to the Constitution and the law.

ARTICLE 304

I. The rural native indigenous autonomies shall exercise the following exclusive authorities:

1. To elaborate their Statute for the exercise of their autonomy pursuant to the Constitution and the law.

8. Exercise of rural native indigenous jurisdiction for the application of justice and the resolution of conflict through their own norms and procedures in accordance with the Constitution and the law.