

# **LEGAL PLURALISM IN THE CONSTITUTION OF BOLIVIA OF 2009: BETWEEN MULTICULTURALISM AND PLURINATIONALISM**

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by

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# **Legal Pluralism in the Constitution of Bolivia of 2009: Between Multiculturalism and Plurinationalism**

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This thesis examines the role of human rights discourse in a decolonisation project. It focuses on 'legal pluralism', which in Bolivia refers to the constitutional recognition of indigenous legal orders, in the Constitution of Bolivia of 2009. This Constitution was the result of a cycle of social protests in Bolivia between 2000-2005 against neoliberalism, imperialism and colonialism headed by indigenous and peasant organisations that culminated in a Constituent Assembly Process (2006-2009). The thesis takes a transdisciplinary approach in order to define the concepts of legal pluralism, decolonization and indigenous autonomy in the Constitution, as well as to understand the way indigenous movements, the state and other political actors deploy the discourse of indigenous collective rights. The theoretical approach to indigenous rights is also transdisciplinary and focused on the problematization of the notions of culture, indigenous subject and indigenous law in international human rights law and in Bolivia's current legal framework.

The main findings of the research are that the Constitution adopts two competing paradigms in relation to the regulation of state-indigenous relations in general and legal pluralism in specific: a human rights approach and plurinationalism. However, because of the political context of the Constituent Assembly, the predominant approach in the Constitution is the human rights approach. The main argument of the thesis is that this approach is in tension with plurinationalism because of the predominance in international human rights law of a reifying perspective of indigenous legal orders and cultures and a primitivist conception of indigeneity. The human rights approach therefore limits radical proposals such as the equal hierarchy of state law and indigenous legal orders, as proposed in the context of plurinationalism. In addition, because of its use of a cultural difference paradigm, currently the human rights approach, particularly in the context of judicial cases, depoliticises race and conflicts related to indigenous peoples by dissociating them from existing political and economic structures. Indigenous collective rights in this context become a (neoliberal) form of governmentality that contributes to the legitimization of these structures and the formation of a 'permitted' indigenous subject.

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## List of Acronyms, Abbreviations and Glossary

CIDOB	Confederación de Pueblos Indígenas de Bolivia (Confederation of Indigenous Peoples of Bolivia) an organisation that comprises several Amazon indigenous unions and associations
COB	Central Obrera Boliviana (Bolivian Workers Central)
CONAMAQ	Consejo Nacional de Markas y Ayllus del Qullasuyu (National Council of Markas and Ayllus of the Qullasuyu) an Andean indigenous organisation
Constitution of Bolivia of 2009	Political Constitution of the Pluri-National State of Bolivia of 2009
CSUTCB	Confederación Sindical Única de Trabajadores Campesinos de Bolivia (Bolivian Unitary Syndical Peasant Workers Confederation), a highland Katarist confederation of indigenous peasant unions
IACHR	Inter-American Commission of Human Rights
ICCPR	International Covenant of Civil and Political Rights
IHRL	International human rights law
ILO Convention 169	International Labour Organization Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries
ILO Convention 107	International Labour Organisation Convention 107 concerning the Protection and Integration Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries
IMF	International Monetary Fund
Indianism	Anti-colonialist political current first introduced by the Bolivian thinker Fausto Reinaga in the 1960s and 1970s
<i>Indigenismo</i>	Indigenism. Ideology developed in Latin America in the 1940s and 1950s that later became the official policy of the Latin American states toward indigenous peoples.
Inter-American Court	Inter-American Court of Human Rights
Katarism	Political, cultural and unionist current that emerged in Bolivia in the late 1960s and later would become a national movement, particularly among the Aymara-speaking people. In the 1980s and 1990s a number of political parties emerged from the Katarist movement, as well as a short-lived guerrilla



	movement.
MAS	Partido Movimiento al Socialismo (Movement Toward Socialism Party), the Bolivian political party currently in power
MNR	Movimiento Nacional Revolucionario (National Revolutionary Movement Party), the Bolivian political party that lead the 1952 revolution
Media Luna	‘Half-Moon’. An Eastern Bolivian autonomist movement that in the 2000s strongly opposed the indigenous and peasant movements. The name half-moon alludes to the crescent moon shape of the Eastern Bolivian departments (Santa Cruz, Beni, Pando and Tarija) in the administrative and territorial map of Bolivia
<i>Mestizaje</i>	Nation-building discourse originated in the early 20 <sup>th</sup> century in Mexico adopted by Latin American states in the period of Social Constitutionalism (1910-1980s). The word <i>mestizaje</i> alludes to <i>mestizo</i> , a colonial racial category referring to the biological mix between male white Spaniards and female Indians.
NGO	Nongovernmental organisation
Pacto de Unidad	‘Unity Pact’.Coalition of indigenous and peasant organisations formed in Santa Cruz in 2004. It drafted a Constitution proposal that formed the basis of the discussions of the Constituent Assembly in Bolivia (2006-2008).
Plurinationalism	Plurinacionalismo. Plurinationalism or ‘Plurinational State’ state is a term that first appeared in the Katarist movement in the 1980s. In the 2000s, it was advanced as a nation-building and decolonisation project by indigenous and peasant organisations.
TIPNIS	Territorio Indígena y Parque Nacional Isiboro Securé (Isiboro Securé Indigenous Territory and National Park), located in the departments of Cochabamba and Beni, Bolivia.
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHRC	United Nations Human Rights Committee

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# Introduction

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

Preamble of the Constitution of the Plurinational State of Bolivia of 2009.<sup>1</sup>

## 1. Argument

This thesis is an analysis of the treatment of indigenous legal orders in the Constitution of Bolivia of 2009. Taking an unprecedented step in Latin American constitutionalism, the new Bolivian constitution establishes an equal hierarchy between state law, or the ‘state jurisdiction’ (*jurisdicción ordinaria*), and indigenous legal orders, referred to in the constitutional text as the ‘indigenous autochthonous peasant jurisdiction’ (*jurisdicción indígena originaria campesina*). This thesis concurs with those authors who claim that this clause is part of a new form of constitutionalism in Latin America that emerged from social movements in Bolivia.<sup>2</sup>

What this work problematizes is the fact that, concomitant with this ‘plurinationalist recognition’ of indigenous legal orders, the Constitution of Bolivia of 2009 grants international human rights law (IHRL) a constitutional and even a supra-constitutional status. Thus, indigenous peoples in general and their legal orders in specific will not only be regulated by clauses based on Plurinational Constitutionalism. Rather, indigenous legal orders are regulated in Bolivia by what is denominated here a ‘human

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<sup>1</sup> Own translation from Spanish.

<sup>2</sup> Raquel Yrigoyen Fajardo, ‘Hitos del reconocimiento del pluralismo jurídico y el derecho indígena en las políticas indigenistas del constitucionalismo andino’ in Mikel Berraondo (ed), *Pueblos Indígenas y Derechos Humanos* (Universidad de Deusto 2006). This thesis however does not examine the Constitution of Ecuador of 2008. Yrigoyen Fajardo is not alone in considering the Constitutions of Bolivia and Ecuador as new forms of constitutionalism in Latin America. See for example Wolff, who argues that these constitutions propose a form of post-liberal democracy Jonas Wolff, ‘New Constitutions and Transformation of Democracy in Bolivia and Ecuador’ in Detlef Nolte and Almut Schilling-Vacaflor (eds), *New Constitutionalism in Latin America Promises and Practices* (Ashgate 2012); Schilling Vacaflor and Kuppe also see the Constitutions of Bolivia and Ecuador as beginning a new era of state-indigenous relations in Latin America. Almut Schilling-Vacaflor and René Kuppe, ‘Plurinational Constitutionalism: A New Era of Indigenous-State Relations?’ in Detlef Nolte and Almut Schilling-Vacaflor (eds), *New Constitutionalism in Latin America Promises and Practices* (Kindle Edition, Kindle edn, Ashgate 2012) loc 8021.

rights approach’.<sup>3</sup> It will be argued in this thesis that there is a tension in the Constitution of Bolivia of 2009 between this human rights approach and the plurinationalist approach—a tension that is resolved with the subordination of one paradigm to the other. Thus, the thesis further argues that the Constitution of Bolivia does not really break with the liberal multiculturalist approach that dominates IHRL since the signing of the ILO Convention 169 in 1989 and that is present in several Latin American constitutions since the 1990s. Instead—at least in its treatment of legal pluralism—the new Bolivian constitution is a continuation of this liberal multiculturalist perspective.

As will be developed throughout the thesis, the dominance of a human rights approach to indigenous peoples—or what is known in Latin America as ‘Multicultural Constitutionalism’—means that what will prevail in the Constitution of Bolivia is a view of toleration towards indigenous peoples in the national space so long as their norms do not conflict with individual rights and individual autonomy endorsement. In this sense, it is a view that promotes the accommodation of indigenous peoples into a liberal democratic society. It will be argued that it is mainly in this emphasis on toleration and accommodation into a liberal democracy that there lies a conflict between the human rights approach and plurinationalism. Liberal theories of minority rights are difficult to fit to contemporary Bolivia, in which over 60% of the population self-identifies as indigenous<sup>4</sup> and in which unionist peasant sectors are in power, represented by the government of Evo Morales. In addition, as will be examined in Chapter 4, plurinationalism was developed in Bolivia in a political context that was critical to multiculturalism. Toleration was no longer sufficient and indigenous and peasant movements demanded recognition, autonomy, political participation and a change in the economic model. In addition, plurinationalism proposes the incorporation of indigenous institutions into Bolivia’s constitutional and legal framework as a solution to the crisis of legitimacy of the state and the presence of colonial forms of domination in the law— aspects that are not touched upon in the state-centred human rights system. Finally, the Pluri-national State is introduced as an alternative to the authoritarian trajectory of

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<sup>3</sup> The term is taken from Karen Engle, *The Elusive Promise of Indigenous Development* (Duke University Press 2010) 72. The term is used as opposed to a ‘self-determination approach’.

<sup>4</sup> Salvador Schavelzon, ‘Mutaciones de la identificación indígena durante el debate del censo 2012 en Bolivia: mestizaje abandonado, indigeneidad estatal y proliferación minoritaria’ 20 *Journal of Iberian and Latin American Research* 328.

liberalism in Latin America, instead of having liberalism as a starting point, as the human rights approach currently does.

Finally, it is argued in this thesis that currently IHRL instruments hold an essentialist and reifying view of indigenous subject, law and culture, which is based on primitivist representations of indigeneity. Since plurinationalism is a decolonisation project, this is another point of tension with the human rights approach. It is suggested here that this second source of tension could potentially be resolved if IHRL operators moved away from the dominant ‘cultural difference’ interpretation framework of indigenous collective rights, towards a self-determination framework that acknowledges the issue of internal colonialism in Latin American post-colonial societies.<sup>5</sup>

It should be emphasised that while this work engages in a comparative exercise between what is presented as two analytically distinct constitutional paradigms in Latin America (namely, Multicultural Constitutionalism or the ‘human rights approach’, and Plurinational Constitutionalism or the ‘plurinationalist approach’), the main concern of the thesis is with the ‘human rights approach’—specifically its treatment of indigenous peoples and its potential compatibility or incompatibility with a decolonisation project. In this sense, the thesis is situated in the debate in critical legal theory and legal anthropology on the role of human rights in a counter-hegemonic political project.<sup>6</sup> The work in this area evidences that human rights have become a ubiquitous social justice discourse in the context of neoliberal globalization.<sup>7</sup> The contention among academics is that while some consider that the human rights discourse shapes social struggles in a way that displaces or forecloses alternative discourses,<sup>8</sup> others maintain that human

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<sup>5</sup> ‘Internal colonialism’ is a term coined in the 1960s and 1970s in Latin America to refer to the continuation of colonialist relations of domination and exploitation of indigenous peoples in the region. Aníbal Quijano and Michael Ennis, ‘Coloniality of Power, Eurocentrism, and Latin America’ (2000) 1 *Nepantla: Views from the South* 533, 577.

<sup>6</sup> A counter-hegemonic political project is understood here as a project that has a conscious strategy to destabilize the ‘common sense’ upon which the hegemonic or predominant worldview rests. Joe Jonathan Wills, ‘The World Turned Upside Down? A Critical Enquiry into the Counter-hegemonic Potential of Socio-Economic Rights Praxis in Global Civil Society’ (PhD, School of Law, University of Leicester 2014) 9-10 based on Antonio Gramsci, *Selections from the Prison Notebooks of Antonio Gramsci* (Quintin Hoare and Geoffrey Nowell Smith eds, Quintin Hoare and Geoffrey Nowell Smith trs, Lawrence and Wishart 1971), 134, 195, 197, 229, 413 and Alan Hunt, ‘Rights and Social Movements: Counter-hegemonic Strategies’ (1990) 17 *Journal of Law and Society* 311, 313.

<sup>7</sup> Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Kindle Edition, University of Chicago Press 2010) 2.

<sup>8</sup> Wendy Brown, ‘“The Most We Can Hope For...”: Human Rights and the Politics of Fatalism’ (2004) 103 *South Atlantic Quarterly* 451; David Kennedy, ‘The International Human Rights Movement: Part of

rights can be complementary to other social justice discourses, and that they themselves have emancipatory potential.<sup>9</sup> This inquiry is intelligible when defining human rights as historically contingent, and as a universalist political project that constitutes just one way among many others of framing struggles for social justice.<sup>10</sup> In this regard, human rights are viewed in this thesis as shaped by the institutional practices and power relations existent at a given time. Moreover, they are viewed as already containing within them an idea of the good life, and the subject and her other.<sup>11</sup>

This thesis seeks to contribute to the critical legal theory debate on the radical potential of human rights by grounding this discussion in the Constitution of Bolivia of 2009—a text that, as mentioned earlier, contains an alternative discourse of indigenous collective rights based on decolonisation, class discourse and self-determination. Therefore, the Constitution of Bolivia of 2009 and the recent history of Bolivia are an ideal laboratory for testing the academic discussion on the relation of human rights with alternative emancipatory and liberation projects.

## 2. Methodology

### 2.1. Social Research Committed to Radical Change

This thesis is based on two methodological perspectives: the view of socio-legal studies as a transdisciplinary field, and the ethical commitment of the socio-legal researcher to radical change. In relation to the latter, the thesis takes as a starting point Fals Borda's

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the Problem?' (2002) 15 *Harvard Human Rights Journal* 101,108-109; Arzu Merali, 'Living as a Social Being-- The Interconnectedness of Being' (International Colloquium Epistemologies of the South, Coimbra, 10-12 July 2014) who mentions the problem human rights discourse has to even conceive radical alterity; Charles R. Hale, 'Neoliberal Multiculturalism: The Remaking of Cultural Rights and Racial Dominance in Central America' (2005) 28 *Political and Legal Anthropology Review* 10; Slavoj Žižek, 'Against Human Rights' (2005) 34 *New Left Review* 115.

<sup>9</sup> Boaventura de Sousa Santos, 'Human Rights as an Emancipatory Script? Cultural and Political Conditions' in Boaventura de Sousa Santos (ed), *Another Knowledge is Possible Beyond Northern Epistemologies*, vol 3 (2nd edn, Verso 2008); Paul O'Connell, 'Human Rights: Contesting the Displacement Thesis' Critical Legal Thinking web page, 18 June 2015 <<http://criticallegalthinking.com/>> accessed June 2015.

<sup>10</sup> In a similar sense, Upendra Baxi, *The Future of Human Rights* (Oxford University Press 2002) v. For a contextualization of human rights see for example Samuel Moyn, *The Last Utopia. Human Rights in History* (Kindle edn, Harvard University Press 2012); and the examination of human rights in the history of political thought Costas Douzinas, *The End of Human Rights* (Hart Publishing 2000).

<sup>11</sup> Makau Mutua, *Human Rights. A Political and Cultural Critique* (University of Pennsylvania Press 2002).

position that commitment and action validate research.<sup>12</sup> In this line of thought, academic research should have a social purpose (as opposed to being an academic exercise or a medium for furthering a personal career), particularly the improvement of the living conditions of the groups that are exploited by capital.<sup>13</sup> Methodologically, this implies that the researcher must make her political views explicit. They would be expressed in an open statement of the ‘how, why and for whom’ of the research project.<sup>14</sup>

While taking the form of a doctoral thesis, this research was written with the underlying aim of attempting to make a humble but valuable contribution to the debate among social movements in Bolivia on the role of human rights in the plurinationalist project. The main query in this regard is whether or not the human rights approach in IHRL is capable of contributing to furthering the demands of indigenous movements for indigenous autonomy, decolonisation and an alternative development model. This thesis is also concerned with the challenges of implementing the plurinationalist constitutional norms related to legal pluralism in the Constitution of Bolivia of 2009, particularly when interpreted and applied by the Plurinational Constitutional Tribunal of Bolivia. Thus, to some extent this work was also written with the Constitutional Tribunal in mind.

Another way in which this thesis attempts to follow the idea of a socially committed research is by attempting to make it relevant in Bolivia and engaging with the academic discussion in Spanish taking place there on plurinationalism and decoloniality. In this connection, this thesis also pays heed to de Sousa Santos’s warning concerning the invisibilisation and devaluation of the intellectual production of global South countries.<sup>15</sup> In this thesis, however, the intellectual production in Bolivia is not added in merely a complementary manner. Rather, it takes a central place and the thesis furthers the normative proposal of plurinationalism as an alternative constitutional paradigm in relation to the regulation of indigenous peoples and the definition of the political subject of the Constitution of Bolivia of 2009.

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<sup>12</sup> Orlando Fals Borda, ‘The Negation of Sociology and its Promise: Perspectives of Social Science in Latin America Today’ (1980) 15 *Latin American Research Review* 161, 165.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> Boaventura de Sousa Santos, *Conocer desde el Sur. Para una cultura política emancipatoria* (2nd edn, CLACSO; CIDES-UMSA; Plural Editores 2008).

Finally, it should be clarified that a commitment to radical change does not entail that the researcher regards herself as the salvation or transformation agent of specific social groups and social classes. Rather, it is a justification of the researcher's existence and of her work, and it places as an ultimate goal the construction of a 'critical social science' that will contribute to structural change.<sup>16</sup> I believe it is also an acknowledgement that the social researcher is a political actor and her research (the results as well as the process of conducting it), far from being neutral, has a degree of impact over the social issues and social actors that it addresses. The methodological requirement of stating the political position is also a way of admitting that the researcher cannot hold an impartial position in relation to the research problem, which itself is shaped by her ethical and political views (this under the epistemological premise that the researcher does not 'discover' the object of study, but constructs it). At the same time, research is also a personal journey of the researcher that may result in a shift in the way the researcher views the world and the research problem itself.

## **2.2. Socio-Legal Studies as a Transdisciplinary Field**

Transdisciplinarity entails seeing disciplines as social and historical constructs sustained by communities and networks of practice.<sup>17</sup> When taking a transdisciplinary epistemological and methodological perspective, other disciplines, traditions or paradigms (produced inside or outside of academia<sup>18</sup>) can be legitimately utilized in order to examine a social phenomenon from different levels of perception.<sup>19</sup> It is not just interdisciplinarity, a paradigm that continues to hold on to disciplinary boundaries,<sup>20</sup> but the possibility of examining law from social theory perspectives.<sup>21</sup> Transdisciplinarity in this sense allows legal scholars to draw on the inquiries and paradigms of social theory and social sciences, instead of just using its methods.<sup>22</sup> In addition, the social sciences methods are to be seen as constitutive of the legal field—as opposed to foreign to it—and as necessary for addressing the research question. More

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<sup>16</sup> Fals Borda (n 12)

<sup>17</sup> Julian Webb, 'When 'Law and Sociology' is not Enough: Transdisciplinarity and the Problem of Complexity' in Michael Freeman (ed), *Law and Sociology*, vol Current Legal Issues 8 (Oxford University Press (Oxford Scholarship Online) 2006) 97.

<sup>18</sup> Ibid, 98.

<sup>19</sup> Manfred A. Max-Neef, 'Foundations of Transdisciplinarity' (2005) 53 *Ecological Economics* 5, 10-11.

<sup>20</sup> Webb (n 17) 100.

<sup>21</sup> Ibid, 91.

<sup>22</sup> Reza Banakar and Max Travers, *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) xi-xvii.

ambitiously, ultimately transdisciplinarity means viewing disciplines that have compatible paradigms as a transdisciplinary approach to the object of study (which is conceived as a multi-faceted objective reality<sup>23</sup>) under a common normative epistemic paradigm (why, how, what should we research).<sup>24</sup>

In this thesis, the view of socio-legal studies as a transdisciplinary field is manifest in two ways. The first is in the choice of literature and methods utilised to reconstruct and examine the human rights approach and plurinationalism—an aspect that will be further developed in the next sub-section. The second is in the way the law is defined. A socio-legal perspective entails seeing law both as a system in itself and as socially embedded, as exemplified by Bourdieu's notion of the juridical field.<sup>25</sup> This involves taking a law-in-context approach that looks at the legal prescriptions and regulations but also at the practice, power relations and modes of communication that are 'disciplinarily and professionally defined'.<sup>26</sup> As will be developed in Section 3, the reason for taking a law-in-context approach in this thesis was not only the methodological starting point of conceiving the law in general and human rights in specific as shaped by social practice, but also the material impossibility for me to fully understand the Constitution of Bolivia of 2009 without taking into account the context of its creation.

In relation to the law, it should be noted also that this thesis takes a legal pluralism perspective.<sup>27</sup> In this regard, legal positivism is called into question because of its role in the semantic reduction of indigenous laws to 'customs'<sup>28</sup> and 'cultural practices'<sup>29</sup>

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<sup>23</sup> Max-Neef (n 19) 9-10.

<sup>24</sup> Rolando García, *Sistemas complejos. Conceptos, método y fundamentación epistemológica de la investigación interdisciplinaria* (Gedisa 2006) 106-107; Max-Neef (n 19) 8-9.

<sup>25</sup> Hilary Sommerlad, 'Socio-Legal Studies and the Cultural Practice of Lawyering' in Dermot Feenan (ed), *Exploring the 'Socio' of Socio-Legal Studies* (Palgrave Macmillan 2013) 187.

<sup>26</sup> Ibid, 187.

<sup>27</sup> Roderick MacDonald, 'Pluralistic Human Rights? Universal Human Wrongs?' in René Provost and Colleen Sheppard (eds), *Dialogues on Human Rights and Legal Pluralism* (Kindle edn, Springer 2013). As a field and a form of conceptualising social space, legal pluralism started being discussed in the 1970s and 1980s, thus giving place to a new trend of legal scholarship in Britain that is for the most part considered radical in relation to mainstream perspectives of law and society, which have the state as a reference point. Fauzia Shariff, 'Editorial' (2008) 2 Law, Social Justice and Global Development 1, 1; Idowu William and Oke Moses, 'Multiculturalism, Legal Pluralism and the Separability Thesis: A Postmodern Critique of 'An African Case for Legal Positivism'' (2008) 2 Law, Social Justice and Global Development, 4-5.

<sup>28</sup> ILO Convention 169, Article 8 (2); ILO Convention 107, Article 7(2); Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article 4(2).

<sup>29</sup> CESCR 'General Comment No. 21 on the Right to Everyone to Take Part of Cultural Life' E/C.12/GC/21 (21 December 2009) para 15.

within the IHRL corpus, since under legal positivism only the state produces ‘real law’.<sup>30</sup> Furthermore, a legal pluralism perspective of the law evidences the historical use of legal positivism in Latin American constitutionalism as a form of subjugation of indigenous peoples. In this sense, as will be further elaborated in Chapter 3, ‘legal monism’ or ‘legal centralism’ justified the dismantling of the colonial institutions of indigenous communities and legal pluralism during mid 19<sup>th</sup> century and early 20<sup>th</sup> century—both of which provided a degree of independence of the subjected indigenous populations.<sup>31</sup>

Human rights are also examined from a socio-legal perspective because the methodological implication of defining them as historically contingent is the prescription to historically situate the debate on the emancipatory potential of human rights,<sup>32</sup> as well as to examine personhood, subjectivities and the socio-economic and political context of disputes and negotiations over rights.<sup>33</sup> In relation to human rights, it is also worth clarifying that, while the thesis focuses on IHRL and its treatment of indigenous subject, and of indigenous legal orders and cultures, it also takes into account that human rights discourse can be produced by ‘unofficial sources’ outside of IHRL and state law.<sup>34</sup> This implies that human rights are shaped by practice and not only by written norms. In the words of Goodale, social practice is perceived as ‘constitutive of the idea of human rights itself, rather than simply the testing ground on which the idea of universal human rights encounters actual ethical or legal systems’.<sup>35</sup>

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<sup>30</sup> Sally Engle Merry, ‘Legal Pluralism’ (1988) 22 *Law and Society Review* 869, 876; Pauline McDonald, ‘The Legal Sociology of Georges Gurvitch’ (1979) 6 *British Journal of Law and Society* 24, 38.

<sup>31</sup> Yrigoyen Fajardo (n 2) 10-11.

<sup>32</sup> In a similar sense, Rachel Sieder and John Andrew McNeish, ‘Introduction’ in Rachel Sieder and John Andrew McNeish (eds), *Gender Justice and Legal Pluralities: Latin American and African Perspectives* (Routledge 2012), 6.

<sup>33</sup> Ibid, 14.

<sup>34</sup> Mark Goodale, ‘Locating Rights, Envisioning Law Between the Global and the Local’ in Mark Goodale and Sally Engle Merry (eds), *The Practice of Human Rights Tracking Law Between the Global and the Local* (Cambridge University Press 2007) (n) page

<sup>35</sup> Ibid, 15. Goodale has a Foucauldian discursive approach to human rights that implies to ‘elevate social practice both as analytical and methodological category’. Ibid. This premise that is at the basis of some anthropological work on human rights that is revised in this thesis. Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* who looks at the way human rights discourse is adopted in different contexts (n 7); Charles R. Hale, ‘Does Multiculturalism Menace? Governance, Cultural Rights and the Politics of Identity in Guatemala’ (2002) 34 *Journal of Latin American Studies* 485. In a similar vein Shanon Speed, ‘Global Discourses on the Local Terrain. Human Rights and Indigenous Identities in Chiapas’ (2002) 14 *Cultural Dynamics* 205.



### **3. Methods**

This section will begin by giving an account of the fieldtrips conducted in 2011 and 2014, underscoring how they informed the research problem and the structure of the thesis. It will also explain the process followed in the conducting of elite interviews and the role they had in the final document. Section 3.2 will refer to the methods and theoretical framework utilised to define and analyse the human rights approach and the plurinationalist approach.

#### **3.1. Field Trips and Elite Interviewing**

After producing an initial PhD proposal, I conducted fieldwork from 19 July to 31 July 2011 in Bolivia—a country I had never been to before. I had exchanges with three legal scholars and one political scientist, and conducted twelve semi-structured interviews (most of which were recorded with the consent of the interviewees) with two Supreme Court Magistrates, with the President of the Judicial Council (Consejo de la Judicatura) and his advisor, with the former civil servant who drafted the Law of Autonomies bill, with two congressmen of the Legislature of Cochabamba (including the Yuki representative), with the advisor of the Government of Cochabamba, with a former constituent delegate for the National Union Party, with the director of one of the main newspapers of Sucre, and with the Head of the Judicial Institute. The Ethics Committee of the University of Leicester decided I could not cite these interviews in the thesis because I had conducted them before my formal registration to the PhD programme, and had therefore not utilized the University's form for gathering written consent. Hence, I did not analyse these interviews and I do not refer to them directly in this thesis.

Nevertheless, this first trip to Bolivia made it clear to me that the text of the Constitution of Bolivia could not be read literally and that its interpretation had to take into account the context of its creation.<sup>36</sup> In this regard, the thesis interprets the constitutional text in the light of the neoliberal period in Bolivia (1985-2005), the Constituent Assembly process (2006-2009), and the first years of the new government

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<sup>36</sup> I thank Dr Farit Rojas for this observation. La Paz, July 2011. This argument finds support in the constitutional clause that establishes the will of the constituent delegate as a parameter of interpretation of the Constitution. Constitution of Bolivia of 2009, Article 196.II.

(2006-2012).<sup>37</sup> Thus, the contradictions in the text are explained as the result of elite pacts and compromises made by different sectors involved in the making of the Constitution. This first fieldwork also evidenced that terms such as ‘legal pluralism’, ‘plurinationalism’, ‘decolonization’ and ‘indigeneity’ have specific meanings in Bolivia’s current political juncture that cannot be grasped through purely legal doctrinal analysis or by reading about the development of these concepts in other latitudes. These insights indicated to me the importance of empirical work for deepening my understanding of the Constitution. Therefore, in 2014 I undertook a second fieldwork trip to Bolivia in which I focused on clarifying these concepts.

Importantly, the first fieldwork also enabled me to realize that my essentialist and colonialist views of indigenous legal orders as isolated spheres that have pre-colonial origin had biased my initial design of the research question. This bias originated not only from my ignorance of the reality of indigenous populations in Latin America and in Bolivia more specifically, but was the result of initially circumscribing the analysis of legal pluralism to a human rights approach. As will be developed in Chapter 2, IHRL assumes an essentialist perspective of indigenous legal orders, instead of conceiving them as a multiplicity of continuously evolving systems that are in constant interaction with state law and other non-legal systems.<sup>38</sup> As a result of taking this approach, the questions to the elite interviewees in my first fieldwork were about the tensions between individual rights and indigenous forms of justice, and the possibility of ‘inter-cultural interpretations’ of human rights that would permit the harmonization of the human rights legal system with indigenous legal orders. However, the responses of the interviewees, as well as the written primary sources and the secondary literature gathered in Bolivia, revealed that my human rights approach had a blind spot in relation to the questioning of state sovereignty and legitimacy. While the issue of individual rights versus indigenous legal orders had importance in post-revolutionary Bolivia, there was also the matter of the ‘re-foundation of the state’, and the restructuring of the judiciary in a way that would incorporate (and not just tolerate) the multiplicity of non-state legal systems in Bolivia. In this sense, legal pluralism in the Bolivian context was

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<sup>37</sup> I thank Prof James Dunkerley from Queen Mary University in London for suggesting that I started the analysis in 1985.

<sup>38</sup> In a similar sense, Rachel Sieder and Jessica Witchell, ‘Advancing Indigenous Claims Through the Law: Reflections on the Guatemalan Peace Process’ in Jane K. Cowan, Marie-Bénédicte Dembour and Richard A. Wilson (eds), *Culture and Rights Anthropological Perspectives* (4th edn, Cambridge University Press 2004) 201.

not only defined in terms of indigenous peoples' right to use their own law, but transcended the language of rights and was at the forefront of the projects of decolonisation of state law and of strengthening indigenous autonomies.

When arriving to conduct doctoral studies in Leicester, I continued for some time to explore the initial research question of whether or not it was possible to have a situation of legal pluralism while subordinating indigenous legal orders to the Constitution and to IHRL. By the second year of the PhD programme I realized that the simple answer to that question was *no*.<sup>39</sup> The constitutional and legal arrangements in Bolivia were such that indigenous legal orders were conceived as part of a single state judicial function and indigenous justice was only entitled to operate in minor cases.<sup>40</sup> The actual discussion around the Constitution was one of how to interpret the conflicting constitutional norms related to legal pluralism: ones pointing towards indigenous autonomy and self-determination and others aimed at regulating indigenous justice in the way proposed by IHRL. From that point onward the research attempted to reconstruct and compare the way IHRL and plurinationalism address legal pluralism, and sought to understand how the recognition of indigenous legal orders was being implemented in such a conflicting constitutional framework.

In March 2014, the Ethics Committee of the University of Leicester gave me permission to conduct elite interviews and to record the consent of the interviewees on my audio recorder or by e-mail without having to request them to sign the University's consent form.<sup>41</sup> My argument was that in this specific context, interviewees are likely to view the signing of a consent form as something that poses a risk to their confidentiality and even their job security and personal safety, rather than as something that serves to protect their rights. Interviewees may even perceive it as an expression of mistrust and ill faith on the part of the researcher.<sup>42</sup> In addition, in order to avoid any potential

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<sup>39</sup> I thank Prof Katja Ziegler from the University of Leicester for helping me reach this conclusion.

<sup>40</sup> This argument will be developed in Chapter 5.

<sup>41</sup> All interviews were recorded except for one in which the interviewee did not give his consent to be recorded. As stipulated by the University of Leicester, all interviewees were provided with an information sheet prior to the interview, as well as my business card with my contact details.

<sup>42</sup> This view was later confirmed by the Head of International Affairs of the Ministry of Communication, who, taking the information sheet to be a consent form, said he found being requested to sign these forms to be 'insulting'. La Paz, 2 May 2014. In addition, half the interviewees did not look at the information sheet and returned it to me or left it on the table, and just read and kept my business card. Overall, however, I considered the use of the information sheet to be relevant for those interviewees who did read it. I believe it also helped present the interview as a formal occasion that was part of a serious research project with institutional support.

inconvenience to my interviewees, their names have been omitted from the thesis and I refer only to their position and institution. Furthermore, if I refer to interviews that may be construed as being critical of the current Bolivian government, I make sure also to omit the name of the institution to which the interviewee is affiliated.

On this second trip (22 April to 15 May 2014) I gathered a large amount of literature available only in Bolivia, spoke to two high-profile academics and conducted eight semi-structured elite interviews in La Paz and Santa Cruz with Constituent Assembly delegates, indigenous representatives, heads of NGOs and government agents. The order and content of the questions varied slightly depending on the expertise of the interviewee, to which sector they belonged, and also the flow of the conversation. However, the main questions related to (1) the role of IHRL in indigenous demands, (2) the current situation in relation to the right of indigenous peoples to use their own law (and in some cases I also asked about how the state was managing the tensions between human rights and indigenous forms of justice), (3) how they define plurinationalism and decolonization in the context of ‘the process of change’ (*‘el proceso de cambio’*) in Bolivia, and (4) whether or not they consider the demands of Pacto de Unidad to have been satisfied in the new Constitution.<sup>43</sup>

Interview analysis hinted at variation in the meaning and effects of the indigenous rights discourse depending on the enunciator (the Bolivian government offices dealing with indigenous peoples, NGOs working with indigenous communities, indigenous and peasant organisations). For this reason, as mentioned earlier, I expanded my thesis in order to address the way indigenous rights discourse was being utilised by indigenous movements—as opposed to limiting the analysis to how human rights are interpreted and implemented by official human rights operators. This would prove important in the thesis as a way of not silencing by omission the contribution of indigenous and peasant movements to the shaping of indigenous rights discourse in IHRL and its implementation in the region.

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<sup>43</sup> In field interviewing it is not considered good practice to ask the interviewee questions directly addressing one’s research problem. However, since this was elite interviewing and I had built a good rapport with two members of NGOs and the former constituent delegate, I also asked them at the end of the interview or in a second interview about what they thought of the idea of neoliberal multiculturalism and the critiques of some anthropologists to the role assumed by NGOs working with indigenous peoples.

Finally, this second fieldwork trip was important in order to learn about the tensions between indigenous organisations and the government of Evo Morales. In this connection, it allowed me to understand that the meaning of indigeneity, decolonisation and plurinationalism was also gradually mutating in government official discourse from the way these concepts were conceived during the revolutionary period (2000-2005) and the Constituent Assembly process—an observation that is reflected, for instance, in my analysis of a resolution of the Constitutional Tribunal in the final chapter of this work.

### **Interview Analysis**

As explained above, fieldwork in Bolivia and the interaction with the elite interviewees and Bolivian academics played a key role in shaping the research question, in the methodological decisions taken, and in structuring the thesis. However, in the text of the thesis the interviews were mainly utilised in a complementary fashion. That is, I privileged other primary and secondary sources (many a time provided by the interviewee herself), resorting to interview analysis only when there were no other sources on a specific point. In addition, I made a conscious decision not to quote interviews, as this would have required a more in-depth discourse analysis of the utterances.<sup>44</sup>

The interview analysis for this thesis was qualitative and based on the recordings of the eight interviews that I was allowed to use by the Ethics Committee of the University of Leicester. Because of time constraints, these interviews were not transcribed. Instead, I resorted to listening to them several times and taking detailed notes. The field notes were particularly important also because they indicated the body language of the interviewee, his or her attitude towards me, and my impressions of the context of the interview and the behaviour of the interviewee. The main purpose of the analysis was disambiguation, or deciding what was said in each individual question and interview by taking into account the context of utterance (power dynamics during the interview,

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<sup>44</sup> Quoting in isolation would have meant to presuppose that the text ‘speaks for itself’, and would have also meant to take the oral text out of its context of utterance. See for example, Charles Antaki and others, ‘Discourse Analysis Means Doing Analysis: A Critique of Six Analytic Shortcomings’ (2003) 1 Discourse Analysis Online.

ideological context of the interview, and techniques used by the interviewee in his or her speech).<sup>45</sup>

The decision to have elite interviewing and interview analysis take a secondary role in this research project was primarily a methodological one, following discussion with my thesis supervisors. The aim was to privilege in the third and fourth year of the PhD the development of the theoretical framework and the chapters related to the human rights approach over the conducting of more extensive fieldwork, and over the development of a full chapter on the result of the elite interviewing. The rationale behind the decision was that I had already systematised a significant amount of information on Bolivia and plurinationalism. Hence, what was required at that stage was to refine the argument and theorise the historical narrative instead of gathering further data. In this regard, as mentioned before, the second fieldwork in Bolivia had the main objective of helping to clarify specific concepts in the Constitution that were difficult to understand through legal doctrinal analysis or secondary literature alone. It also sought to gain a better understanding of the political situation in Bolivia, the use of human rights discourse among certain sectors, and the implementation of the norms related to legal pluralism.

A second reason for interviews not being more prominent was that while in elite interviewing having a representative sample is not a relevant criterion when assessing the validity and reliability of the corpus, and while in the second fieldwork I interviewed representatives of the three sectors that were proposed in my fieldwork plan (NGOs, indigenous movements and government agents), I considered that with the interviews that I was permitted to use, there was insufficient material to develop a chapter based on comparative interview analysis. The small number of elite interviews in the second fieldwork was the result of not having powerful contacts that could grant access to influential political actors or high government officers, as I did in 2011. Time constraints in the third year of the PhD meant I could not stay for more than a month in Bolivia either, in order to build those contacts by negotiating an internship with an NGO or a government institution, or by becoming a visiting scholar at a university. Finally, despite my efforts, the tense political situation between the Bolivian

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<sup>45</sup> My method of interview analysis was mainly based on Dr Sophie Duchesne-Guilluy's course on Interview Analysis at the School of Politics and International Relations of the University of Oxford. Hilary Term, 2009.

government and indigenous organisations in 2014 made it impossible to access representatives of the indigenous organisations CIDOB and CONAMAQ.

### **3.2. The Study and Comparison of the Human Rights Approach and Plurinationalism**

#### **The Human Rights Approach**

This thesis examines the human rights approach principally through legal doctrinal analysis of the treatment of indigenous subject, law and culture by IHRL instruments and official reports. The thesis also examines decisions of the United Nations Human Rights Committee (UNHRC) and judicial resolutions of the Inter-American Court of Human Rights ('Inter-American Court'). The UNHRC is responsible for the supervision of the Member States' compliance with their obligations laid down under the International Covenant on Civil and Political Rights (ICCPR). It has been central to the development of the right to culture in connection with indigenous peoples (under Article 27 of the ICCPR).<sup>46</sup> The Inter-American Court on the other hand is the only IHRL institution that produces binding judicial resolutions related to the right to culture. Its case law has also been at the centre of the implementation of indigenous peoples' 'special connection to land' as a legal argument for granting indigenous petitioners the right to communal land.

A theoretical framework that problematizes the definition of culture in IHRL, as well as a contextualisation of the shift towards a multiculturalist approach in IHRL in the late 20th century, inform the analysis of IHRL instruments, reports and decisions. In relation to the problematisation of culture, the examining of multiculturalist theory, particularly Kymlicka's liberal theory of minority rights<sup>47</sup> (which was part of the discussion in the

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<sup>46</sup> The UNHRC consists of eighteen experts, who are nominated by the Member States but do not represent them. Among other tasks, the UNHRC functions as a quasi-judicial organ because it considers communications filed by individuals if the State party has ratified the First Optional Protocol of the ICCPR. Katja Göcke, 'The Case of Ángela Poma Poma v. Peru before the Human Rights Committee. The Concept of Free Prior and Informed Consent and the Application of the International Covenant on Civil and Political Rights to the Protection and Promotion of Indigenous Peoples' Rights,' in A. von Bogdandy and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, vol 14 (Brill 2010) *ibid*, 340-341.

<sup>47</sup> Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Kindle edn, Oxford University Press 1996).

Bolivian context<sup>48</sup>), and Taylor's seminal essay on multiculturalism and recognition,<sup>49</sup> and the critiques of these theories,<sup>50</sup> enabled me to analyse at a deeper level the 'cultural difference' justification of indigenous collective rights in IHRL.

In addition, the thesis refers to the literature on the 'regime of authenticity'<sup>51</sup> in order to better identify reifying views of indigeneity in IHRL decisions and understand their implications in relation to indigenous radical demands. The thesis also developed the notion of the 'regime of toleration'<sup>52</sup>, which is utilised to organise the discussion around the limits that liberal multiculturalism imposes to indigenous radical demands. This discussion also sheds light on the distinction between recognition and toleration, and why toleration can be considered a form of governmentality.

Anthropologists and legal scholars concerned with the limitations imposed on indigenous legal orders by international and domestic courts informed my analysis of the treatment of indigenous legal orders in IHRL.<sup>53</sup> In addition, legal anthropological work represented an important secondary source for understanding indigenous legal orders in various Bolivian communities. Resorting to anthropological research also enabled me to move away from generalisations about indigenous forms of justice and,

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<sup>48</sup> Salvador Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (CLACSO; Plural Editores; IWGIA; CEJIS 2012) 482.

<sup>49</sup> Charles Taylor, 'The Politics of Recognition' in Amy Gutmann (ed), *Multiculturalism Examining the Politics of Recognition* (Expanded edition of Taylor's 'Multiculturalism and the 'Politics of Recognition', Princeton University Press 1994).

<sup>50</sup> In this sense, particularly influential was the work by Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press 2002); Anne Phillips, *Multiculturalism without Culture* (Princeton University Press 2007); Jeff Spinner-Halev, 'Multiculturalism and its Critics' in John S. Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press 2008) (n); David Scott, 'Culture in Political Theory' (2003) 31 *Political Theory* 92.

<sup>51</sup> The expression is of Phillips (n 50).

<sup>52</sup> For the development of the notion 'regime of toleration' I drew mainly on the work of Wendy Brown, *Regulating Aversion: Tolerance in the Age of identity and Empire* (Kindle edn, Princeton University Press 2009); Engle (n 3); Anna Elisabetta Galeotti, 'Identity, Difference, Toleration' in John S. Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (University of Oxford Press 2008) and Ghassan Hage, *White Nation: Fantasies of White Supremacy in a Multicultural Society* (Kindle edn, Routledge 2000).

<sup>53</sup> Kirsten Anker, *Declarations of Interdependence. A Legal Pluralist Approach to Indigenous Rights* (Kindle edn, Asghate 2014) Caroline Dick, "'Culture and the Courts" Revisited: Group-Rights Scholarship and the Evolution of S.35(1)' (2009) 42 *Canadian Journal of Political Science* 957; Sieder and Witchell, 'Advancing Indigenous Claims Through the Law: Reflections on the Guatemalan Peace Process' (n 38); Nicholas Buchanan and Eve Darian-Smith, 'Introduction: Law and the Problematics of Indigenous Authenticities' (2011) 36 *Law and Social Inquiry* 115 Rachel Sieder, 'The Challenge of Indigenous Legal Systems: Beyond Paradigms of Recognition' (2012) 18 *Brown Journal of World Affairs* 103; Donna Lee Van Cott, 'A Political Analysis of Legal Pluralism in Bolivia and Colombia' (2000) 32 *Journal of Latin American Studies* 207.



instead, allowed me to provide specific examples when referring to indigenous justice in Bolivia. Finally, anthropological work was also relevant in understanding the treatment of the indigenous subject in human rights discourse.<sup>54</sup> The analysis of the indigenous subject in IHRL was also informed by Critical Race Theory categories such as ‘race’, ‘racial resistance’ and the analysis of the use of the term ‘ethnicity’ in IHRL. I also drew on Latin American de-colonial theory and the work of Fanon on the shaping of the racialised postcolonial subject.<sup>55</sup>

Chapter 3 was important for transposing the discussion on the human rights approach to Latin America. It should be taken into account that while the human rights approach has a universalist claim, plurinationalism is a discussion that has taken place mainly in the Andean region and that juridically it has been expressed only at a domestic level. Consequently, for the purposes of comparing the human rights approach and plurinationalism, it was important to situate the former in the Latin American context. The theoretical framework for this chapter was state formation, which was chronologically organised by referring to the economic and constitutional periodization of Latin American post-independence history. For the period between the independence in the 1800s and the late 1980s, the emphasis was on highlighting the colonial legacy in Latin American constitutionalism in relation to the treatment of indigenous peoples and afro-Latin Americans. From the 1980s onward, the organising concepts were ‘neoliberal multiculturalism’,<sup>56</sup> as well as Albó and Hale’s ‘rebel Indian’ and ‘permitted Indian’.<sup>57</sup> This theoretical framework highlights how the multiculturalist turn, while breaking with assimilationism, represented in some ways a continuation of the colonial legacy, and in others ways constituted the racial formation of the neoliberal period in the region. This

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<sup>54</sup> Alcida Rita Ramos, ‘The Hyperreal Indian’ (1994) 14 *Critique of Anthropology* 153; Astrid Ulloa, *The Ecological Native: Indigenous Movements and Eco-governmentality in Colombia* (Routledge 2010). Another influential work was Juliet Hooker, ‘Indigenous Inclusion/Black Exclusion: Race, Ethnicity and Multicultural Citizenship in Latin America’ (2005) 37 *Journal of Latin American Studies* 285.

<sup>55</sup> Michael Omi and Howard Winant, *Racial Formation in the United States* (3rd edn, Routledge 2015) Nelson Maldonado-Torres, ‘On the Coloniality of Being’ (2007) 21 *Cultural Studies* 240; Etienne Balibar, ‘Is There Neo-Racism?’ in Etienne Balibar and Immanuel Wallerstein (eds), *Race, Nation, Class Ambiguous Identities* (Verso 1991); Frantz Fanon, *Black Skin White Masks* (Lam Markmann tr, Originally published in 1952, 2nd edn, Pluto Press 2008); Charles Mills, ‘Multiculturalism as/and/or Anti-Racism?’ in Anthony Simon Laden and David Owen (eds), *Multiculturalism and Political Theory* (Cambridge University Press 2007).

<sup>56</sup> For example, Hale, ‘Does Multiculturalism Menace? Governance, Cultural Rights and the Politics of Identity in Guatemala’ (n 35); Jodi Melamed, ‘From Racial Liberalism to Neoliberal Multiculturalism’ (2006) 24 *Social Text* 1.

<sup>57</sup> Xavier Albó, *Movimientos y poder indígena en Bolivia, Ecuador y Perú* (PNUD; CIPCA 2008) Hale, ‘Does Multiculturalism Menace? Governance, Cultural Rights and the Politics of Identity in Guatemala’ (n 35).

chapter was also important in highlighting the role of the transnational indigenous movement in the implementation of multicultural policies in Latin America, as well as the advancement of indigenous rights at an IHRL level.

### **Plurinationalism**

Plurinationalism is a challenging paradigm to explore because it is an ongoing political project that did not fully materialize in the Constitution of Bolivia of 2009. Second, plurinationalism is a term that is currently being developed not only by indigenous and peasant movements but also by Bolivian intellectuals and by the current MAS (Movement Toward Socialism Party) government (2006-2020). Third, plurinationalism in the early 2000s was an umbrella term for a number of political demands articulated by a temporary coalition of indigenous and peasant organisations. These demands are not necessarily compatible with each other in terms of the position of indigenous and peasant groups in relation to the state, to white-mestizo elites,<sup>58</sup> to development models, to private property and even to the definition of indigeneity. Fourth, while plurinationalism and multiculturalism are presented in the research question as differentiated analytical categories, they both deploy the discourses of identity politics and human rights. Hence, plurinationalism (as developed in the 2000s by indigenous movements) includes the constitutional recognition of indigenous collective rights present in the ILO Convention 169 and the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP, signed in 2007). Therefore, it was important in this thesis to establish whether the human rights approach forms part of plurinationalism, or whether indigenous collective rights are given a different sense in that paradigm.

Taking into account the aforementioned challenges, plurinationalism is explored in this thesis from three different angles. First, plurinationalism is explained in the context of the Indianist-Katarist project, since the term first appeared in the Political Thesis of the Bolivian Unitary Syndical Peasant Workers Confederation (CSUTCB) in 1983 ('Political Thesis'). In addition, it will be argued that Katarist thought significantly

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<sup>58</sup> 'White-mestizo' is a term utilized by the Bolivian sociologist Rivera-Cusicanqui ('*criollaje blanco-mestizo*'). Silvia Rivera Cusicanqui, "*Oprimidos pero no Vencidos*". *Luchas del Campesinado Aymara y Qhechwa 1900-1980* (4th edn, La Mirada Salvaje 2010). 'Mestizo' is a racial category that is based on culture and skin pigmentation (n 554). A white-mestizo in this context is a person whose body is the result of a genetic mixture of different ethnic groups and has the culture and the social status of a white European (who is at the top of the colonial racial hierarchy). His or her skin and features may also be predominantly Caucasian, but not necessarily. In this thesis, the Bolivian white-mestizo elites are referred to interchangeably as white-mestizos, creoles or whites.

influences the Constitution of Bolivia of 2009 in relation to the definition of plurinationalism, decolonization, indigeneity and legal pluralism. To explain plurinationalism from a Katarist perspective, I look at the Political Thesis, the Tiwanaku Manifesto (1973) and the analysis of Katarism by Rivera Cusicanqui.<sup>59</sup> Second, this thesis looks at plurinationalism as it was defined by the indigenous-peasant coalition Pacto de Unidad during the Constituent Assembly period (2006-2009).<sup>60</sup> For this purpose, the thesis utilises the systematization report produced by Pacto de Unidad, and the Constitution proposal that Pacto de Unidad presented to the Constituent Assembly in 2007.<sup>61</sup> The thesis also draws on the ethnographical work of Schavelzon, who narrated and analysed the various debates that took place in the Constituent Assembly in relation to indigenous subject and indigenous justice.<sup>62</sup> Finally, plurinationalism is also examined in Chapters 4 and 5 by looking at the way it is presented in the text of the Constitution of Bolivia of 2009, particularly in relation to legal pluralism.

The aforementioned analysis of plurinationalism is accompanied by an inquiry into the political economy and politics in Bolivia between 1985-2012—that is, from the beginning of the neoliberal period to the TIPNIS conflict<sup>63</sup> that led to the breaking of Pacto de Unidad. As explained earlier, the purpose of looking at Bolivia's political context during this period is to inform the interpretation of Bolivia's Constitution and legislation. In the analysis of the period of study, there is an emphasis on presenting the different interest sectors involved and their demands. In doing so, the thesis seeks to move beyond the all-encompassing term 'indigenous movements', which obfuscates the important differences in ideology and strategy between different sectors that pushed forward their respective agendas in the constitutional text.

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<sup>59</sup> Ibid.

<sup>60</sup> I thank Dr Luis Tapia Mealla from CIDES-UMSA in La Paz for advising me to focus on plurinationalism as it was constructed collectively in the context of the Constituent Assembly. La Paz, 14 May 2014.

<sup>61</sup> Fernando Garcés (ed) *El Pacto de Unidad y el proceso de construcción de una propuesta de Constitución Política de Estado. Sistematización de la experiencia* (Preview Gráfica 2010).

<sup>62</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48). I thank Dr. Farit Rojas Tudela from the Universidad Católica Boliviana in La Paz for facilitating Schavelzon's work and Pacto de Unidad's systematization document in 2011, as well as the minutes of the Constituent Assembly.

<sup>63</sup> The conflict erupted in 2011 when the MAS (Movement to Socialism) government attempted to construct a motorway over the Indigenous Territory and National Park Isiboro Securé (TIPNIS).

## **The Analysis**

As mentioned earlier, the thesis looks at the tensions and convergences between plurinationalism and the human rights approach in the Constitution of Bolivia of 2009 with the purpose of contributing to the discussion on whether or not human rights can be part of a decolonisation project. Both paradigms are examined and compared taking into account four main criteria: (1) their definition of the indigenous subject, (2) how the positivisation of indigenous collective rights in general and indigenous peoples' right to use their own law in specific is justified, (3) the place of indigenous peoples in the nation (in this regard these constitutional paradigms are viewed also as nation-building projects), (4) and the take of each paradigm on liberalism. At a conceptual level, the result of this comparison is provided in Chapter 4, while Chapter 5 looks at the way the human rights approach and plurinationalism are present in the Constitution of Bolivia of 2009 in relation to the regulation of legal pluralism.

The last two chapters of the thesis also look at relation between the two constitutional paradigms in the light of the revolutionary period of 2000-2005 and the development of the Constituent Assembly. The purpose is primarily to provide an explanation of why both the human rights approach and plurinationalism are present in the Constitution of Bolivia of 2009, thus shedding light on how to interpret the contradictions in the constitutional text in relation to the regulation of legal pluralism. In addition, the law in context analysis provides an explanation of why the human rights approach prevailed over plurinationalism in Bolivia's current constitutional and legal framework. Finally, drawing on the theoretical framework laid out in Chapters 1, 2 and 3, the final two chapters of this thesis examine the way plurinationalism and the human rights approach deal with race and neoliberalism. In addition, the last chapters evidence the presence of the regime of toleration and the regime of authenticity in Bolivia's current legal framework.

## **4. Structure of the Thesis**

This thesis is divided into two parts. The first part, comprised of Chapters 1 to 3, constitutes the theoretical framework and focuses on examining the human rights approach. As mentioned previously, Chapters 4 and 5 then focus on the development of the human rights approach and plurinationalism in the specific case of Bolivia. They

also provide the comparison of the two constitutional paradigms and an analysis of the treatment of legal pluralism in the Constitution of Bolivia of 2009.

More specifically, Chapter 1 looks at the treatment of indigenous culture in IHRL, arguing that is defined in essentialist terms. The chapter further makes the case that indigenous collective rights are justified in IHRL mainly by utilising a cultural difference interpretation framework, to the detriment of a self-determination framework. Finally, this chapter argues that the indigenous subject in IHRL is portrayed as a noble savage. Chapter 2 explains the regimes of authenticity and the regime of toleration and how they are present in the decisions related to indigenous peoples of the Inter-American Court and the UNHRC, as well as in the treatment of legal pluralism by IHRL instruments. Chapter 2 develops the argument that the regime of authenticity derives from the use of essentialist definitions of indigenous subject, law and culture. It requires indigenous applicants to prove their authenticity and that of their communities, laws and cultural practices in order to access collective rights. The regime of toleration is related to the liberal multiculturalist approach and therefore sets autonomy endorsement and individual rights as the limits to toleration of racialised groups and their cultural expressions in the national space.

Chapter 3 is a transition chapter between a more theoretical discussion of the human rights approach based on the analysis of IHRL decisions, instruments and official reports, and an analysis of indigenous rights discourse in the Latin American context. As mentioned previously, Chapter 3 has a chronological structure and begins by examining the constitutional models in Latin America from the 1800s to the 1980s. The chapter then focuses on the adoption of Multicultural Constitutionalism in several Latin American countries. This second part of Chapter 3 argues that indigenous collective rights were advanced by indigenous movements and then co-opted by Latin American governments and transnational actors. In this context, multiculturalism is conceptualised both as a form of neoliberal governmentality and as the racial project of neoliberalism.

Chapter 4 examines the development of Multicultural Constitutionalism in Bolivia, arguing that the country was not an exception in Latin America to a situation of indigenous rights discourse being pushed from below and co-opted from above. Nevertheless, the chapter explains how in the 21<sup>st</sup> century, Bolivia's trajectory became exceptional with the revolutionary period that culminated in the overthrowing of the

neoliberal government. In this context, neoliberal multiculturalism became the backdrop for the advancement of plurinationalism. Chapter 4 then examines Plurinational Constitutionalism and compares it to Multicultural Constitutionalism, arguing that the former constitutes an alternative to the latter. Finally, Chapter 5 focuses on the treatment of legal pluralism in the Constitution of Bolivia of 2009, evidencing the continuation of the human rights approach for its regulation. Chapter 5 concludes with a detailed analysis of a judicial resolution by the Plurinational Constitutional Tribunal of Bolivia that establishes an authenticity test for the assessment of allegations of human rights violations in indigenous jurisdictions.

# Chapter 1. Multiculturalism in International Human Rights Law

## 1.1. Introduction

In this chapter I argue that since the 1990s, multiculturalism permeates IHRL norms and official documents related to indigenous peoples. Consequently, the right to culture (that includes the ‘right to cultural identity’ and the ‘right to cultural integrity’) becomes central in the justification of indigenous collective rights. This means that indigenous peoples’ right to land and territory, their right to use their own law and their right to utilize natural resources within their territory will be justified in terms of the protection of culture—this as opposed to other possible justifications, notably the right to self-determination. This line of argumentation is also denominated the ‘cultural difference approach’,<sup>64</sup> as it substantiates the differentiated treatment of indigenous groups on the ideas of cultural distinctiveness and cultural diversity.

The use of a multiculturalist approach in IHRL and in Latin American constitutions may be considered an achievement in relation to previous forms of regulation of indigenous peoples. It emphasises their recognition as distinct groups (as opposed to former assimilationist perspectives) and affords them collective rights. But how exactly does multiculturalism justify the special treatment of indigenous peoples? How does this approach deal with radical demands for political and legal autonomy, political representation and decolonization? In this regard, I further argue that the cultural difference paradigm is problematic because it has as a starting point an essentialist concept of indigenous culture. Moreover, it is based on a primitivist conception of the indigenous subject that reproduces colonial representations of indigeneity as being outside the modern nation.

This chapter has the following structure, with the sub-sections below setting out how the terms multiculturalism and race are utilized in this thesis. Section 1.2 examines the way multiculturalist theory deals with minorities and how it defines race and culture. Section 1.3 explains the shift in IHRL to a multiculturalist perspective and how the cultural difference approach has become the dominant paradigm to the detriment of the

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<sup>64</sup> The term is from Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Kindle edn, Oxford University Press 2001) loc 1676-1688.

self-determination approach. Accordingly, the section also explains how despite indigenous populations being denominated ‘peoples’ in IHRL, they actually have the status of minorities. That said, they are treated as a special type of minorities with collective rights on account of the way they are racialized by IHRL. Finally, section 1.4 explains the way currently IHRL defines culture, racialized minorities and indigenous peoples.

### 1.1.1. Defining Multiculturalism

Multiculturalism is a problematic term because it has been utilized to refer to a number of different phenomena. Kymlicka explains that it may refer to (1) the formation of ‘multi-ethnic societies’ partly because of migration of individuals belonging to post-colonial societies into the former imperial hubs, (2) the policies employed by those new and old empires (United States, Britain) to address immigration, and also to deal with the presence of ‘national minorities’ (a category that in IHRL may or may not include indigenous peoples), (3) the normative discussion among political theorists concerning the treatment of difference in industrial societies of the global North,<sup>65</sup> and (4) the discussion among liberal political theorists about the role of minority rights in liberal theories of justice.<sup>66</sup>

In this thesis multiculturalism does not refer to any of the above. Rather, it refers first to the ‘multiculturalist turn’ in IHRL in relation to the treatment of indigenous peoples.<sup>67</sup> However, in the way it will be developed throughout this chapter, the definition of culture and of the cultural difference approach in IHRL is close to (4), namely, the discussion on minority rights among liberal theorists. Hence, in order to examine the meaning of culture in IHRL and its implications, this chapter looks at multiculturalism as an ‘academic debate’ (for multiculturalism cannot be considered a doctrine, a single

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<sup>65</sup> ‘Global north’ refers to the politically, economically and culturally dominant groups in the former imperial hubs but also in post-colonial societies. More importantly, it refers to the dominant ways of perceiving and organising the world that come from that global North, in a process of negation of the epistemologies of the global South. de Sousa Santos, *Conocer desde el Sur. Para una cultura política emancipatoria* (n 15) 79-91.

<sup>66</sup> Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 47) 51-60; Paul Kelly, ‘Introduction: Between Culture and Equality’ in Paul Kelly (ed), *Multiculturalism Reconsidered* (Polity Press 2002) 1-3.

<sup>67</sup> Julie Ringelheim, ‘Minority Rights in a Time of Multiculturalism. The Evolving Scope of the Framework Convention on the Protection of National Minorities’ (2010) 10 Human Rights Law Review 99; James S. Anaya, ‘International Human Rights and Indigenous Peoples: The Move Toward the Multiculturalist State’ (2004) 21 Arizona Journal of International and Comparative Law 13.



political theory or a single ideological stance<sup>68</sup>). The debate on cultural groups and group rights among liberals emerged in the 1980s and 1990s,<sup>69</sup> around the same time that IHRL took a multicultural turn. The fall of the Berlin Wall in 1989 and the rise of nationalism in Eastern Europe, the dissolution of the Soviet Union, and large-scale migration as a result of decolonisation (Britain, France, Portugal and Spain) prompted this debate.<sup>70</sup> As will be discussed in Section 1.3, the multiculturalist shift in IHRL was also a response to these events.

In the context of the academic debate, I focus on liberal theories, particularly Kymlicka's theory of minority rights.<sup>71</sup> The reasons for this are both the relevance of his work in Latin America, and the strong resemblance between his justification and limitations to minority rights, and the way IHRL and Multicultural Constitutionalism in Latin America justify and limit indigenous rights. I also refer to Taylor who, although coming from a Hegelian perspective, has been influential in IHRL and Latin American constitutionalism mainly by introducing 'recognition' as constitutive of the multiculturalist approach in IHRL and Multicultural Constitutionalism.<sup>72</sup> As discussed in Chapter 2, however, despite the introduction of the term 'recognition', what operates in IHRL and Multicultural Constitutionalism is a liberal regime of toleration.

A second meaning of multiculturalism in this thesis is as a set of public policies. However, here I do not refer to old imperial hubs but to Latin American states. As developed in Chapter 3, indigenous collective rights and the 'recognition' of indigenous populations were incorporated in Latin American constitutions in the 1990s, following the ratification of the International Labour Organisation Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries ('ILO Convention 169') adopted in 1989. Third, since the underlying research question of this thesis is on the emancipatory potential of human rights discourse, Chapter 3 will also look at the meaning that indigenous movements themselves assign to multiculturalism and indigenous collective rights.

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<sup>68</sup> Paul Kelly, 'Multiculturalism Reconsidered' (International Political Science Association (IPSA), Fukuoka, Japan, 9-13 July 2006), 11-13; Bhikhu Parekh, 'Barry and the Dangers of Liberalism' in Paul Kelly (ed), *Multiculturalism Reconsidered* (Polity Press 2002), 139-140.

<sup>69</sup> Spinner-Halev (n 50) 546.

<sup>70</sup> Kelly, 'Introduction: Between Culture and Equality' (n 66) 2-3; Spinner-Halev (n 50) 546.

<sup>71</sup> Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 47).

<sup>72</sup> Taylor (n 49) More generally, the politics of recognition and liberal multiculturalism are separate debates with very different theoretical frameworks that nevertheless are connected when looking at multiculturalism as a set of policies and a normative framework. Mills (n 55) 95.

Fourth, as developed in Chapters 2 and 3, and drawing on Brown and Hage,<sup>73</sup> I look at multiculturalism as a form of governmentality. By producing a specific indigenous subject, multiculturalist toleration creates boundaries for indigenous demands, thus protecting the status quo and the privileged position of the white subject in the nation. Finally, as examined below and in Chapter 2, political theorists who critically examine multiculturalism have pointed out its tendency to reify culture<sup>74</sup> and thereby contribute to the subordination of minority groups.<sup>75</sup> Authors working with Critical Race Theory have gone still further, not only identifying the reification of culture in multiculturalism, but also highlighting that in this paradigm, culture and ethnicity operate as metonyms for ‘race’.<sup>76</sup> Moreover, as examined in Chapter 3, Critical Race Theory has been key to understanding the relation between multiculturalism and neoliberalism. Therefore, following Melamed, multiculturalism is also understood here as the racial project of neoliberalism.<sup>77</sup>

### 1.1.2. Defining Race

In the context of Critical Race Theory, race is considered a valid analytical category, not in its biological dimension as a phenotype,<sup>78</sup> but as an enduring social category, constructed by law, custom, and inter-subjective identification, and ‘objectively signifying a location in a system of domination’.<sup>79</sup> ‘Race’ is a process of ‘othering’.<sup>80</sup> As a category it can be defined as follows,

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<sup>73</sup> Brown, *Regulating Aversion: Tolerance in the Age of identity and Empire* (n 52); Hage (n 52). They draw on Foucault’s term ‘governmentality’. Michel Foucault, ‘Governmentality’ in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press 1991).

<sup>74</sup> Benhabib (n 50); Spinner-Halev (n 50).

<sup>75</sup> Phillips (n 50); Chandran Kukathas, ‘Moral Universalism and Cultural Difference’ in John S. Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press 2008).

<sup>76</sup> Mills (n 55); Melamed (n 56).

<sup>77</sup> Jodi Melamed, *Represent and Destroy. Rationalizing Violence in the New Racial Capitalism* (University of Minnesota Press 2011) 6.

<sup>78</sup> As a phenotype, race is linked to Social Darwinism and other ‘scientific’ explanations of human variation according to which the white body is the standard or the most evolved form of human being. In contrast, according to these views, racialised groups such as blacks and indigenous peoples are considered inferior, as well as their cultures and political forms of organization, which are considered to ‘emanate’ from race. Omi and Winant (n 55) 23-24.

<sup>79</sup> Mills (n 55) 104-105. In this sense see also Hall when he states that ‘black’ is a ‘politically and culturally constructed category, which cannot be grounded in a set of fixed, trans-cultural or transcendental racial categories, and which therefore has no guarantees in Nature’. Stuart Hall, ‘New Ethnicities’ in David Morley and Kuan-Hsing Chen (eds), *Critical Dialogues in Cultural Studies* (Routledge 1996).

<sup>80</sup> Omi and Winant (n 55) 105.

[A] concept, a representation or signification of identity that refers to different types of human bodies, to the perceived corporeal and phenotypic markers of differences and the meaning and social practices ascribed to those differences.<sup>81</sup>

For Omi and Winant, race is a master category that determines the history, polity, culture and economy of the United States<sup>82</sup>—a conclusion that may be extended to other post-colonial societies. Indeed, for these authors the conquest and colonization of the Americas was a defining moment in the construction of distinctions and categorizations that are at the basis of a racialised social structure of exploitation, appropriation, domination and signification.<sup>83</sup> The conquest of the Americas and this process of racial formation were also constitutive of Europe as a metropolis of a series of empires under the logic of a struggle between civilization and barbarism.<sup>84</sup> In the process of the colonized being racialised, the whiteness of the Europeans was also established as a position of cultural power.<sup>85</sup>

Race, however, transcends racism and systems of colonial domination to form the basis of resistance struggles. In this regard, as developed in Chapters 3 and 4, in the transnational indigenous peoples' movement<sup>86</sup> as well as in Bolivian indigenous organisations, categories such as 'indigenous', 'Indian' or 'first peoples' (*originarios*)<sup>87</sup> are a way of referring to a common experience of racism and marginalization.<sup>88</sup> These terms provide an 'organizing category of a new politics of resistance, among groups and communities with in fact very different histories, traditions and ethnic identities.'<sup>89</sup> In this context, indigenous individuals and organisations become the subjects of practices of representation instead of the objects. They themselves appropriate the term 'indigenous' and struggle against the fetishization, objectification and negative

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<sup>81</sup> Ibid, 111.

<sup>82</sup> Ibid, 105.

<sup>83</sup> Ibid, 112-113.

<sup>84</sup> Ibid, 114.

<sup>85</sup> Hage (n 28) 57. White in this colonial form of thought 'is the ideal of "Western" civilization'. Hage explains whiteness as fantasy itself and a field of 'accumulating whiteness' for 'no one can be fully White'. Ibid.

<sup>86</sup> The concept is from Virginia Q. Tilley, 'New Help or New Hegemony? The Transnational Indigenous Peoples' Movement and 'Being Indian' in El Salvador' (2002) 34 *Journal of Latin American Studies* 525. I will refer to it in more detail in Chapter 3.

<sup>87</sup> '*Originario*', used in the same sense as the 'First Nations' in the United States and Canada.

<sup>88</sup> Ronald Niezen, *The Origins of Indigenism. Human Rights and the Politics of Identity* (University of California Press 2003) 4-5.

<sup>89</sup> The wording is from Hall when he refers to the 'black experience' in the post-II World War in England. Hall (n 79) 442.

figuration attached to the indigenous subject.<sup>90</sup> For Omi and Winant, this process can be denominated ‘racial resistance’, or the creation of an oppositional racial consciousness that is a response to racial despotism.<sup>91</sup> In sum, race as an element of social structure and a dimension of human representation<sup>92</sup> transcends racism and can also work as a ‘template for resistance’ to forms of marginalization and domination.<sup>93</sup>

## **1.2. Liberal Multiculturalism and its Treatment of Minorities, Culture and Race**

### **1.2.1. Multiculturalism as a Liberal Solution to Difference**

According to Kymlicka, in liberal political theory, multiculturalism represents a comeback of the discussion on minority rights, which had been relegated for most of the 20th century.<sup>94</sup> More importantly, multiculturalism in this context is a response to the liberal non-discrimination approach to difference, which emerged as the solution provided to religious wars of early modern Europe.<sup>95</sup> The non-discrimination approach is based on the division between the public sphere and the private sphere, and the restriction to the private sphere of religious practices (and also, by default, matters such as race, ethnicity and culture).<sup>96</sup> The non-discrimination approach operates under a principle of neutrality according to which the state turns a blind eye to difference (racial, sexual, cultural, religious, sexual orientation) and considers every citizen equal before the law.<sup>97</sup> This is why this approach can also be denominated the ‘neutralist answer’.<sup>98</sup> Consequently, under the non-discrimination approach, the state will not

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<sup>90</sup> Ibid, 443.

<sup>91</sup> Omi and Winant (n 55) 130.

<sup>92</sup> Ibid, 112.

<sup>93</sup> Ibid, 108.

<sup>94</sup> For Kymlicka, the period before that of the fall of the British Empire, the Cold War, racial segregation policies in the United States and disappointment with the minority policies implemented by the League of Nations, among other factors, were reasons for the silence among liberals concerning the topic of minority rights. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 47) 57-60.

<sup>95</sup> Galeotti (n 52) 566.

<sup>96</sup> Ibid, 566-575.

<sup>97</sup> Ibid, 567.

<sup>98</sup> A neutralist approach is also present in Rawls’ political liberalism. Under this perspective (which can be denominated ‘justificatory minimalism’), human rights would claim not to have (or to need) any metaphysical foundational view. Joshua Cohen, ‘Minimalism about Human Rights: The Most We Can Hope For?’ (2004) 12 *The Journal of Political Philosophy* 190, 199. Human rights would represent an ideal of global ‘public reason’, to utilise Rawls’ terminology, an allegedly broadly shared set of values and norms for assessing political societies. Ibid, 195-196. Thus, under political liberalism, human rights have the ambiguous position of claiming not to be programmatic or even political, but at the same time

favour certain views over others and will express this principle by ‘protecting’ public spaces and public institutions from cultural or religious symbols and from public displays.<sup>99</sup> Furthermore, neutrality means that liberal institutions should be designed independently of any particular moral outlook.<sup>100</sup> Finally, the non-discrimination approach is also characterized by an instrumental view of toleration, according to which difference should be tolerated for the sake of public peace and the legitimacy of the political system, or because the use of coercion would be counter-productive or too expensive.<sup>101</sup> As a result, the state will refrain from exercising its political power to interfere in individuals’ religious and moral views.<sup>102</sup>

As a ‘colour-blind’ policy, the non-discrimination approach was implemented in the United States in relation to Afro-Americans to replace the idea of ‘separate but equal treatment’ that justified segregated public services for white and black people.<sup>103</sup> Instead, the prevalent idea would be that of non-discrimination and equality of opportunity. A somewhat similar case is the French constitutional principle of republican secularism (*laïcité*), under which religious expressions and symbols are forbidden in public spaces in order to guarantee the neutrality, autonomy and homogeneity of these spaces, and (allegedly) to guarantee equal liberties for all individuals.<sup>104</sup>

In contrast to the non-discrimination principle, the multiculturalist approach (also known as the group-specific rights approach or the differentiated-rights approach) is supposedly not based on the idea of an instrumental toleration. Rather, in Raz’s words, toleration of difference (and, in his opinion, even appreciation of and respect for that difference) is based on the premise that individual freedom and prosperity ‘depend on full and unimpeded membership in a respected and flourishing cultural group’.<sup>105</sup> The

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not being sceptical or anti-foundationalist either. Ibid, 199; Moyn (n10) loc 2433-2459; Chantal Mouffe, *The Return of the Political* (Verso 1993) 135-136.

<sup>99</sup> Galeotti (n 52) 567.

<sup>100</sup> Ibid, 567.

<sup>101</sup> Joseph Raz, ‘Multiculturalism: A Liberal Perspective’ (1994) Winter Dissent 67; Mouffe (n 98) 136-137. For Mouffe, this instrumental perspective comes from John Locke.

<sup>102</sup> Galeotti (n 52) 567.

<sup>103</sup> Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 47) 57-58.

<sup>104</sup> Cécile Laborde, ‘Secular Philosophy and Muslim Headscarves in Schools’ (2005) 13 Journal of Political Philosophy 305.

<sup>105</sup> Raz (n 101) 69. In Raz’s liberal multiculturalism there is value pluralism, which posits an intrinsic value to diversity. Thus, there cannot be an absolute hierarchy of values, but different activities and forms of life are valuable. Therefore, liberals must come to appreciate and respect other cultures on account of this intrinsic value. Ibid, 72.

special role that is assigned to culture for autonomous choices and individual well-being is crystallized in a 'right to culture'.<sup>106</sup> More specifically, the value assigned to 'culture' is expressed in differentiated rights given to 'ethno-cultural groups' to afford them an equal status in relation to the dominant group, whose culture permeates the state apparatus.<sup>107</sup> Therefore, culture can provide the basis of claims for group rights and state special protection.<sup>108</sup> This entails that the state will no longer pretend to be blind or neutral with regard to cultural difference (and race and ethnicity), but will explicitly regulate in a different manner those groups that are considered minorities.<sup>109</sup>

### 1.2.2. The Concept of Culture in Multiculturalism

The academic debate on multiculturalism in the United States, Canada and Britain presents a variety of positions including those articulated by Parekh, Young, Taylor and Kymlicka, and these perspectives vary in their definitions of culture and equality.<sup>110</sup> For Kelly, it is possible nevertheless to identify two main reasons for which culture is important in multiculturalist theories. The first is a 'methodological reason' used mainly by theorists who come from a communitarian tradition (Taylor, Sandel, MacIntyre) that criticises the atomistic conception of the subject and instead proposes the idea that people are determined by their social context (the 'social thesis').<sup>111</sup> Thus, culture would be the context in which 'personal and moral identity is constructed',<sup>112</sup> and it is a condition of self-identity.<sup>113</sup> The second approach is that of liberal theorists like Raz and Kymlicka, who consider it to be a 'moral resource'. Culture in this sense contextualizes choice. Without culture, 'there would be nothing from which to make an autonomous choice about the good life'.<sup>114</sup> Consequently, although for Kymlicka and Raz individual autonomy is the key liberal value that must be defended at all costs, autonomy in itself does not provide an idea of the good life. It is culture that provides this content.<sup>115</sup>

In this sense, Kelly argues that Kymlicka and Raz are perfectionist liberals who pay attention to the content of the idea of the good life and demand that freedom of choice

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<sup>106</sup> Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 47) 74, 82.

<sup>107</sup> Ibid, 36-37, 108-110. Kymlicka refers to these as 'external protections' for minorities.

<sup>108</sup> Kelly, 'Introduction: Between Culture and Equality' (n 66) 9.

<sup>109</sup> Galeotti (n 52) 569.

<sup>110</sup> Kelly, 'Introduction: Between Culture and Equality' (n 66) 5-7.

<sup>111</sup> Ibid, 7.

<sup>112</sup> Ibid, 6.

<sup>113</sup> Ibid, 11.

<sup>114</sup> Ibid, 8.

<sup>115</sup> Ibid, 8.

be at its centre.<sup>116</sup> In other words, the value of an ideal of the good life (and consequently, the value of a specific culture) can be determined by the level of freedom of choice it affords the individual.<sup>117</sup> Kelly softens this affirmation when stating that while liberal multiculturalism requires cultures to pass the ‘test of autonomous endorsement’, liberal multiculturalists would normally start with the working assumption of the equal value of cultures.<sup>118</sup> He cites Tully in this regard, and Raz may also be counted among the liberal defenders of value pluralism.<sup>119</sup> I would argue, however, that Kymlicka is further away from value pluralism as he conditions the protection of culture to ethnic groups’ endorsement of autonomy and individual rights:

Liberals can and should endorse group-differentiated rights for ethnic groups and national minorities. But this endorsement is always a conditional and qualified one. The demands of some groups exceed what liberalism can accept. Liberal democracies can accommodate and embrace many forms of cultural diversity, but not all. [...] First, a liberal conception of minority rights will not justify (except under extreme circumstances) ‘internal restrictions’—this is, the demand by a minority culture to restrict the basic civil or political liberties of its own members.<sup>120</sup>

As will be discussed in Chapter 2 when examining IHRL’s treatment of indigenous peoples’ right to use their own law, Kymlicka’s autonomy endorsement test is at the centre of IHRL’s treatment of indigenous peoples’ rights and minority rights. In other words, in IHRL individual autonomy and individual rights will constitute the limits to toleration of cultural rights. This includes the right to use ‘customary law’ because, as will be explained in Chapter 2, indigenous law is treated in IHRL mainly as a cultural practice. It may even be argued that under a cultural difference or multiculturalist approach, in IHRL individual rights and individual autonomy constitute the limits to *all* indigenous collective rights, even if culture does not seem to be the issue at conflict. For example, this would be the case in communal property or in indigenous peoples’ use of natural resources in the territory. I will elaborate further on this in Chapter 2.

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<sup>116</sup> Ibid, 8.

<sup>117</sup> Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 47) 152, 153.

<sup>118</sup> Kelly, ‘Introduction: Between Culture and Equality’ (n 66) 9. He cites James Tully, *Strange Multiplicity. Constitutionalism in an Age of Diversity* (Cambridge University Press 1995).

<sup>119</sup> Kelly, ‘Introduction: Between Culture and Equality’ (n 66) in relation to Raz (n 101).

<sup>120</sup> Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 47) 152.

Another element that some of these multiculturalist theories share—notably those of Kymlicka and Taylor—is a Herderian concept of culture.<sup>121</sup> Herder made a contribution to anthropology by criticizing the colonialist idea of the superiority of Western cultures and the stadial theory of social evolution. According to the latter, development is unilinear and different societies undergo the same stages until they reach their maximum evolution.<sup>122</sup> In this sense, Herder defended the idea of cultures as entities existing in the plural and distinct from each other<sup>123</sup>—an idea that was later popularized in the United States by Franz Boas.<sup>124</sup> In addition, Herder criticised the idea of the self-determined individual. Instead, he considered individuals to be shaped by historical and environmental factors.<sup>125</sup> Thus, although he believed that all humans share a common essence, which is a potentiality, this potential only acquires meaning in specific historical, geographical and cultural formations.<sup>126</sup>

In addition to the ‘social thesis’, multiculturalist theories inherited Herder’s conception of cultures as discrete entities that are internally coherent and are the property of a specific ethnic group or race.<sup>127</sup> In her critique of multiculturalist theories, Benhabib denominates this view the ‘reductionist sociology of culture’ and in Tully, it is the ‘billiard-ball’ conception of cultures as self-contained wholes that bounce against each other instead of being inter-related.<sup>128</sup> Culture as a discrete whole implies an essentialist perspective. Essentialism in this context is the idea that individuals who share ascriptive characteristics possess a shared biological nature or essence that remains unchangeable despite the presence of other variables such as gender, class, and

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<sup>121</sup> In relation to Herder’s idea of culture in Taylor see Benhabib (n 50) 55-59; Patchen Markell, *Bound by Recognition* (Princeton University Press 2003) 53-60. In relation to Herder’s idea of culture in Kymlicka’s work see *ibid*, 154. Benhabib does not mention that Kymlicka utilizes Herder but identifies essentialism in his definition of culture. Benhabib (n 50) 59-67. For Scott, multiculturalist theorists such as Walzer, Kymlicka, Kukathas, Carens and Taylor tend to utilize the concept of culture that most suits their political theory. A notable exception to this failure to problematize the concept of culture and instead use an essentialist definition is offered by the work of Tully, who makes an effort to move to a constructionist perspective drawing on Wittgenstein, Skinner, Foucault and Arendt. Scott (n 50) 95-98 referring to Tully. In this thesis however I will not refer to Tully but focus on Kymlicka because I consider his theory to be closer to the multiculturalist approach in IHRL and Multicultural Constitutionalism.

<sup>122</sup> David Denby, ‘Herder: Culture, Anthropology and the Enlightenment’ (2005) 18 *History of the Human Sciences* 55, 59-62.

<sup>123</sup> *Ibid*, 57.

<sup>124</sup> *Ibid*, 57; Sally Engle Merry, ‘Human Rights and the Demonization of Culture (And Anthropology Along the Way)’ (2003) 26 *Political and Legal Anthropology Review* 55, 65.

<sup>125</sup> Denby (n 122) 64.

<sup>126</sup> *Ibid*, 66.

<sup>127</sup> Benhabib (n 50) 1-5.

<sup>128</sup> Phillips (n 50) 29. She is citing Tully (n 118) 9-10.



sexuality, and despite historical and cultural variation.<sup>129</sup> Thus, there is a relation between the essentialist view of culture and racism. In contrast, more recent anthropological understandings of identity conceive it as socially constructed. Therefore, culture is not to be seen as an entity but as a ‘process of signification and meaning making’.<sup>130</sup> The constructivist perspective, although it may have problems of its own,<sup>131</sup> avoids reducing the idea of culture to racial, ethnic, national or linguistic difference, to the exclusion of class, gender, sexual orientation and other identity markers.<sup>132</sup>

### **1.2.3. The Ethnicization of Race in Multiculturalism**

In multiculturalist theory, race, racial analysis and racial discrimination are not explicitly mentioned.<sup>133</sup> Instead, as Mills explains, the word ‘race’ is substituted by ‘ethnicity’—an anthropological term that alludes to mutable cultural traits (in contrast to race, which refers to unchangeable biological traits).<sup>134</sup> The same occurs in IHRL in relation to indigenous peoples, who despite the denomination ‘peoples’ are effectively treated as ‘ethnic minorities’, as explained below. In this connection, when liberal multiculturalist theories and IHRL refer to national, ethnic, religious or linguistic minorities, often (and the case of indigenous peoples is no exception) they are referring to racialised groups.<sup>135</sup> Racialization here means ‘the extension of racial meaning to a previously racially unclassified relationship, social practice, or group’.<sup>136</sup> In other words, it is to give a social and symbolic meaning (based on religious, scientific or political ideologies and projects) to perceived phenotypical differences.<sup>137</sup> For instance, when referring to the Australian case, Hage considers that it is the ‘Third World-looking people’ with ‘very low national capital’ who are racialised as ‘ethnics’ and non-whites, and who are constructed as a problem within White-dominated societies.<sup>138</sup>

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<sup>129</sup> Dick (n 53) 959.

<sup>130</sup> Ibid.

<sup>131</sup> See for example the critique of Scott (n 50)

<sup>132</sup> Dick (n 53) 960. Precisely Markell criticises Kymlicka’s approach to culture because it emphasizes the relation between culture and nation and at the same time it excludes certain forms of difference that might ‘cut across national and ethnic lines’, such as class and gender. Markell (n 121) 167-168.

<sup>133</sup> Mills (n 55) 92-97 referring to the work of Kymlicka, Tully and Taylor.

<sup>134</sup> Ibid, 101.

<sup>135</sup> In a similar sense, *ibid*, 98-99; Hage (n 28) 48, 58 referring to the racialization of Indians, blacks, immigrants and people from the ‘Third World’.

<sup>136</sup> Omi and Winant (n 55) 111.

<sup>137</sup> Ibid, 111.

<sup>138</sup> Hage (n 28) 58.

Ethnicity as a paradigm of racial theory is not exclusive to multiculturalist theory or human rights discourse. According to Omi and Winant, ethnicity as a theory of race that gives primacy to cultural variables<sup>139</sup> was born in the United States sociology of the early 20<sup>th</sup> century as a challenge to prevailing biologist racial views of the period.<sup>140</sup> It had two main streams: assimilationism and cultural pluralism, both of which were elaborated on the basis of the experience of white European immigrants in the United States<sup>141</sup>—an aspect these authors find problematic as ethnicity is now applied to racialised groups that were not considered in the elaboration of this theory.<sup>142</sup>

Although the deployment of the term ethnicity constituted an important step in relation to the biologicistic view of race, it has a number of issues that are transferred to the multiculturalist approach to difference, both in liberal multicultural theory and in IHRL. The first is the cultural determinism of this paradigm, which is coupled with a downplaying of the relevance of corporeal markers of identity and difference.<sup>143</sup> This means that when utilising a multiculturalist approach to process the demands of indigenous individuals or groups, their conflicts and needs will be analysed as deriving from a problem of insufficient cultural appreciation.<sup>144</sup> This culturalist one-dimensional approach does not address the fact that in post-colonial societies such as Bolivia, the main issue is one of indigenous peoples (and other racialized groups such as Afro-Bolivians) being divested of their humanity.<sup>145</sup> Their construction as sub-human is what justifies the devaluation of their practices in relation to modern (white) society. Therefore, under a multiculturalist approach, the IHRL system is unable to evidence and address structures of racial domination. On the contrary, human rights organs operating with a cultural difference approach contribute to the mystification of the history of racial oppression of indigenous peoples as well as the specificities of state-indigenous relations,<sup>146</sup> which, as further explained in Chapter 3, have been characterised by violence and marginalization.

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<sup>139</sup> Omi and Winant (n 55) 21.

<sup>140</sup> Ibid, 23.

<sup>141</sup> Ibid, 25-26. Under this paradigm, these immigrants were not racialised as ex-slaves or ‘coolies’ or low-wage workers, as other human groups such as blacks, Mexicans, indigenous peoples, Japanese and Chinese. Instead, they would eventually be considered white.

<sup>142</sup> Ibid, 25.

<sup>143</sup> Ibid, 21.

<sup>144</sup> Based on Mills (n 55) 100.

<sup>145</sup> Ibid, 94.

<sup>146</sup> Ibid, 105.

Second, Omi and Winant explain that in the ethnicity paradigm, race becomes something more voluntary and less ascribed because it is related to beliefs, religion, language, and ways of life.<sup>147</sup> However, multiculturalism utilizes an essentialist view of culture. Therefore, the practices, beliefs or behaviours of ‘ethnic minorities’ become an ascription or attribute that is above choice<sup>148</sup> and that is fixed. Consequently, in multiculturalist theory (as well as in indigenous rights discourse in IHRL), ethnicity is a politically correct way to refer to race, and culture is a ‘respectable way’ to speak about human difference (in culturalist rather than biologicistic terms).<sup>149</sup> Hence, as further explained in Section 1.4, although the theory of ethnicity was an attempt to move away from biologicistic conceptions of race, the ‘culture-bound other’ of IHRL is close to the notion in ‘classic racism’ of culture as emanating from race.<sup>150</sup>

### **1.3. The Multiculturalist Trajectory of Indigenous Rights in International Human Rights Law**

Minority rights were incorporated into IHRL in the late 1980s through the United Nations Declaration on the Rights to Minorities (1992) and the European Framework Convention for the Protection of National Minorities (1995).<sup>151</sup> Previously, from 1945 to 1989, the IHRL system was mainly concerned with the development of universal individual human rights. Except for Article 27 of the ICCPR, it left issues related to minorities to be resolved by states as a domestic matter. In this regard, the prevailing view at the time of the creation of the United Nations and the Universal Declaration of Human Rights was that persons belonging to minorities only needed to be guaranteed equal rights with all other persons. As a result, the focus of the UN Commission on Prevention of Discrimination and Protection of Minorities was mainly to fight against racial discrimination.<sup>152</sup> Therefore, the incorporation of minority rights from 1989

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<sup>147</sup> Omi and Winant (n 55) 22. This would be problematic because it minimizes the fact that the assignment of group identity based on physical appearance is many a time imposed, although later on the person or group can incorporate it to their idea of themselves and even utilize it to resist or defy those who imposed the category in the first place. Ibid, 21.

<sup>148</sup> Brown, *Regulating Aversion: Tolerance in the Age of identity and Empire* (n 52) 34.

<sup>149</sup> Mills (n 55) 101; Paul Gilroy, ‘Multiculturalism and Post-Colonial Theory’ in John S. Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press 2008) 670.

<sup>150</sup> Mills (n 55) 93.

<sup>151</sup> Ringelheim (n 67) 105-108.

<sup>152</sup> Ibid, 105-106.

onwards entailed a shift from this non-discrimination approach to minorities to a (liberal) multiculturalist approach that would justify the creation of differentiated rights.

As explained in Section 1.2, the multiculturalist shift was a response to the concern of some states with the situation of minorities in Eastern Europe after the fall of the communist regimes, the increasing migration from former colonies to Western Europe (and a response to the racism and discrimination that migrants faced), and the rise of identity movements, including indigenous movements.<sup>153</sup> The rights of indigenous peoples were originally included within minority rights (and this continues to be the case, for example, in relation to Article 27 of the ICCPR, which refers to cultural rights). However, these rights developed as a separate branch in IHRL norms and doctrine.<sup>154</sup> The division would not only be nominal: indigenous peoples would acquire collective rights (such as rights to land and territory and the possibility to exercise their own law), as opposed to only individual rights, as is the case of members of minority groups under Article 27 of the ICCPR.<sup>155</sup>

Indigenous rights have developed separately, particularly since the 1980s, with the gradual opening of spaces in the United Nations organs to indigenous individuals and organisations and the emergence of NGOs dedicated to defending indigenous causes.<sup>156</sup> Niezen explains that the humanization of indigenous peoples in IHRL started after the Second World War, when the Holocaust raised awareness concerning the treatment by states of racialised minorities in their colonies.<sup>157</sup> Eventually, the independence of former colonies and the elevation of self-determination to the status of a collective right in 1960 created important precedents for indigenous claims.<sup>158</sup> Afterward, the UN Decade for Action to Combat Racism and Racial Discrimination (1973-1982) channelled attention and resources towards indigenous peoples. International attention culminated in 1982 with the creation inside the UN Economic and Social Council of a Working Group on Indigenous Populations. The Working Group acquired the status of

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<sup>153</sup> Ibid, 105-106.

<sup>154</sup> James Anaya, 'International Human Rights and Indigenous Peoples: The Move Toward the Multiculturalist State' (2004) 21 *Arizona Journal of International and Comparative Law* 13, 14-15.

<sup>155</sup> UNHRC 'General Comment 23, Article 27' (26 April 1994) para 3.1.

<sup>156</sup> Niezen (n 88) 40-45.

<sup>157</sup> In a similar sense, *ibid*, 40.

<sup>158</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples (adopted 14 December 1961 res. 1514 (XV)) 66, U.N. Doc. A/4684, Art. 2.

a permanent forum in 2000.<sup>159</sup> This forum propitiated for indigenous peoples from different parts of the world to connect with each other and to self-identify and be recognised by others as distinct groups with differentiated rights.<sup>160</sup>

In the context of the International Labour Organisation, the multicultural shift was crystallised by the ILO Convention 169 adopted in 1989—the only IHRL binding instrument to explicitly recognise indigenous collective rights.<sup>161</sup> As a result, the institution moved away from condoning the exploitation of indigenous peoples in the colonies because they were neither considered sovereign nor part of any state—a view that was prevalent in the 1920s.<sup>162</sup> It also marked a shift from the ILO views of the mid-20<sup>th</sup> century according to which indigenous peoples are caught between savagery and acculturation, and are miserable peoples destined to extinction because of the process of modernization.<sup>163</sup> The International Labour Organisation Convention 107 concerning the Protection and Integration Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, which was signed in 1957 ('ILO Convention 107'), represented these views.<sup>164</sup>

### **1.3.1. The Right to Self-Determination v. the Cultural Difference Approach**

Although indigenous peoples are entitled to minority rights (in connection to violations of the rights set out in Article 27 of ICCPR) and have made use of them when presenting cases before the United Nations Human Rights Committee (HRC), they do not wish to be considered like every other minority group.<sup>165</sup> The reason for this is their colonial past and current situation of internal colonialism, and their claim to sovereignty over their lands. Thus, self-determination is a paradigm in international law opposed to

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<sup>159</sup> Niezen (n 88) 48; Alexandra Xanthaki, *Indigenous Rights and the United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press 2010) 1-5.

<sup>160</sup> Niezen (n 88), 41-47.

<sup>161</sup> However, only twenty-two countries have ratified this convention, fourteen of which are Latin American. Source:

[http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312314](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314)

<sup>162</sup> Niezen (n 88) 36-37.

<sup>163</sup> Ibid, 36.

<sup>164</sup> It should be noted that while the ILO Convention 107 is closed for ratification, it is still in force in eighteen countries. In Latin America and the Caribbean, these countries are El Salvador, Panama, Cuba, Haiti and Dominican Republic. Source:

[http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312252](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312252)

<sup>165</sup> Isabelle Schulte-Tenckhoff, 'Treaties, Peoplehood, and Self-Determination: Understanding the Language of Indigenous Rights' in Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press 2012) 73.

colonialism. In IHRL, it (potentially) provides a remedial regime.<sup>166</sup> This regime does not entail independent statehood but for indigenous peoples to be able to self-govern and to be in control of their own destinies.<sup>167</sup> Self-determination has consequently become the most important claim of indigenous identity movements before IHRL organs.<sup>168</sup> Nonetheless, states have rejected such a claim with various arguments related to state sovereignty and territorial integrity.<sup>169</sup> The main arguments against the possibility have been the ‘blue water doctrine’ (also known as the ‘salt-water doctrine’) that establishes that norms related to decolonisation (and that consequently establish the right to self-determination of nations), are only related to colonies that are separated from the metropolis by ocean water.<sup>170</sup> A second argument is the principle of international law of *uti possidetis* established in Latin America during the independence period, according to which countries shall maintain the borders established during the colonial period.<sup>171</sup>

Disregarding the issue of indigenous nations’ peoplehood was made easier for governments after indigenous self-determination was turned into a human right and consequently a domestic matter rather than an international one.<sup>172</sup> Furthermore, since the 1990s, IHRL organs have processed demands related to indigenous rights utilizing mainly a multiculturalist approach<sup>173</sup> as an interpretation framework, rather than a self-determination approach. Thus, indigenous collective rights such as the right to land and

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<sup>166</sup> James S. Anaya, *Indigenous Peoples in International Law* (2nd edn, Oxford University Press 2004) 103-113.

<sup>167</sup> *Ibid.*, 113.

<sup>168</sup> Xanthaki (n 159) 131; Chris Tennant, ‘Indigenous Peoples, International Institutions, and the International Legal Literature from 1945-1993’ (1994) 16 *Human Rights Quarterly* 1, 43.

<sup>169</sup> Malcolm Shaw, *International Law* (6th edn, Cambridge University Press 2009), 291; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (adopted 18 December 1992 res. 47/135) 210, UN Doc. A/47/49, Article 4.4; UNDRIP, Article 46.

<sup>170</sup> See for example Timo Makkonen, *Identity, Difference and Otherness. The Concepts of ‘People’, ‘Indigenous People’ and ‘Minority’ in International Law* (Research Reports 7/2000, The Erik Castrén Institute of International Law and Human Rights, Faculty of Law, University of Helsinki 2000); Joshua Castellino, *International Law and Self-Determination* (Martinus Nijhoff Publishers 2000) (n), 65-73. Anaya argues in this regard that it is a mistake to equate decolonisation with self-determination. Anaya, *Indigenous Peoples in International Law* (n 166) 100-103.

<sup>171</sup> Robert McCorquodale, ‘Human Rights and Self-Determination’ in Mortimer Sellers (ed), *The New World Order Sovereignty, Human Rights and the Self-Determination of Peoples* (Berg 1996); Shaw (n 169) 291.

<sup>172</sup> For example, Irene Watson and Sharon Venne, ‘Talking Up Indigenous Peoples Original Intent in A Space Dominated by State Interventions’ in Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press 2012) 87-90; Schulte-Tenckhoff (n 165) 64-67, 78-79.

<sup>173</sup> Karen Engle, ‘On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights’ (2011) 22 *The European Journal of International Law* 141, 151. Engle does not speak about multiculturalism but a predominance of ‘human rights approach’ and the advancement of a right to culture framework.

the right to maintain ‘customary law’ are currently justified mainly in terms of the right to culture, and not the right to self-determination.<sup>174</sup> In this regard, Weissner has even proposed the ‘culturalization’ of the right to self-determination. For this author, all indigenous rights are cultural rights, and self-determination should then be understood as ‘cultural self-determination’, and not in political or economic terms.<sup>175</sup> However, I agree with the body of literature that sees the absorption of the right to self-determination by IHRL as problematic because it de-politicises it and casts aside the issue of colonialism.<sup>176</sup> In this regard, the judicialization of self-determination claims and their conversion into a cultural rights issue ignores the specificities of the historical trajectory of self-determination in international law. In addition, self-determination directly addresses matters related to citizenship, decolonisation, sovereignty, and the status of indigenous peoples in international law—something that, as further examined below, the cultural difference approach fails to do.

An example of the privileging of cultural difference over self-determination is the treatment of the case of the Miskito in Nicaragua by the Inter-American Commission of Human Rights (IACHR).<sup>177</sup> In this case, the IACHR did not (or, as they claim, could not) recognise the self-determination of the Miskito in Nicaragua, but nevertheless recognized their cultural rights under Article 27 of the ICCPR.<sup>178</sup>

Although the current status of international law does not allow the view that the ethnic groups of the Atlantic zone of Nicaragua have a right to political autonomy and self-determination, special legal protection is recognized for the use of their language, the observance of their religion, and in general, all those aspects related to the preservation of their cultural identity.<sup>179</sup>

More generally, the right to self-determination as established in Article 1 of the ICCPR is not justiciable before the HRC.<sup>180</sup> Moreover, states have not accepted yet that this

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<sup>174</sup> Ibid, 153-157.

<sup>175</sup> Siegfried Wiessner, ‘The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges’ (2011) 22 *The European Journal of International Law* 121, 122.

<sup>176</sup> For example, Watson and Venne (n 172); Schulte-Tenckhoff (n 165).

<sup>177</sup> IACHR ‘Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin’ OEA/Ser.L/V/II.62 (23 November 1983) This case culminated in a friendly settlement.

<sup>178</sup> IACHR ‘Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin’ (n 132) Section 2 (B). This point is also made by Engle, *The Elusive Promise of Indigenous Development* (n 3) 153-157. Further examples will be provided in Chapter 2.

<sup>179</sup> IACHR ‘Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin’ (n 132) Section 2 (B) para 15.

<sup>180</sup> UNHRC, *Lubicon Lake Band v Canada*. Communication No 167/1984 (26 March 1990) CCPR/C/38/D/167/1984, para 32.1.

right can even be applied to indigenous peoples in the first place.<sup>181</sup> Koivurova explains that, despite the fact that the HRC has suggested that indigenous groups have the right to self-determination, and that Article 1 of the ICCPR can be utilised to interpret Article 27 of the ICCPR, states and international law have not actually accepted this.<sup>182</sup> Like the IAHCRC in the Miskito case, there seems to be willingness on behalf of the HRC to advance the right to self-determination of indigenous peoples, but the initiative is not necessarily echoed by member states.

The right to self-determination was not included in the ILO Convention 169 either. Hence, although indigenous peoples acquired the denomination of ‘peoples’ in IHRL with its adoption, the Convention explicitly states that they do not attain peoplehood in the sense given to the term by international law.<sup>183</sup> Finally, the twenty-five year debate over the Declaration on the Rights of Indigenous Peoples (UNDRIP, adopted in 2007) evidenced that even within the realm of IHRL, indigenous demands for self-determination continued to be felt by states as threats to their territorial integrity and sovereignty.<sup>184</sup> In this sense, Article 3 of the UNDRIP (a non-binding instrument) refers to the right to self-determination in exactly the same wording as Article 1 of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, Article 4 of the UNDRIP specifies that it refers to the right to self-government only, and Article 46 of the same instrument establishes the principle of territorial integrity and political unity of the state.

Currently the exercise of the right to self-determination is limited to ‘internal self-determination’. Internal self-determination can be broadly understood as the right of indigenous peoples to decide matters related to them. They can do so by participating as

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<sup>181</sup> Timo Koivurova, ‘From High Hopes to Disillusionment: Indigenous Peoples’ Struggle to (re)Gain Their Right to Self-Determination’ (2008) 15 International Journal on Minority and Group Rights 1, 18-19; Xanthaki (n 159) 133.

<sup>182</sup> The UNHRC has mentioned the right to self-determination in its concluding observations of state reports (particularly the reports of Canada and Norway of 1999, Finland 2003) and *Apirana Mahuika et al v New Zealand*. Communication No. 547/1993 (27 October 2000) CCPR/C/70/D/547/1993, para 9.2 (where it mentioned that Article 1 can be used as interpretative framework). Koivurova (n 136) 6-8.

<sup>183</sup> ILO Convention 169, Article 1 (3).

<sup>184</sup> Engle, *The Elusive Promise of Indigenous Development* (n 3) 44; Sean Goggin, ‘Human Rights and ‘Primitive’ Culture: Misrepresentations of Indigenous Life’ (2011) 15 The International Journal of Human Rights 873; Jérémie Gilbert, ‘Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples’ (2007) 14 International Journal on Minority and Group Rights 207, 214-216. Representatives of Canada, Australia, the United States and New Zealand were opposed to granting indigenous peoples the right to self-determination in the terms of Article 1 of the ICCPR, as they considered this could threaten the sovereignty and territorial integrity of the states. Ibid, 219.



citizens in public life. Otherwise, by having a certain degree of autonomy that allows them to handle their own affairs in accordance with their own decision-making processes, political forms of organizations and legal institutions.<sup>185</sup> Therefore, indigenous peoples' right to self-determination refers to the political inclusion of indigenous individuals and the exercise of some collective rights within the boundaries of the state and its economic and political regime. In sum, despite their denomination as 'peoples', indigenous groups are currently treated by international law as 'a specific category of minorities with special needs'.<sup>186</sup>

### 1.3.2. Indigenous Peoples as Minorities with 'Special Needs'

If indigenous peoples are minorities, what are those 'special needs' or special features that enable them to have collective rights, as opposed to other minorities that are only entitled to individual rights? Actually, the definitions of indigenous groups and minority groups are strikingly similar. They both have the following components: (a) non-dominant groups, (b) social isolation or persistent discrimination, (c) cultural, religious and/or linguistic distinctiveness, (d) geographical concentration, (e) aboriginality or being autochthonous (although this is not applied anymore to minority rights, which include nomadic groups such as the Romani, and immigrants).<sup>187</sup> The main feature that distinguishes indigenous groups from minorities seems to be that they possess 'ancestral territories'.<sup>188</sup>

<sup>185</sup> Xanthaki (n 159) 164; Shaw (n 169) 293, The Committee on the Elimination of Racial Discrimination General Recommendation 21, para 4.

<sup>186</sup> Shaw (n 169) 298.

<sup>187</sup> ECOSOC 'Working Paper by on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples' by Asbjørn Eide and Erica-Irene Daes E/CN.4/Sub.2/2000/10 (19 July 2000) para 47-65; ECOSOC (Sub Commission on Prevention of Discrimination and Protection of Minorities) 'Study of the Problem of Discrimination Against Indigenous Populations by Special Rapporteur José Martínez Cobo' UN Doc E/CN.4/Sub.2/1986/7 and Add.1-4 (1986) ('Cobo Report'); ECOSOC (Sub-Commission on Prevention of Discrimination and Protection of Minorities) Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities by Special Rapporteur Francesco Capotorti' UN Doc E/CN.4/Sub.2/384/Rev.1. (1979); For an examination of such definitions see Makkonen (n 125) 87-89, 112-115.

<sup>188</sup> Schulte-Tenckhoff (n 165) 68; ECOSOC 'Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the Concept of "Indigenous People"' E/CN.4/Sub.2/AC.4/1996/2 (10 June 1996) para 60, 64, 69. According to this report, the other components of the definition of indigeneity in addition to 'priority in time with respect to the occupation and use of a specific territory' are voluntary perpetuation of cultural distinctiveness, self-identification, and experience of subjugation, marginalization, exclusion, dispossession or discrimination. Ibid, para 69. There was also the suggestion of indigenous peoples having being colonized and subjugated by colonizers from overseas, but the Rapporteur did not accept this distinction because it mystifies the colonization and subjugation by neighbours. Ibid, para 60-63.

But minority groups that are geographically concentrated could also claim rights to land and territory, and there have indeed been initiatives to expand their rights to territorial autonomy.<sup>189</sup> Furthermore, in judicial practice, the argument that indigeneity is linked to special connection to land derives from a circular reasoning whereby indigenous groups that wish to claim collective rights are those that have ‘ancestral lands’, and the groups that have ‘ancestral lands’ can be considered indigenous.<sup>190</sup> In this regard, Pulitano mentions that the adoption of the UNDRIP has prompted ‘national minorities’ to self-identify as indigenous in order to advance their demands for recognition and restoration of historical injustices.<sup>191</sup> As will be explored in Chapters 3 and 4, the concept of indigeneity is flexible at a domestic level as well, with communities and organisations moving between self-identification according to region, ethnicity, race, gender and class depending on the political circumstance and the legal framework in place.

I argue that the fact that indigenous peoples can exercise collective rights while minority groups cannot has less to do with significant differences between the definitions in IHRL of indigenous peoples and minority groups, and more to do with the differences in the racialization of each group. Under a multiculturalist framework, indigenous peoples have been afforded differentiated collective rights because of the reproduction in IHRL instruments and official documents of representations of indigeneity as connected to nature (‘the spiritual or special connection’ of indigenous peoples with their ‘ancestral lands’, ‘indigenous peoples as stewards of nature’). Therefore, indigenous peoples would require collective rights in order to preserve their culture and their habitat, and to survive as distinct ethnic groups.<sup>192</sup> This is not to say

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<sup>189</sup> The Lund Recommendations on the Effective Participation of National Minorities in Public Life (1 September 1999) (OSCE)

<sup>190</sup> The same argument is presented in Engle in relation to the Cobo Report definition of indigeneity, Engle, *The Elusive Promise of Indigenous Development* (n 3) 170 citing Diane M. Nelson, *A Finger in the Wound: Body Politics in Quincentennial Guatemala* (University of California Press 1999) 302-303.

<sup>191</sup> Elvira Pulitano, ‘Indigenous Rights and International Law: An Introduction’ in Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press 2012) 11.

<sup>192</sup> Colin Perrin, ‘Approaching Anxiety: The Insistence of the Postcolonial in the Declaration on the Rights of Indigenous Peoples’ in Peter Fitzpatrick and Eve Darian-Smith (eds), *The Laws of the Postcolonial* (The University of Michigan Press 1999) 32; On indigenous peoples right to land on account of their unique way of life and special connection to land, UNHRC ‘General Comment No. 23, Article 27’ (Rights of minorities) UN Doc CCPR/C/21/Rev.1/Add.5 (26 April 1994) para 3.2; ECOSOC (Sub Commission on Prevention of Discrimination and Protection of Indigenous Peoples and Minorities) ‘Indigenous Peoples and Their Relationship to Land, by Special Rapporteur Erica-Irene A. Daes’ (11 June 2001) E/CN.4/Sub.2/2001/21 para 12; Xanthaki (n 159) 14; CESCR ‘General Comment No. 21 on the Right to Everyone to Take Part of Cultural Life’ E/C.12/GC/21 (21 December 2009) para 36 (indigenous peoples’ communal life is indispensable for their well-being, and it includes their traditionally owned lands, territories and resources); ILO Convention 169, Article 13(1); UNDRIP, Article 25 (establishes the spiritual connection of indigenous peoples to land); IACHR, ‘Indigenous and

that minority groups are not exempt from the imposition of external definitions of their identity. The difference is that, under the dominant multiculturalist approach, this specific representation of the indigenous person as a noble savage justifies collective rights for indigenous groups. Under the cultural difference paradigm, even the exercise of the right to self-determination will be conditioned to adherence to this representation.

A good example of the power of the noble savage argument is the situation of Afro-Latin Americans. Of the fifteen Latin American states that adopted multiculturalist policies in their constitutions (and therefore indigenous collective rights), only six (Brazil, Colombia, Ecuador, Honduras and Nicaragua) extended some collective rights to Afro-Latin Americans.<sup>193</sup> Of those, only three (Honduras, Guatemala and Nicaragua) have granted the same scope of collective rights to Afro-Latin Americans as given to indigenous peoples.<sup>194</sup> Hooker explains that only the Afro-Latin Americans communities that have utilised a cultural identity and indigenous-like rhetoric have been able to successfully claim collective rights<sup>195</sup> such as cultural recognition, land rights, access to natural resources, and territorial and political autonomy.<sup>196</sup> These have generally been communities that have descended from runaway African slaves (such as the Quilombos in Brazil, the Garifuna or Creoles in Central America, and the Cimarrones or Palenques in Ecuador and Colombia) who can articulate their demands in a similar way as indigenous peoples (appealing to connection to land and ancient origins).<sup>197</sup>

Although this idea requires further exploration, I would argue that these differences in racialization have entailed variance in the management of difference for groups considered in IHRL as minorities and those denominated indigenous. Hence, while indigenous rights have followed the path of liberal multiculturalism, minority rights seem to have remained closer to the liberal neutralist or non-discrimination approach to difference, or the idea that the state should be blind to cultural difference and treat everyone equally.<sup>198</sup> As mentioned earlier, the latter was the approach to minority rights

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Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System' OEA/Ser.L/V/II. Doc 56/09 (30 December 2009).

<sup>193</sup> Hooker (n 54) 286.

<sup>194</sup> Ibid, 286.

<sup>195</sup> Ibid, 293, 304-307. According to Hooker, only a small percentage of rural Afro-Latin American communities make claims based on cultural distinctiveness. Ibid, 296.

<sup>196</sup> Ibid, 295.

<sup>197</sup> Ibid, 295.

<sup>198</sup> Galeotti (n 52) 567.

before World War II.<sup>199</sup> For instance, the idea that differentiated rights do not run against the principle of equality was not incorporated into human rights instruments and official documents until the multiculturalist shift of the late 1980s.<sup>200</sup> As is patent in Kymlicka's work, this notion is central to the idea of a multicultural citizenship based on the inclusion of groups and not only individuals as the basis of society and as subjects of rights.<sup>201</sup> While this re-interpretation of the principle of equality was applied both to minority rights and indigenous rights, the advancement of differentiated rights understood as special protections (or 'external protections', as Kymlicka terms them<sup>202</sup>) and collective rights for 'ethnocultural groups'<sup>203</sup> was mainly achieved in relation to indigenous peoples after the adoption of the ILO Convention 169.<sup>204</sup> In contrast, as mentioned earlier, minority rights remain in IHRL as individual rights and are focused on palliating discrimination.

## 1.4. Indigenous Subject and Culture in Human Rights

### 1.4.1. Culture in International Human Rights Law

The essentialist view of culture as an integrated whole that was identified in multicultural theory is also present in IHRL norms related to the 'right to culture'.<sup>205</sup> Cultures are consequently referred to as entities that can be preserved, destroyed, developed or isolated,<sup>206</sup> as well as objects that can be commoditized.<sup>207</sup> However, in

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<sup>199</sup> Ringelheim (n 67) 105.

<sup>200</sup> For example, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (adopted 18 December 1992) Article Art. 8.3: 'Measures taken by States to ensure the effective enjoyment of the rights set forth in the present Declaration shall not prima facie be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights'; *ibid* (n) 105.

<sup>201</sup> Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 47) Ch 9.

<sup>202</sup> He defines external protections as an ethnic group attempting to protect its 'existence and identity' 'by limiting the impact of the decisions of the larger society'. *Ibid*, 36.

<sup>203</sup> This term is also Kymlicka's. *Ibid*; Will Kymlicka, 'Western Political Theory and Ethnic Relations in Eastern Europe' in Will Kymlicka and Magda Opalski (eds), *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford University Press 2001).

<sup>204</sup> In relation to the connection between indigenous movements and IHRL see Niezen (n 88) 31-43; Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (n 64) Loc 1571-1674. Kymlicka believes that the only argument to differentiate indigenous peoples from other 'national minorities' has been that of cultural difference and the perception of indigenous peoples as pre-modern.

<sup>205</sup> Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* Merry, 'Human Rights and the Demonization of Culture (And Anthropology Along the Way)' (n 124) 60-61.

<sup>206</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (adopted 19 December 1992) Article 4.2 (culture as something that can be developed); UNESCO Declaration on the Principles of International Cultural Cooperation ((adopted 4 November 1966) (the dignity and value of each culture should be protected), UNDRIP, Article 8.1 (right not to be

IHRL the definition of culture varies depending on whether human rights instruments and official documents refer to the ‘right to access to culture’, or to the ‘right to culture’ of minorities. The right to access to culture (also referred to as the ‘right to take part in cultural life’, or the ‘right to the benefits of culture’) refers to culture as the arts, sciences and technology of the dominant society.<sup>208</sup> It may well refer to the ‘high culture’ and scientific and technological production of the industrial societies of the global North. The state has the duty to diffuse this dominant culture<sup>209</sup> (presumably abroad as well as domestically) for it is connected not only to tangible goods but also to ‘human spiritual development’.<sup>210</sup> In contrast, the instruments for the protection of minorities and cultural diversity refer to culture as a way of life and as a set of values and beliefs,<sup>211</sup> equated to religion, customs and traditions,<sup>212</sup> that have a greater role in

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subjected to destruction of culture), UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions Article 2.1 (cultural diversity can be protected and promoted), Art.1.b (to create conditions for culture to flourish). Also Merry, ‘Human Rights and the Demonization of Culture (And Anthropology Along the Way)’ (n 124) 65. Merry sees a connection between IHRL and Boas’ conception of cultures as isolated and bounded, ‘as distinct and incommensurate ways of living’.

<sup>207</sup> Cultural expressions are referred to in terms of tradable goods and services and also as intellectual property in the Preamble of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005) (cultural ‘activities, goods and services have both economic and cultural value because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value’); in the same instrument, Article 1 (g) (cultural activities, goods and services as a vehicle of meaning), Article 6 (2) (b) (right of the Parties to promote cultural activities, goods and services), and Article 14 (a) (ii) (Parties shall endeavour to facilitate access of cultural good and services to the global market and international distribution networks); CESCR ‘General Comment No. 21 on the Right to Everyone to Take Part of Cultural Life’ para 16 (a) (cultural goods and services include libraries, museums, theatres, sports stadiums, cinemas, literature, folklore, arts in all forms; open spaces such as parks, lakes and rivers and biodiversity; intangible cultural good such as customs, traditions, beliefs, history and values).

<sup>208</sup> See in this sense, Sally Holt, ‘Family, Private Life, and Cultural Rights’ in Marc Weller (ed), *Universal Minority Rights A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford University Press 2007), 218. Holt clarifies that the right to access to culture in the Covenant of Economic, Social and Cultural Rights was expanded to include the cultures of minorities in the Economic, Social and Cultural Rights Committee revised guidelines of 1990. For the right to access to culture, International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966) Article 15 (right to take part in cultural life and to benefit of scientific progress, duty of the states to diffuse science and culture); Framework Convention for the Protection of National Minorities. (Strasbourg 1.II.1995) Council of Europe. Article 15 of the (right of national minorities to effective participation in cultural, social and economic life); American Declaration of the Rights of Man (1948) Article XIII (right to the benefits of culture, take part in cultural life of the community, enjoy arts, intellectual progress, scientific discoveries); San Salvador Protocol (adopted 17 November 1978) OAS, Article 14 (right to participate in the cultural and artistic life of the community and to benefit from scientific and technological progress).

<sup>209</sup> Constitution of UNESCO (adopted 16 November 1945) Preamble and Article 1

<sup>210</sup> American Declaration of the Rights and Duties of Man (1948) Preamble.

<sup>211</sup> Mexico City Declaration on Cultural Policies (6 August 1982, World Conference on Cultural Policies) UNESCO, Preamble; Universal Declaration on Cultural Diversity (adopted 2 November 2001 Res 25, Annex 1) UNESCO Doc. 31C, Preamble and Article 1; Fribourg Declaration on Cultural Rights (adopted 8 May 2007) UNESCO, Article 2 (a).

shaping the identity of its members. As a result, the ‘right to culture’ in the case of minorities mutates into a ‘right to cultural identity’.<sup>213</sup> In contrast, the dominant culture of the ‘right to access to culture’ is not presented as binding or shaping the identity of the modern subject.

To better understand this division in IHRL between the dominant culture in ‘Western liberal societies’<sup>214</sup> and that of minorities and its implications, it is relevant to look at the way this division operates in Kymlicka’s liberal theory of minority rights. He uses culture as a synonym of national groups or people.<sup>215</sup> By using this definition, his ‘societal cultures’ will not be restrictive of individual autonomy in the way ‘political communities’ are because, for him, nations do not have an underlying normative dimension.<sup>216</sup> Kymlicka’s societal cultures are ‘a territorially concentrated culture, centred on a shared language which is used in a wide range of societal institutions, in both public and private life’. They provide their members with ‘a range of socially meaningful options’<sup>217</sup> and in this way they constitute a ‘context of choice’ for individuals to freely exercise their autonomy. Furthermore, individuals are able to revise their ultimate ends and do not have to adhere to their societal cultures.<sup>218</sup> For Kymlicka, nations are recent phenomena, characteristic of the process of modernization<sup>219</sup> and therefore very much linked to the nation-state. At the same time, however, Markell highlights that Kymlicka utilizes the Herderian concept of culture when justifying differentiated rights.<sup>220</sup> Hence, for Kymlicka, culture is not only a background against which choices are made, but also an entity that deserves protection as well as a good to which individuals should have access.<sup>221</sup> Markell therefore

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<sup>212</sup> Merry, ‘Human Rights and the Demonization of Culture (And Anthropology Along the Way)’ (n 124) 61 particularly referring to CEDAW (Convention on the Elimination of all Forms of Discrimination Against Women) adopted in 1979.

<sup>213</sup> For example, Inter-American Court, *Sarayaku Kichwa Indigenous People v Ecuador* (Merits) Series C No 245 (27 June 2012) In relation to the right to culture of minorities, ICCPR, Article 27, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Articles 2 and 4 (2), International Covenant on Economic, Social and Cultural Rights, Article 15 (a), Council of Europe Framework Convention for the Protection of National Minorities, Article 5. In relation to cultural rights of indigenous peoples, UNDRIP, Articles 11 (1), 12 (1) and 15 (15), ILO Convention 169, Articles 2.2 (b), 4, 5 (a) (b) and 13 (1) .

<sup>214</sup> Will Kymlicka, ‘Introduction’ in Will Kymlicka (ed), *The Rights of Minority Cultures* (Oxford University Press 1995) 9.

<sup>215</sup> Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 47) 76; Phillips (n 50) 19.

<sup>216</sup> Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 47) 45.

<sup>217</sup> *Ibid*, 79.

<sup>218</sup> *Ibid*, 92.

<sup>219</sup> *Ibid*, 34, 76.

<sup>220</sup> Markell (n 121) 154-158.

<sup>221</sup> *Ibid*, 158-159.

concludes that when Kymlicka speaks about a ‘right to culture’ he is referring to culture in Herderian terms<sup>222</sup>—an argument that, as evidenced above, is also true for IHRL.

In sum, Kymlicka’s multiculturalist theory encompasses two different conceptions of culture: as a context of choice (the ‘societal culture’ or ‘cultural structure’) and as a moral resource, a way of life, which gives meaning to choices and shapes the individual’s identity.<sup>223</sup> IHRL also carries this ambivalence in the definition of culture and it resolves it by distinguishing between the modern (or civilized) culture of the ‘right to access to culture’, and traditional (or primitive) culture of the ‘right to culture and cultural identity’ of minorities. Hence, minority cultures (and by extension, the individuals identified as belonging to a minority) would be backward and particularistic. As elaborated in Chapter 2, in IHRL, minorities and indigenous peoples’ cultures are not a context of choice but a way of life that determines identity. In some instances, culture or cultural practices are even considered something that harms the ability of members of minorities to choose. It becomes an insuperable obstacle that clouds discernment and impedes the individual from exercising her autonomy, thereby constituting a ‘barrier to progress’.<sup>224</sup> In contrast, the ‘modern culture’ of Western liberal democracies is viewed as a path to freedom, universalistic, progressive and conceding of rights.<sup>225</sup> Ironically enough, these distinctions between the modern and the traditional, between enlightened choice and hampered rationality, bring us back to the imperialist ideas of racial difference and stadial social evolution<sup>226</sup> that Herder criticised and for which he developed his concept of culture.<sup>227</sup>

#### **1.4.2. The Racialized Subject in International Human Rights Law**

I concur with Markell that the division in Kymlicka between culture as context of choice and culture as a way of life seems a way of solving the tension between the two conflictive ideas of the individual in Kymlicka’s work: as determined by her culture

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<sup>222</sup> Ibid, 160.

<sup>223</sup> Ibid, 155; Dick (n 53) 965.

<sup>224</sup> Phillips (n 50) 106-108 referring to Parekh’s theory in which culture is seen as an obstacle to free choice; Merry, ‘Human Rights and the Demonization of Culture (And Anthropology Along the Way)’ (n 124) 60 referring to the idea ‘harmful traditional cultural practices’ developed by CEDAW Committee, and how CEDAW in general sees culture as an obstacle for women rights.

<sup>225</sup> Balibar (n 55) 25.

<sup>226</sup> Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (n 7) 12-13.

<sup>227</sup> Merry, ‘Human Rights and the Demonization of Culture (And Anthropology Along the Way)’ (n 124) 60.

(the ‘social thesis’) and as self-determined or sovereign.<sup>228</sup> However, I further argue that the way these tensions between conceptions of culture and subject are resolved in IHRL is by creating (or rather, reinforcing) a hierarchy between the self-determined individuals (who freely choose their culture) and the racialized groups (immigrants and indigenous peoples, countries of the global South) whose identities, beliefs, behaviour and actions are shaped by their culture.<sup>229</sup>

In liberal societies in which autonomy and freedom of choice are central aspects to the idea of the subject and of human dignity, to refer to members of minorities as culturally bound is to refer to them as morally inferior because of their diminished agency.<sup>230</sup> In this regard, these distinctions between conceptions of culture and agency for different groups suggest the continuation of a ‘coloniality of being’ (‘others are not’, ‘others are dispensable’) and a ‘coloniality of knowledge’ (‘others do not think’, ‘others are not rational’).<sup>231</sup> These ontological and epistemological perspectives permeate the construction of the modern political subject of human rights (the self-determined individual) as well his alterity: the subject of minority rights (the primitive, the culturally-bounded).<sup>232</sup> The modern political subject has also been referred to in decolonial theory as Being (Heidegger’s *Dasein*, Descartes’ *ego cogito*, or Dussel’s *ego conquiro*).<sup>233</sup> The alterity of Being is the post-colonial subject, the *damné* of Fanon,<sup>234</sup>

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<sup>228</sup> Markell (n 121) 158. As Markell puts it, ‘this way of thinking of culture is an unstable amalgamation of the liberal language of property and possessive individualism, and the communitarian language of encumbrance...’. Ibid.

<sup>229</sup> I draw on Peter Fitzpatrick and Eve Darian-Smith, ‘Laws of the Postcolonial: an Insistent Introduction’ in Peter Fitzpatrick and Eve Darian-Smith (eds), *Laws of the Postcolonial* (The University of Michigan Press 1999); and Phillips (n 50) 85.

<sup>230</sup> Galeotti (n 52) 568; Phillips (n 50) 128. In relation to the idea of individual autonomy as central to human dignity see Taylor (n 49) 57.

<sup>231</sup> Maldonado-Torres (n 55) 252. ‘Coloniality’ (*colonialidad*) is defined in Latin American decolonial theory as the racial hierarchy which sustains the capitalist system and was originated in America. Aníbal Quijano, ‘Colonialidad del Poder y Clasificación Social’ (2000) XI Journal of World-Systems Research 342, 342-343.

<sup>232</sup> Maldonado-Torres (n 55) 244-245 based on Enrique Dussel, ‘Modernity, Eurocentrism, and Trans-Modernity: In Dialogue with Charles Taylor’ in Eduardo Mendieta (ed), *The Underside of Modernity: Apel, Ricoeur, Rorty, Taylor and the Philosophy of Liberation* (Humanities Press 1996) 133. Maldonado explains that the ‘barbarian’ is the context of reflection on subjectivity and reason of the Being or *cogito*. Moreover, the modern subject is constituted in relation to the violence and annulment of the postcolonial subject. In a similar sense, Astrid Ulloa, ‘Las representaciones sobre los indígenas en los discursos ambientales y de desarrollo sostenible’ in Daniel Mato (ed), *Políticas de economía, ambiente y sociedad en tiempos de globalización* (Facultad de Ciencias Económicas y Sociales, Universidad Central de Venezuela 2005) 95.

<sup>233</sup> Maldonado-Torres (n 55) 145.

<sup>234</sup> Frantz Fanon, *Les Damnés de la Terre* (Folio Actuel 1961).



the culturally bounded, whose humanity and rationality are called into question, as well as her place in a modern, civilized society.<sup>235</sup>

The division between cultures and subjects produces a dual system close to authoritarian liberalism.<sup>236</sup> McCallum explains that, on the basis of colonial racial divisions and evolutionary theory, ‘actually existing liberalism’ (or liberalism as a historical phenomenon and not as a political theory)<sup>237</sup> entails a division between advanced societies and individuals and those unable to self-govern.<sup>238</sup> In the case of indigenous peoples, liberal government means the enforcement of obligations because they are seen as incapable of governing themselves. Therefore, liberal governments discipline these lesser peoples so they can acquire some citizenship rights.<sup>239</sup>

While McCallum is mainly referring to British Imperialism and the Australian government, in Chapter 3 it will be examined how this period of authoritarian liberalism also took hold in Latin America. What is relevant to emphasize here is that although the multiculturalist approach is supposed to be a step forward in relation to authoritarian liberalism and assimilationism, it reproduces colonial racial divisions in its treatment of culture. As explained in the section on the ethnicization of race, a feature of multiculturalism is that it presents discussions on race as discussions on culture. Hence, the multiculturalist regime does not eliminate racial hierarchies but simply obscures the fact that it is referring to specific groups by referring more generally to cultures and religions.<sup>240</sup>

This issue is not only a trait of the multiculturalist approach but, according to Fitzpatrick and Darian-Smith, the very idea of human rights is constructed in opposition to the idea of minorities’ culture in a Herderian sense. Fitzpatrick and Darian-Smith refer to this reified view of culture as ‘cultural absolutism’.<sup>241</sup> Hence, human rights norms are situated on the side of the non-binding culture of Western liberal societies.<sup>242</sup>

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<sup>235</sup> Maldonado-Torres (n 55) 244-245.

<sup>236</sup> The term is of Barry Hindess, ‘Political Theory and ‘Actually Existing Liberalism’ (2008) 11 Critical Review of International Social and Political Philosophy 347, 348-349 referring mainly to ‘British liberal imperialism’.

<sup>237</sup> The term ‘actually existing liberalism’ is from *ibid*, 347.

<sup>238</sup> David McCallum, ‘Liberal Forms of Governing Australian Indigenous People’ (2011) 38 Journal of Law and Society 604, 608-609.

<sup>239</sup> *Ibid*, 605-607.

<sup>240</sup> Hage (n 52) 87.

<sup>241</sup> Fitzpatrick and Darian-Smith (n 229) 7.

<sup>242</sup> *Ibid*, 8-9.

Instead of being status-ridden, static and pervasive, as are the cultures (and legal orders) of racialized minorities, human rights norms are universal, dynamic<sup>243</sup> and an integral part of liberalism, democracy, individualism and progressive change, which are meant to be Western traits.<sup>244</sup> As Merry argues, as a consequence of this, the production of conceptions of global justice, definitions of gender roles, and discourses of identity in human rights organs are not considered culture but 'law'.<sup>245</sup> In contrast, if indigenous authorities produce gender roles, identity discourses, etc., this would be culture and not law.

### **i. The Ecological Native of Human Rights**

Ramos makes a differentiation between the Indian or indigenous person of 'flesh and blood' and the 'model Indian' defended by human rights advocates, funded by international donors and spoken about in international human rights courts.<sup>246</sup> The hyperreal Indian evokes empathy and is easily defensible because she portrays the positive moral values of the 'Western man'.<sup>247</sup> Ulloa denominates this representation the 'ecological native', since it is associated with images of nature as pristine, as a lost paradise that is separate from culture.<sup>248</sup> The 'hyperreal Indian' or the 'ecological native' corresponds to the image of the noble savage<sup>249</sup> who lives in Herod's 'Golden Age' in which there are 'no laws, no wars, no agriculture, no private ownership of land, no knowledge of iron or gold'.<sup>250</sup>

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<sup>243</sup> As in the 'evolutionary interpretation of human rights' of the Inter-American Court of Human Rights. The Inter-American Court affirms in this regard that human rights are 'living instruments, whose interpretation must go hand in hand with evolution of times and of current living conditions'. This is an interpretation the Court deems consistent with the American Convention of Human Rights and the Vienna Convention on Treaty Law. *Yakye Axa Indigenous Community v Paraguay* (Merits) Series C No 125 (17 June 2005) para 125.

<sup>244</sup> Fitzpatrick and Darian-Smith (n 229) 7-10.

<sup>245</sup> Merry, 'Human Rights and the Demonization of Culture (And Anthropology Along the Way)' (n 124) 70.

<sup>246</sup> Ramos is referring to human rights NGOs in Brazil. Ramos (n 54); in a similar sense, Charles R. Hale, 'Rethinking Indigenous Politics in the Era of the "Indio Permitido"' (2004) 38 *NACLA Report on the Americas* 16.

<sup>247</sup> Ramos (n 54) 10.

<sup>248</sup> Ulloa, 'Las representaciones sobre los indígenas en los discursos ambientales y de desarrollo sostenible' (n 232) 90-92, 101; Ulloa, *The Ecological Native: Indigenous Movements and Eco-governmentality in Colombia* (n 54) loc 1927-1957.

<sup>249</sup> Ulloa, 'Las representaciones sobre los indígenas en los discursos ambientales y de desarrollo sostenible' (n 232) 92.

<sup>250</sup> Claudia Egerer, 'Ambivalent Geographies' (2001) 15 *Third Text* 15, 24 citing Neil Rennie, *Far-Fetched Facts: The Literature of Travel and the Idea of the South Seas* (Clarendon Press 1995) 5.

The representation of the primitive as human potential and simultaneously as a walking tragedy that is bound to disappear (whether because indigenous peoples become 'extinct' or 'acculturated') has been a common 20<sup>th</sup> century representation of the post-colonial subject.<sup>251</sup> Egerer explains in this regard that notions of what was exotic and foreign in the colonial period were based on what was familiar to the conquerors.<sup>252</sup> The indigenous person represents what is to be found in the 'home culture' and is appreciated, or what is found in the home culture but 'exiled as too dangerous'.<sup>253</sup> Consequently, the indigenous other is an object to be both desired and rejected.

According to Tennant, the image of the indigenous person as a noble savage started being used in literature related to indigenous people's rights (particularly UN documents)<sup>254</sup> in the 1970s. Before that, particularly in the period 1945-1958, the prevailing image, especially in ILO documents, was that of the 'ignoble primitive', which legitimized assimilationist policies such as those articulated in the ILO Convention 107.<sup>255</sup> The ignoble Indian, rather than coming from Rousseau's state of nature, emerges from Hobbes' pre-societal permanent state of war. Consequently, the indigenous is a brute who leads a miserable life and is in need of being civilized.<sup>256</sup> By contrast, the noble savage of the 'UN period' constitutes a locus of 'authenticity and community', what has been lost with industrial progress, but also represents the possibility of a 'return to the primitive'.<sup>257</sup>

The noble savage representation is therefore associated with a critique of individualism, the degradation of the environment, and capitalist relations.<sup>258</sup> To 'save' indigenous cultures is to preserve this age of innocence (or barbarity).<sup>259</sup> To be able to understand these cultures is to unlock the knowledge that will save the world from environmental

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<sup>251</sup> Tennant (n 168) 8 citing James Clifford, *The Predicament of Culture. Twentieth-Century Ethnography, Literature and Art* (Harvard University Press 1988) James Clifford, 'On Ethnographic Allegory' in James Clifford and George E. Marcus (eds), *Writing Culture: The Poetics and Politics of Ethnography* (University of California Press 1986), 112.

<sup>252</sup> Egerer (n 250), 18.

<sup>253</sup> Ibid.

<sup>254</sup> The term 'indigenous' according to Tennant originated in the 1940s and 1950s as a translation of *indígena* in Spanish and the French *indigène*. Before that the common denominations in English literature were 'Indian', 'native', 'primitive' or 'aboriginal'. Tennant (n 168) 4.

<sup>255</sup> Ibid, 10, 48.

<sup>256</sup> Ibid, 8-15. Tennant is referring to Jean-Jacques Rousseau's *A Discourse upon the Origin and Foundation of the Inequality Among Mankind* (1755) and Thomas Hobbes' *Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiastical and Civil* (1651).

<sup>257</sup> Ibid, 6-8.

<sup>258</sup> Ibid, 19.

<sup>259</sup> Egerer (n 250) 24.

devastation and moral degeneration.<sup>260</sup> In this connection, for Ulloa, the ‘ecological native’ serves ‘the West’ as a resource for eco-capitalism. She further argues that the noble savage is also a spiritual model for the construction of a ‘post-industrial self’ that will be redeemed from the ecological crisis caused by capitalist societies.<sup>261</sup> In this way, the ecological Indian generates a *plus de joie*,<sup>262</sup> a form of gratification while contributing to advance a sustainable development agenda<sup>263</sup> in the context of capitalist economies.<sup>264</sup>

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<sup>260</sup> Engle, *The Elusive Promise of Indigenous Development* (n 3) 145-146.

<sup>261</sup> Ulloa, *The Ecological Native: Indigenous Movements and Eco-governmentality in Colombia* (n 54) loc 4377.

<sup>262</sup> The term is from Lacan and it is understood as explained in Slavoj Žižek, *The Sublime Object of Ideology* (Verso 1989).

<sup>263</sup> Sustainable development is a model promoted since the 1980s to reconcile the conflicts between the protection of ecosystems and economic growth. Susan Baker, *Sustainable Development* (Routledge 2006) 24. Ulloa is possibly referring to its weak version, which prioritizes continued economic growth and sees nature in terms of resources that need to be managed. Maggie H. Roe, ‘Landscape and Sustainability: An Overview’ in John F. Benson and Maggie H. Roe (eds), *Landscape and Sustainability* (2nd edn, Routledge 2008) 8.

<sup>264</sup> Ulloa, *The Ecological Native: Indigenous Movements and Eco-governmentality in Colombia* (n 54) loc 4358.

## Chapter 2. The Regimes of Authenticity and Toleration in International Human Rights Law

### 2.1. Introduction

The previous chapter argued that since the late 1980s, IHRL has taken a multiculturalist approach toward indigenous peoples that employs primitivist conceptions of indigeneity and an essentialist concept of culture. This chapter elaborates upon the implications of these views of the indigenous subject and indigenous culture and their expression in IHRL judicial practice. In addition, since legal pluralism is at the centre of this thesis, this chapter also examines the definition and regulation of indigenous law in IHRL. The analysis of the implications of essentialist and primitivist perspectives is organised around two main themes: the regime of authenticity and the regime of toleration.

The regime of authenticity is particularly apparent in the context of IHRL (and domestic) judicial cases.<sup>265</sup> It consists of the use of essentialist and primitivist definitions of indigenous identity, culture and law as a benchmark to assess indigenous claims for collective rights. In this sense, the regime of authenticity permits state judicial authorities to regulate the access of racialized groups to collective rights. The regime of authenticity in IHRL is consequent with theories of recognition based on Herderian notions of culture and authenticity.<sup>266</sup> However, in this chapter I argue that despite the unproblematized use of the concept of ‘recognition’ in IHRL norms and the use of authenticity tests by human rights organs, actually toleration and not recognition is at the basis of IHRL’s regulation of indigenous peoples.

In practical terms, the regime of toleration can be identified by the establishment of moral and political standards (which are present as clauses in human rights norms and domestic legislation) that limit the scope of indigenous collective rights. These clauses aim to prevent the exercise of collective rights from altering the political and economic system and compromising state sovereignty. In addition, these clauses protect the

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<sup>265</sup> For analyses of the regime of authenticity in domestic courts, see Phillips (n 50); Dick (n 53); Kirsten Anker, ‘The Law of the Other. Exploring the Paradox of Legal Pluralism in Australian Native Title’ in Pierre Lagayette (ed), *Dealing with the Other: Australia’s Faces and Interfaces* (electronic version Sorbonne University Press 2008) <<http://ssrn.com/abstract=1606967>> .

<sup>266</sup> Notably Taylor (n 49).

privileged position of the dominant groups at the centre of the idea of the nation, and reinforce their role as the ones who decide which groups and which cultural practices or legal norms are tolerated. As will be discussed in Chapters 3 and 4, it is important to highlight that in both regimes (of toleration and authenticity) the subordinated groups are not passive but have an active role in pushing boundaries. In the case of the regime of authenticity, indigenous groups negotiate the meaning of their identity and deploy specific representations of themselves in order to access rights. Their resistance and struggle also influence the threshold of toleration and consequently the location of indigenous peoples in the polity as well as their capacity to express difference.

In addition to explaining the regime of authenticity, Section 2.2 of this chapter examines the right to cultural identity and the effects of reification, homogenization and depoliticization tied to an essentialist view of culture. Section 2.3 elaborates on the regime of toleration, which, following Brown and Hage, is presented as a practice of nationalist inclusion and a form of governmentality.<sup>267</sup> Section 2.4 then examines the decisions of the United Nations Human Rights Committee (HRC) and judicial resolutions of the Inter-American Court of Human Rights ('Inter-American Court'), identifying the use of authenticity tests and essentialist and primitivist perspectives of indigenous subject and culture. Finally, Section 2.4 looks at the regulation of legal pluralism in IHRL emphasising the presence of a regime of toleration to regulate indigenous peoples' right to use their own law.

## **2.2. The Regime of Authenticity**

### **2.2.1. The Right to Cultural Identity**

As mentioned in Chapter 1, in liberal multiculturalism the idea of cultural identity constitutes the justification for the protection of minority cultures because individual freedom and prosperity depend on the person's capacity to relate to a 'flourishing' cultural group.<sup>268</sup> In Taylor's theory of recognition, culture is also indispensable in defining a person's identity, providing a 'horizon of meaning' that helps individuals

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<sup>267</sup> Brown, *Regulating Aversion: Tolerance in the Age of identity and Empire* (n 52); Hage (n 52).

<sup>268</sup> Raz (n 101) 69.

shape their world.<sup>269</sup> These views are present in the ‘right to cultural identity’ in IHRL. The Preamble of the UNESCO Declaration on Cultural Policies affirms,

[T]hat it is culture that gives man the ability to reflect upon himself. It is culture that makes us specifically human, rational beings, endowed with a critical judgement, and a sense of moral commitment. It is through culture that we discern values and make choices. It is through culture that man expresses himself, becomes aware of himself, recognises his incompleteness, questions his own achievements, seeks untiringly for new meanings and creates works through which he transcends his limitations.<sup>270</sup>

Both in IHRL and in these multiculturalist theories, the division between culture and identity is erased, and culture becomes a synonym of identity, an identity marker and a differentiator.<sup>271</sup> As explained in Chapter 1, this is particularly the case with minorities, where the preservation of culture (understood in essentialist terms as something static and self-contained) is tied to the preservation of their collective (and even individual) identities. Second, it is justified in terms of protecting ‘cultural diversity’, which is conceived in IHRL as ‘heritage of humankind’.<sup>272</sup> Balibar traces this view of cultural diversity to Lévi-Strauss’s notion that the mixing of cultures and the suppression of cultural distances would entail the intellectual death of humanity, maybe even jeopardising its biological survival.<sup>273</sup> Consequently, cultural closure would be important in order to permit the accumulation of individual aptitudes.<sup>274</sup> In the case of indigenous peoples, they are perceived as ‘stewards’ of 99% of the world’s genetic resources, and thus they are ‘keepers of human variety’.<sup>275</sup>

As for the ‘right to cultural identity’ of indigenous peoples, an equivalence is made between ethnicity and culture,<sup>276</sup> which permits the conclusion that indigenous cultures

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<sup>269</sup> Dick (n 53) 962; Taylor (n 49) 72.

<sup>270</sup> Mexico City Declaration on Cultural Policies (6 August 1982, World Conference on Cultural Policies) UNESCO, Preamble, in a similar sense, Article 3.

<sup>271</sup> Benhabib (n 50) 3.

<sup>272</sup> Mexico City Declaration on Cultural Policies, Articles 4,5,6,8; Declaration on Race and Racial Prejudice (adopted 27 November 1978) UNESCO E/CN.4/Sub.2/1982/2/Add.1, annex V, Article 5.1; Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005) UNESCO, Preamble.

<sup>273</sup> Balibar (n 55) 22 referring to Claude Lévi-Strauss, *View from Afar* (J. Neugroschel and P. Hoss trs, Blackwell 1985).

<sup>274</sup> Balibar (n 55) 22. For Balibar, this cultural closure also serves as a justification for xenophobia and social aggression, particularly against racialized immigrants. *Ibid*, 26.

<sup>275</sup> Perrin (n 192) 32 citing UN Docs. DP1/1248-98045, DP1/1293-98051, DP1/1294-98054, 1993. Also ILO Convention 169, Preamble, where it mentions the contribution of ‘indigenous and tribal peoples’ to cultural diversity and ‘social and ecological harmony of humankind’.

<sup>276</sup> Dick also points this out for the case of the treatment of aboriginal peoples by the Supreme Court of Canada. Dick (n 53) 969.

need to be preserved for the sake of keeping indigenous peoples as a distinct ethnic groups. In this connection, in multiculturalist theory as well as in IHRL, the right to culture and to cultural identity in the case of indigenous peoples is developed around the idea of ‘cultural survival’. This means that an ethnic minority cannot survive as a distinct group without its culture,<sup>277</sup> understood in Herderian terms as a way of life (which is portrayed as diametrically different to the Western, modern way of life). This idea makes sense when thinking of indigenous peoples and their culture as part of nature (and modern man as not part of nature but rather as dominating it).<sup>278</sup> In parallel with biologicistic perspectives of race as a metonym for species,<sup>279</sup> indigenous peoples and their cultures in IHRL can become extinct in the same way animal and plant species become extinct.<sup>280</sup> This would occur because of the allegedly inevitable and necessary process of modernization.<sup>281</sup> Thus, indigenous culture needs to be preserved by the dominant groups for the sake of cultural diversity, as capitalist societies wish to preserve endangered species that are bound to extinction, or as someone would preserve a ‘tragic museum piece’.<sup>282</sup> This view disempowers indigenous individuals and communities as agents, as social actors and citizens,<sup>283</sup> making them a ‘passive and a-temporal spectacle of their own situation’.<sup>284</sup>

### 2.2.2. Authenticity, Reification and Homogenization

One implication of substantiating indigenous rights on a Herderian view of culture is that ethnic and racial identities (which, again, are perceived as ‘essences’) must be preserved as a condition for minorities to exercise their group-rights.<sup>285</sup> In this

<sup>277</sup> In multiculturalist theory see Taylor (n 49) 42, 45, 52-58. Taylor refers to Quebec; Kymlicka also refers at one point to indigenous peoples in terms of ‘cultural survival’ Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 47) 43. For the idea of ‘cultural survival’ in relation to indigenous rights discourse see Renée Sylvain, ‘“Land, Water, and Truth”: San Identity and Global Indigenism’ (2002) 104 *American Anthropologist* 1074, 1075-1076; Article 43 of the UN Declaration of the Rights of Indigenous Peoples (the rights recognised in the Declaration constitute minimum standards for the ‘survival, dignity and well-being of indigenous peoples of the world’).

<sup>278</sup> Ulloa, ‘Las representaciones sobre los indígenas en los discursos ambientales y de desarrollo sostenible’ (n 232) 99.

<sup>279</sup> Omi and Winant (n 55) 109-110.

<sup>280</sup> Tennant (n 123) 15-18.

<sup>281</sup> As Jameson famously said, it is easier to conceive the end of the world than the end of capitalism. Frederic Jameson, ‘Future City’ (2003) 21 *New Left Review*.

<sup>282</sup> To use the wording of Buchanan and Darian-Smith when referring to the way ‘Ishi’ or the last survivor of the Yahi in what is now California. The Anthropology department of the University of California kept Ishi as a living study object and a ‘research assistant’. Buchanan and Darian-Smith (n 53) 118.

<sup>283</sup> Ulloa, ‘Las representaciones sobre los indígenas en los discursos ambientales y de desarrollo sostenible’ (n 232) 90-95.

<sup>284</sup> *Ibid.*, 96.

<sup>285</sup> Dick (n 53) 171.



connection, the equivalence culture-identity (and also identity-ethnicity, identity-race and culture-nation) is propitiated by the use of a specific notion of ‘authenticity’ that derives from Herder’s idea of culture. Herder considered that for a nation to be authentic it must be true to its unique culture.<sup>286</sup> This idea is central to Taylor’s theory of recognition<sup>287</sup> because to recognize someone is not only to see her as an individual, ‘but as the member of a culture-bearing group’,<sup>288</sup> where culture is understood as a world of beliefs and practices.<sup>289</sup>

More importantly, this notion of authenticity becomes central in the assessment of evidence in Court cases related to indigenous peoples.<sup>290</sup> The reason for this is that under a cultural difference framework, the assignment of rights and resources will depend on the ability of the indigenous applicant(s) to prove the authenticity of their cultural practices, their ‘customs’, their communities and themselves as legitimate representatives of a particular culture.<sup>291</sup> As was advanced in the introduction to this chapter, the ‘regime of authenticity’<sup>292</sup> is problematic because it limits the number of groups that might seem eligible to make multicultural claims.<sup>293</sup> For example, urban indigenous individuals are excluded from the idea of indigeneity that underpins indigenous collective rights (indigeneity as a pre-colonial condition, connected to ancestral territories).<sup>294</sup> This is in tension with a decolonization project as it means that, paradoxically, under the multiculturalist lenses human rights interpreters and legislators are incapable of recognising indigenous peoples’ colonial and post-colonial trajectory. Furthermore, to fit the racialised other into pre-existing categories constitutes an act of domination that reduces the exotic to a ‘domesticated other’ or to recognizable, legible difference, while at the same time reasserting the universality of such categories.<sup>295</sup>

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<sup>286</sup> Taylor (n 49), 32-33.

<sup>287</sup> Ibid, 31; Markell (n 121) 50-53, 154.

<sup>288</sup> Markell (n 121) 154.

<sup>289</sup> Ibid, 154.

<sup>290</sup> Buchanan and Darian-Smith (n 53) 117-120.

<sup>291</sup> Markell (n 121) 173-174; Kirsten Anker, ‘Law, Culture, Fact: Indigenous Rights and the Problem of Recognition’ (Centaur Jurisprudence Conference: The Legalization of Culture and the Enculturation of Law, Montréal, 21 February 2014) 2.

<sup>292</sup> The term ‘regime of authenticity’ is from Phillips (n 50) 14.

<sup>293</sup> Markell (n 121) 168. Markell is actually referring to Kymlicka and how his concept of culture as nation limits the number of potential beneficiaries of differentiated-rights.

<sup>294</sup> In a similar sense see Irene Watson, ‘Sovereign Spaces, Caring for Country, and the Homeless Position of Aboriginal People’ (2009) 108 South Atlantic Quarterly 27, 43-44.

<sup>295</sup> Egerer (n 250) 26.

A second implication of using an essentialist view of culture is that when cultures' distinctiveness is exaggerated, cultures become reified and, instead of being considered as internally contested, they are treated as internally homogeneous, which leads to the legitimization of internal hierarchies and forms of repression.<sup>296</sup> For example, in rural Aymara communities in Bolivia homosexuality is not socially accepted because the family (initiated by a heterosexual couple) and not the individual is the basis of society. In addition, only married heterosexual individuals acquire full rights in the community.<sup>297</sup> A perspective of culture as a discrete unit freezes this norm in time, disregarding internal dissidence or external critique. More generally, the timelessness of 'pre-modern cultures' is another way in which the superiority of Western culture is asserted.<sup>298</sup>

Furthermore, the emphasis on distinctiveness tends to make cultures the subject of rights instead of the members of indigenous or minority groups themselves.<sup>299</sup> In this regard, Peroni Manzoni found that there was a tendency in the judicial resolutions of the European Court of Human Rights (ECHR) to represent certain applicants (particularly Romani, Muslim women and Sikhs) in a collectivised fashion. This means that applicants' traits are objectified (e.g. 'Gypsy way of life') and, as a result, the applicant loses agency.<sup>300</sup> Instead, the judges utilize the passive voice to refer to the cultural group of the applicant (e.g. 'the turban is considered at the heart of their religion').<sup>301</sup> The references to the cultural group can be negative stereotypes or can present the trait

<sup>296</sup> Benhabib (n 50) 4 citing Turner. Terence Turner, 'Anthropology and Multiculturalism: What Is Anthropology that Multiculturalism Should be Mindful of It?' (1993) 8 *Cultural Anthropology* 411, 412.

<sup>297</sup> Marcelo Fernández Osco, *La ley del ayllu: práctica de jach'a y jisk'a justicia (justicia mayor y justicia menor) en comunidades aymaras* (Second Edition edn, Fundación PIEB 2004); John Kenny Ledezma Main, 'Percepción del aymara boliviano sobre la homosexualidad' (XIX Reunión Anual de Etnología, La Paz, 24-27 August 2005). The study by Ledezma Main only referred to male homosexuals and not to lesbians.

<sup>298</sup> I thank Prof Hilary Sommerlad for this argument. Leicester, June 2015.

<sup>299</sup> I thank Dr Stefano Berteà for this observation. Mexico City Declaration on Cultural Policies (adopted 6 August 1982) Article 9 (recognition of equality and dignity of all cultures), Declaration on the Principles of International Cultural Cooperation (adopted 4 November 1966) UNESCO, Article I.1 (each culture has a dignity and value that must be preserved and respected) and Art.I.2 (every people has the right and duty to develop their culture), Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005) UNESCO, Article 1 (b) (an objective of the convention is to create the conditions for cultures to flourish and to freely interact) and Article 3 (all cultures have equal dignity, including those of minorities and indigenous peoples).

<sup>300</sup> In this sense, Galeotti expresses that 'given the social construction of differences as ascriptive marks of the different group, the individual member is so to speak, forced from the outside into his or her collective identity, with very little room for personal individuation.' Anna Elisabetta Galeotti, 'Neutrality and Recognition' (2007) 1 *Critical Review of International Social and Political Philosophy* 37, 41.

<sup>301</sup> Maria de Lourdes Peroni Manzoni, 'Religion and Culture in the Discourse of the European Court of Human Rights: the Risks of Stereotyping and Naturalising' (2014) 10 *International Journal of Law in Context* 195, 200-201.

in question as ‘paradigmatic’ or distinctive of the whole group.<sup>302</sup> As explained in Chapter 1, in the case of indigenous peoples, the prevalent image is that of Rousseau’s ‘noble savage’, which has been a common representation since colonial times. Consequently, the ‘authenticity test’ for an indigenous person or community means having to prove that their political and legal institutions and modes of production are pre-colonial (or at least have pre-colonial origins) and are friendly with nature.<sup>303</sup>

The problems of homogenization and reification that accompany indigenous rights not only derive from the use of a Herderian concept of culture, but from the Herderian idea of authenticity<sup>304</sup>—which is central to Taylor’s multiculturalist theory. At the same time, his theory of recognition is relevant for the understanding of IHRL’s treatment of indigenous peoples to the extent that the ideas of recognition, authenticity and also ‘misrecognition’ are present in the judicial practice of indigenous rights—although, as is the case with ‘culture’, the use of the word ‘recognition’ in the context of indigenous rights is unproblematic.<sup>305</sup> Taylor takes from Hegel that identity is constructed dialogically through a process of mutual recognition<sup>306</sup>—this as opposed to the ‘monologic’ or self-determined individual of liberal thought.<sup>307</sup> Recognition is constitutive of subjectivity, and one becomes a subject by recognizing and being recognised by another.<sup>308</sup> In Taylor, recognition is based on a public acknowledgement and respect of the ‘authentic identity’ of a person, who she really is, instead of reducing the other person to a different mode of being that accords with the dominant group’s fantasies, desires, qualities and characteristics.<sup>309</sup> In this train of thought, misrecognition as a form of injustice (and a justification for group rights) means ‘the failure, whether

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<sup>302</sup> Ibid, 197.

<sup>303</sup> See for example Dick (n 53) in relation to the use of an ‘authenticity test’ by the Supreme Court of Canada; Buchanan and Darian-Smith (n 53) 117; Watson, ‘Sovereign Spaces, Caring for Country, and the Homeless Position of Aboriginal People’ (n 294) in relation to the aboriginal peoples of Australia.

<sup>304</sup> Markell (n 121) 40; Taylor (n 49) 30, although Taylor considers Herder to be the main articulator and not the originator of the idea of authenticity.

<sup>305</sup> Anker, *Declarations of Interdependence. A Legal Pluralist Approach to Indigenous Rights* (n 53) 27.

<sup>306</sup> Nancy Fraser, ‘Rethinking Recognition’ (2000) 3 *New Left Review* 107, 109; Brenna Bhandar, ‘Recovering the Limits of Recognitions: The Politics of Difference and Decolonisation in John Borrows’ *Recovering Canada: The Resurgence of Indigenous Law* (2007) 27 *Australian Feminist Law Journal* 125, 137.

<sup>307</sup> Anker, *Declarations of Interdependence. A Legal Pluralist Approach to Indigenous Rights* (n 53) 40.

<sup>308</sup> Fraser (n 306) 109.

<sup>309</sup> Markell (n 121) 3.

out of malice or out of ignorance, to extend people the respect or esteem is due to them in virtue of who they are'.<sup>310</sup>

However, as is the case with Kymlicka's liberal multiculturalism,<sup>311</sup> the main issue with Taylor's theory of recognition is the tension between the idea of a self-determined individual and an individual whose identity is created intersubjectively.<sup>312</sup> In other words, the main problem with the theory of recognition is precisely the idea of authenticity. As Anker explains,

There is a tension between the belief in an authentic individual self, and by extension, authentic cultures, and the need for both of these to be actualized through the recognition of others because of the essentially dialogic nature of human existence.<sup>313</sup>

Hence, while group identity is the result of interaction, differentiated rights created to address misrecognition of racialized groups presuppose there is a pre-existing culture and a pre-existing collective and individual identity that must be protected.<sup>314</sup> Therefore, there is a tension between the idea of authenticity (and thus the appeal to universals, to authentic cultures and identities) and the notion of recognition as a creative act.<sup>315</sup> I follow Anker in that indigenous peoples, their culture and their law do not pre-exist the recognition encounter, which is a creative process in which the identity of the recognizers is involved as well.<sup>316</sup> Moreover, dealing with indigenous identities and cultures as pre-existing entities reifies and essentializes them.<sup>317</sup> Thus, in the judicial context, while state courts behave as if they were identifying or verifying the existence of an authentic indigenous community, culture or custom (which, as Markell explains, is not only a cognitive act but an evaluative one<sup>318</sup>), they actually create indigenous identity, law and culture in that moment.<sup>319</sup> As explained previously, for this purpose human rights organs utilize ethnocentric labels to determine what is

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<sup>310</sup> Ibid, 3.

<sup>311</sup> See Chapter 1, Section 1.4.2.

<sup>312</sup> Anker, *Declarations of Interdependence. A Legal Pluralist Approach to Indigenous Rights* (n 53) 38. She is drawing from Markell (n 121) Chapter 2 of his work.

<sup>313</sup> Anker, *Declarations of Interdependence. A Legal Pluralist Approach to Indigenous Rights* (n 53) 37.

<sup>314</sup> Ibid, 34.

<sup>315</sup> Markell (n 121) 17-18; Anker, *Declarations of Interdependence. A Legal Pluralist Approach to Indigenous Rights* (n 53) 29.

<sup>316</sup> Anker, *Declarations of Interdependence. A Legal Pluralist Approach to Indigenous Rights* (n 53) 29.

<sup>317</sup> Ibid, 28.

<sup>318</sup> Ibid, 29 referring to Markell (n 121) 39-40.

<sup>319</sup> In a similar sense, Anker, *Declarations of Interdependence. A Legal Pluralist Approach to Indigenous Rights* (n 53) 29.

authentic.<sup>320</sup> Hence, the regime of authenticity carries the issues of both reifying indigeneity and of perpetuating colonial representations of it.

### 2.2.3. The Depoliticization of Culture

An important argument made by Markell and Dick is that the decision to utilise an essentialist concept of culture and identity—one upon which debates about justice are phrased in terms of encounters of distinct cultures—is political.<sup>321</sup> The use of a Herderian view of culture in IHRL may be seen as a pragmatic or even an inevitable choice (in the context of a cultural difference approach to minority rights), as it makes it possible to ascribe rights to a clearly identifiable beneficiary. However, it also has the political consequence of obscuring the reason why certain groups stand in a subordinated position in relation to the dominant conception of culture.<sup>322</sup> Therefore, the naturalization of culture entails the mystification of specific power relations, racial hierarchies and the economic system, thus permitting their reproduction.<sup>323</sup> In this sense, multiculturalism contributes to masking institutionalized racism and the role of structures of inequality and the hegemonic group in producing the ‘different practices and beliefs’ the dominant group seeks to protect.<sup>324</sup>

Balibar considers that the cultural difference approach brings with it a new form of racism whose dominant theme is not ‘biological heredity’ but cultural difference.<sup>325</sup> This ‘differentialist racism’<sup>326</sup> does not create hierarchies between individuals or groups in the way classic racism does. Instead, it takes the guise of standards that will contribute to decisions about which lifestyles and traditions are compatible and which are not.<sup>327</sup> Consequently, the cultural difference approach can develop into ‘neo-

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<sup>320</sup> Ibid, 28.

<sup>321</sup> Markell (n 121) 171; Dick (n 53) 960-961; in a similar sense, Anker, *Declarations of Interdependence. A Legal Pluralist Approach to Indigenous Rights* (n 53) 28 when she says that the problem with recognition is overlooking that systematic misrecognition is driven by a desire to maintain control over the nation and its resources.

<sup>322</sup> In a similar sense see Dick (n 53) 961 quoting Rita Dhamoon, ‘The Politics of Cultural Contestation’ in Barbara Arneil and others (eds), *Sexual Justice/Cultural Justice: Critical Perspectives in Political Theory and Practice* (Routledge 2007), 43.

<sup>323</sup> Balibar (n 55), 22, 24; Hage (n 52) 86; Gilroy (n 149) 670-671; Melamed, ‘From Racial Liberalism to Neoliberal Multiculturalism’ (n 31) 6-7.

<sup>324</sup> Brown, *Regulating Aversion: Tolerance in the Age of identity and Empire* (n 52) 46.

<sup>325</sup> Balibar (n 55) 21.

<sup>326</sup> Ibid, 21. Balibar takes the term from Pierre-André Taguieff, ‘Les présuppositions définitionnelles d'un indéfinissable: "le racisme"' (1984) 8 Mots 71.

<sup>327</sup> Balibar (n 55) 22.

racism<sup>328</sup> as an exclusionary practice that, under the pretence of dealing with ‘cultural distances’, justifies material barriers in order to keep racialized immigrants outside of the white nation.<sup>329</sup> Cultural difference can also be a practice of inclusion of racialized others in the white nation<sup>330</sup> —which, as I will elaborate on in the following section, is precisely the role it performs in IHRL.

The political use of culture is possible firstly because culture is presented as a-historical and a-political. Therefore, cultural, legal and religious practices (or their banning by state organs) will be separated from their political implications and their historical trajectory.<sup>331</sup> For example, the wearing of the headscarf by a Muslim woman or the *pollera* (skirt) by an Aymara woman will be read as ‘merely cultural’<sup>332</sup> acts, without looking into the intentionality of the wearer (was she wearing it as an expression of a deep religious belief, as a political statement, as a symbol of status inside a particular group, as a result of coercion, as a fashion, etc.). Furthermore, in IHRL the responsibility for oppression is located in the domain of culture (understood as beliefs and values) of the racialized group, to the exclusion of internal and external political and economic factors.<sup>333</sup> This makes it possible to ignore the role of dominant groups in producing situations of oppression within the subaltern groups.<sup>334</sup> The penetration of the market economy, the invasion of indigenous territories, and the persistence of colonial forms of domination are not linked by liberal multiculturalist theories such as Kymlicka’s to the internal situation of indigenous communities. As argued in Chapter 1, this means that under a multiculturalist approach, IHRL organs are unable to articulate human rights violations to indigenous communities or even within indigenous communities as related to structural racism and the inequalities derived from it.

Both in liberal multiculturalist theory and in an IHRL system, not only are the dominant groups placed outside of the circumstance of minority groups, but also they are located

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<sup>328</sup> Balibar is actually referring to the case of France, which as explained in Chapter 1, utilises a secularist approach to difference that presupposes state neutrality.

<sup>329</sup> Balibar (n 55) 22-23.

<sup>330</sup> Hage (n 52) 90 referring to multiculturalist toleration.

<sup>331</sup> Markell (n 121) 171.

<sup>332</sup> The expression is from Judith Butler, ‘Merely Cultural’ (1998) 227 *New Left Review* 33, 36 where ‘merely cultural’ means something secondary and derivative that is disconnected from the political. I use it to refer to culture and cultural practices and expressions as divested of their political and economic dimensions.

<sup>333</sup> Merry, ‘Human Rights and the Demonization of Culture (And Anthropology Along the Way)’ (n 124) 63.

<sup>334</sup> In a similar sense see Markell (n 121) 171.

in a privileged position in relation to them. On the one hand, the racialized groups are denominated ‘minorities’ and perceived as possessing limited agency (because of being culture bounded and because of their victimized position as helpless groups<sup>335</sup>). On the other hand, the authority of domestic courts to formulate norms that regulate minorities or discursively construct the other and her practices is never questioned.<sup>336</sup> In this regard, the liberal multiculturalist approach of Kymlicka conceives the state as an impartial arbiter<sup>337</sup> instead of a stakeholder with conflicting interests in the matter of recognizing indigenous peoples and their claims for political autonomy, land and territory.<sup>338</sup> The portrayal of the state as an impartial arbiter is particularly problematic in the case of indigenous peoples, with whom the colonial state has had since its inception a relation of violence.<sup>339</sup> The very sovereignty of the state in Latin America has been based on the dehumanization and dispossession of indigenous peoples.<sup>340</sup>

In addition, as argued in Chapter 1, the essentialist view of culture deflects attention from demands for territorial and political self-determination, claims against the invasion of lands, and instead translates them into demands for cultural recognition and cultural survival. This makes indigenous movements or applicants lose agency and gives the power to the state to decide how to process the claims. For example, Watson presents the case of native title in Australia and how its legal recognition absorbed indigenous law and cultures into Australian property law. It also created a situation for indigenous property that is precarious and that entitles the state to intervene.<sup>341</sup> When Aboriginal interests conflict with development proposals, Watson says that Aboriginal interests are rarely protected.<sup>342</sup>

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<sup>335</sup> Tennant (n 123) 11, 17. This is not to challenge the fact that some indigenous groups might actually be vulnerable to attacks by dominant groups and the state. What I wish to emphasize is that official history and IHRL tend to portray indigenous peoples as passive, disregarding their resistance and struggles and their involvement in negotiating their identities and pushing the boundaries of state toleration.

<sup>336</sup> Dick (n 53) 962.

<sup>337</sup> Hale, ‘Does Multiculturalism Menace? Governance, Cultural Rights and the Politics of Identity in Guatemala’ (n 35) 493.

<sup>338</sup> In this regard, Anker affirms that far from being a ‘site of reconciliation’, through rights and entitlements the state contributes to the creation of forms of political identification and allegiance that further its own project of sovereignty. Anker, *Declarations of Interdependence. A Legal Pluralist Approach to Indigenous Rights* (n 53) 40.

<sup>339</sup> Watson, ‘Sovereign Spaces, Caring for Country, and the Homeless Position of Aboriginal People’ (n 294) 28; Spinner-Halev (n 50) 557.

<sup>340</sup> Stewart Motha, ‘The Failure of ‘Postcolonial’ Sovereignty in Australia’ (2005) 22 *The Australian Feminist Law Journal* 107.

<sup>341</sup> Watson, ‘Sovereign Spaces, Caring for Country, and the Homeless Position of Aboriginal People’ (n 294) 39.

<sup>342</sup> *Ibid*, 42.

Questioning the state is particularly complex because the international protection of human rights is a state-centred system that depends upon the action of states to create human rights norms and guarantee their protection.<sup>343</sup> As explained in Chapter 1, the conflict of interests that arises from this has translated into indigenous groups having been granted a void title of peoplehood and their claims to land, territory and legal pluralism being justiciable only if such claims are translated into the language of cultural rights. Markell elaborates on this aspect and considers that in the case of post-colonial societies, the recognition approach serves to both reassure the position of sovereign agent of the dominant liberal majority and to sustain the ideological fantasy of a ‘complete redemption from liberal societies own unjust histories’.<sup>344</sup> Thus, it is a way to shut the door to their colonial past even if colonialist forms of domination are still in place. In other cases, instead of claiming to recognise indigenous peoples, states negate their existence because they do not agree with the use of the term ‘indigenous’ and the rights attached to it.<sup>345</sup> In this regard, as mentioned previously, a key issue with the regime of authenticity is that even if a given group complies with the definition of indigeneity set out by a human rights convention or by a domestic or international institution, whether or not this group is considered indigenous remains a political decision—one in which the state will play a prominent role.

In this regard, Sarfaty—who conducted extensive ethnographical work on the culture of the World Bank and its implementation of the Bank’s human rights policies and indigenous policies—asserts that whether or not a group is considered indigenous by the World Bank is strongly influenced by domestic political and legal constraints.<sup>346</sup> As occurs with the ILO Convention 169,<sup>347</sup> the World Bank relies on a set of criteria to identify beneficiaries of their policies aimed at indigenous peoples.<sup>348</sup> Thus, in addition to considering the status given to a group by domestic legislation, the Bank’s staff with

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<sup>343</sup> Helen Quane, ‘Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?’ (2013) *Oxford Journal of Legal Studies* 1, 8.

<sup>344</sup> Markell (n 121) 169-170.

<sup>345</sup> This, of course, is not the case of Latin American states that have ratified the ILO Convention 169. It refers more to states in Asia, Africa and the Middle East. Sarfaty offers the examples of Morocco and India. Galit A. Sarfaty, ‘The World Bank and the Internalization of Indigenous Rights Norms’ (2005) 114 *The Yale Law Journal* 1791, 1805, 1807-1808.

<sup>346</sup> *Ibid.*, 1803-1804.

<sup>347</sup> Article 1 of the ILO Convention 169.

<sup>348</sup> Sarfaty, 1803. It should be highlighted that, as it occurs in IHRL, the World Bank is reluctant to define indigeneity alleging that no single definition can encompass the multiplicity of contexts of indigenous peoples. In addition, even if there is a set of criteria, there is no clear method of assessment of these criteria or a formula to define the importance of each criterion. *Ibid.*



‘regional expertise’<sup>349</sup> decides on the indigeneity of a group based on the following criteria: ‘close attachment to ancestral lands’, self-identification and identification by others as members of a distinct cultural group, the presence of an indigenous language different from the ‘national language’, the presence of ‘customary social and political institutions’, and subsistence-oriented production.<sup>350</sup>

However, as illustrated by Sarfaty’s analysis of the case of the Berbers in Morocco, the debate over indigeneity is not a technical one but a political one within the World Bank, and there can be disagreement over the indigeneity of a group based on factors outside of this set of criteria.<sup>351</sup> These factors include the state’s position on ethnic minorities. If the state’s position is favourable to the recognition of indigenous peoples and to indigenous rights, there is a higher probability that the World Bank will recognise a given group as indigenous and implement its indigenous-related policies. But if indigenous rights and human rights are ‘sensitive issues’ for a given state, then the chances of an indigenous group or community being recognised as such are reduced. Therefore, by 2003, the World Bank had never implemented its indigenous policies in countries in Central Asia, Africa, the Middle East, and in Russia.<sup>352</sup> The second factor is the level of ‘civil society activism’ within a country. Since the staff that works with (and defends) indigenous policies and related policies of environment and resettlement within the Bank are a minority, pressure by indigenous organisations and NGOs can provide the necessary leverage for this staff to implement the World Bank’s indigenous-related policies in a given case.<sup>353</sup> In this regard, as will be argued in Section 2.3, local indigenous organisations and the transnational indigenous movement can play an important role in pushing the margin of toleration for the presence of indigenous peoples in the nation and advance domestically and internationally the agenda of indigenous organisations. At the same time, as will be further explained in Chapter 3, notwithstanding the fact that an institution does not have a single voice, the formulation and implementation of indigenous-related policies and human rights approaches by some transnational actors such as the World Bank is predominantly shaped by a neoliberal governance agenda.

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<sup>349</sup> Ibid, 1804.

<sup>350</sup> Ibid, 1803-1804.

<sup>351</sup> Ibid, 1805-1806.

<sup>352</sup> Ibid, 1804-1806.

<sup>353</sup> Ibid, 1806-1807.

## 2.3. The Regime of Toleration

### 2.3.1. Recognition as Toleration

In human rights norms, 'recognition' of minority rights may have two meanings. First, the recognition of indigenous peoples as independent nations, which derives in the restitution of their self-determination as a measure of restorative or corrective justice.<sup>354</sup> It is to recognise the fact of colonization and that indigenous peoples were on the land before the formation of the state.<sup>355</sup> As explained previously, self-determination becomes then the principle or justification for assigning collective rights to indigenous peoples, such as the rights to land, territory and political autonomy. The second meaning relates to cultural difference and the idea that misrecognition can be addressed by the 'recognition' of differentiated rights, and the emphasis on mutual knowledge, dialogue and respecting people (and their cultures) 'in virtue of, and not despite, who they are'.<sup>356</sup> I argue here that recognition is not prevalent in IHRL, despite the (largely unreflective) presence of the term in IHRL norms,<sup>357</sup> and despite indigenous demands for recognition of their humanity and their territories. As advanced in Chapter 1, what prevails is a regime of toleration according to which the indigenous subject and indigenous law and culture are tolerated (and even protected) by the state and IHRL organs under the condition of autonomy endorsement and respect for individual rights.

For Fanon, the Hegelian idea of recognition is not possible (or even desirable) under colonial forms of domination, which, as examined in Chapter 3, have persisted in Latin American constitutionalism during the post-independence period. For Fanon, the possibility of recognition is annulled by the very act of recognition by the white of the black other (and we can extend Fanon's analysis to other racialized groups, including indigenous peoples). In his interpretation of Hegel, Fanon argues that it should be the

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<sup>354</sup> In this sense, Xanthaki (n 159) 131-134, 146-152.

<sup>355</sup> This may be related to the idea expressed by Anker that perhaps the most important (and the only feasible) form of recognition in a colonial situation, is holding a mirror to the colonial self. Anker, *Declarations of Interdependence. A Legal Pluralist Approach to Indigenous Rights* (n 53) 61.

<sup>356</sup> Markell (n 121) 40.

<sup>357</sup> ILO Convention 169, Article 5 (social, cultural, religious and spiritual values of indigenous peoples shall be recognised and protected), Article 9 (recognition of indigenous punitive systems, to the extent they are compatible with the state punitive system and human rights), Article 14 (recognition of ownership and possession over the lands "traditionally occupied" by indigenous peoples), Article 23 (recognition of cultural and economic value of handicrafts, local industry and 'traditional activities' such as hunting and gathering); UNDRIP, Article 27 (recognition of indigenous peoples' laws, traditions, and land tenure system and recognition of ownership of land and natural resources that they have traditionally used or occupied).

black person who has to recognise her own humanity as an independent self-consciousness.<sup>358</sup> In the colonial context, the act of recognition by the white of the black ‘machine-animal-man’ as human only reinforces old racial hierarchies, the division between masters and servants. Black people are led to believe that they are masters<sup>359</sup> when actually they have been ‘acted upon’,<sup>360</sup> losing the opportunity to become the subjects of their own liberation. Consequently, the official ‘recognition’ that takes place leaves intact colonial forms of domination and inter-racial hierarchies, foreclosing the possibility for the black/indigenous person to reaffirm her distinctiveness. Instead, she must adhere to the models of ‘white liberty and ‘white justice’ produced by the dominant white culture.<sup>361</sup>

Recognition in the colonial context is actually toleration, which allows the person who tolerates the advantageous position of simultaneous proximity (to exploit) and distance to the racialized body.<sup>362</sup> This would be the distance of ‘indifference and paternalistic curiosity’ for Fanon,<sup>363</sup> and the distance residing in the power to be tolerant or intolerant for Hage.<sup>364</sup> Galeotti similarly affirms that in liberal perfectionism (from which liberal multiculturalism derives) ‘recognition and acceptance’ actually refers to a form of toleration. It gives rise to a regime in which identity itself becomes a matter of toleration.<sup>365</sup> Galeotti explains that recognition as toleration appears (only) when minorities display differences that fit within the boundaries of the ‘liberal good’. Whether or not they are socially liked, these differences are considered the product of autonomous choice and are accepted.<sup>366</sup> When they do not, toleration takes a negative form, and differences are only tolerated because it is counterproductive or useless to repress them.<sup>367</sup> In addition, they are tolerated because they are deemed not to cause harm to anyone, ‘apart from keeping their bearers in a position of cultural dependency’<sup>368</sup>—this under the liberal assumption that minorities are culturally bound

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<sup>358</sup> Fanon, *Black Skin White Masks* (n 55) 170.

<sup>359</sup> Ibid

<sup>360</sup> Ibid

<sup>361</sup> Ibid.

<sup>362</sup> Hage (n 52) 87.

<sup>363</sup> Fanon, *Black Skin White Masks* (n 55) 172.

<sup>364</sup> Hage (n 52) 87.

<sup>365</sup> Galeotti, ‘Identity, Difference, Toleration’ (n 52) 565; Brown, *Regulating Aversion: Tolerance in the Age of identity and Empire* (n 52) 77.

<sup>366</sup> Galeotti, ‘Identity, Difference, Toleration’ (n 52) 567-568.

<sup>367</sup> Ibid, 568.

<sup>368</sup> Ibid, 568. It should be stressed that the quoted text does not reflect the thought of Galeotti. She is merely reconstructing the liberal perfectionist position.

and that they have yet to develop ‘rational faculties and capacities for autonomy’.<sup>369</sup> This is the case with the use of the veil by Muslim women, for example. Finally, there are differences that are intolerable, because they undermine liberal order and/or individual rights.<sup>370</sup> In sum, this liberal perfectionist use of the idea of recognition and acceptance is far from the Hegelian sense. It relates to a regime of toleration that applies to cultures, and therefore it determines the acceptance or intolerance of racialized groups.

As advanced in Chapter 1, the regime of toleration is certainly the case for Kymlicka’s liberal theory of minority rights, according to which the purpose of creating ‘external protections’ for minority cultures is to permit the flourishing of their members, under the premise that culture is necessary for the exercise of choice.<sup>371</sup> At the same time, in order to be consonant with liberalism, individual autonomy (and, therefore, individual rights) should always be placed above group-differentiated rights.<sup>372</sup> This is because Kymlicka considers that a defining feature of liberalism is that it ascribes fundamental freedoms to each individual, including freedom of choice concerning the good life (and therefore the community cannot impose itself over the individual, and the individual always retains a right to exit).<sup>373</sup> In this regard, personal autonomy should be placed above the liberal principle of toleration, or, rather, toleration does not make sense without taking into account personal autonomy.<sup>374</sup> Consequently, toleration of non-liberal groups that endorse the co-option of individual freedoms is out of the question in liberal multiculturalism.

In truth, Kymlicka views the case of indigenous peoples separately as he considers liberals in general to be in agreement that they are in a different position to that of other minority groups.<sup>375</sup> He does not believe that liberalism should be imposed on national minorities because they form distinct political communities.<sup>376</sup> Furthermore, a state that recognizes indigenous peoples as nations would have to accept the idea of a differentiated, dual citizenship, reducing, in such cases, central government’s power to

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<sup>369</sup> Ibid, 568.

<sup>370</sup> Ibid, 568.

<sup>371</sup> Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 47) 41-42, 164.

<sup>372</sup> Ibid, 75.

<sup>373</sup> Ibid, 81. When he refers to liberalism here, he is mainly referring to Dworkin and Rawls.

<sup>374</sup> Ibid, 154, 155.

<sup>375</sup> Ibid, 63.

<sup>376</sup> Ibid, 167.

one that is derivative.<sup>377</sup> Here, once more, this recognition is actually a case of toleration because the acceptance of indigenous peoples in the liberal (white) polity as separate nations is a matter of necessity or unavoidability and not of choice. Kymlicka expresses in this sense that indigenous peoples' presence as separate political communities in the liberal polity is impossible to deny. For this reason, although destabilizing for the 'larger political community', their demands including that of self-determination become 'reasonable and unavoidable' for the liberal government.<sup>378</sup>

The regime of toleration is also present in IHRL. This point will be further examined in relation to legal pluralism in the following section. It will also be explained in Chapter 3 in relation to Multicultural Constitutionalism, which functions on the basis of a regime of toleration that creates permitted and unpermitted indigenous subjects. For now, I will provide two examples. The first is the UN Committee on Economic, Social and Cultural Rights General Comment on the right of everyone to take part in cultural life:

The Committee wishes to recall that, while account must be taken of national and regional particularities and various historical, cultural and religious backgrounds, it is the duty of States, regardless of their political, economic or cultural systems, to promote and protect all human rights and fundamental freedoms. Thus, no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.<sup>379</sup>

The aforementioned Committee recommends that any cultural practice, tradition, custom, institution or law that prevents women from participating fully in (the dominant) cultural life must be eliminated.<sup>380</sup> Consequently, under the IHRL regime, human rights norms are seen both as an indispensable requisite for the protection of the culture and cultural diversity<sup>381</sup> as well as the limit to the enjoyment of culture. Another example is the Joint Separate Opinion of Judges Cançado Trindade, Pacheco Gómez and Abreu Burelli in the Inter-American Court of Human Rights case *Awás Tingni v. Nicaragua*. In their Joint Opinion, the judges considered that the protection of cultural

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<sup>377</sup> Ibid, 183.

<sup>378</sup> Ibid, 181-185.

<sup>379</sup> CESCR 'General Comment No. 21 on the Right to Everyone to Take Part of Cultural Life' para 18.

<sup>380</sup> Ibid, para 25.

<sup>381</sup> Universal Declaration on Cultural Diversity (adopted 2 November 2001 Res 25, Annex 1) UNESCO Doc. 31C, Article 4 (the defence of cultural diversity implies a commitment to human rights), and Article 5 (cultural rights are an integral part of human rights;) Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005) UNESCO, Article 2 (1) (cultural diversity can be protected and promoted only if human rights and fundamental freedoms, as well as the ability of individuals to choose cultural expressions, are guaranteed).

diversity is essential for the protection of human rights norms. However, the judges affirmed they did not endorse ‘cultural relativism’; consequently, ‘cultural manifestations cannot attempt against [sic] the universally recognized standards of observance and respect for the fundamental rights of the person.’<sup>382</sup>

The limits to toleration are materialized in IHRL instruments in what Engle denominates the ‘invisible asterisk’ or the setting of ‘minimum standards’ (which are usually individual rights but can also be state sovereignty and territorial integrity) that are applied as the qualification to the toleration of indigenous cultural practices or legal norms.<sup>383</sup> Bhandar makes a similar point in relation to judicial practice in cases that involve indigenous peoples in Canada, where ‘recognition’ amounts to the rights claims that fit within already existing political, economic and legal relations founded upon colonial sovereignty.<sup>384</sup>

### 2.3.2. Multiculturalist Toleration as Governmentality

Some authors refer to multiculturalism and its regime of toleration as a form of (neoliberal) governmentality,<sup>385</sup> because, as Brown affirms, it ‘peregrinates between civil society, the state and citizens, because it produces and organizes subjects, and because it is used by subjects to govern themselves.’<sup>386</sup> Brown refers here to Foucault’s notion of government as a rational activity undertaken by a multiplicity of authorities and agencies (thus alluding to Foucault’s notion of power as dispersed). These authorities and agencies seek to shape conduct by ‘working through the desires, aspirations, interests and beliefs of various actors’.<sup>387</sup> Governmentality involves not only practices of government but also practices of the self,<sup>388</sup> and external powers contribute to determine the latter by shaping the field of possible action of the

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<sup>382</sup> Inter-American Court, *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Merits) Series C No 79 (31 August 2001) Joint Separate Opinion of Judges Cançado Trindade, Pacheco Gómez and Abreu Burelli, para 14.

<sup>383</sup> Engle, *The Elusive Promise of Indigenous Development* (n 3) 133-134. She takes the expression from Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Duke University Press 2002) 12, 176.

<sup>384</sup> Bhandar (n 306) 129.

<sup>385</sup> Hale, ‘Does Multiculturalism Menace? Governance, Cultural Rights and the Politics of Identity in Guatemala’ (n 35); Brown, *Regulating Aversion: Tolerance in the Age of identity and Empire* Shaylih Muehlmann, ‘How do Real Indians Fish? Neoliberal Multiculturalism and Contested Indigeneities in the Colorado Delta’ (2009) 111 *American Anthropologist* 468; Hage (n 52).

<sup>386</sup> Brown, *Regulating Aversion: Tolerance in the Age of identity and Empire* (n 52) 77.

<sup>387</sup> Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (2nd (Kindle) edn, SAGE 2010) 17.

<sup>388</sup> *Ibid.*, 20.

subject.<sup>389</sup> In contrast with recognition, toleration does not require understanding and knowing the other.<sup>390</sup> To tolerate is to position the other within specific limits or boundaries,<sup>391</sup> and acceptance of the other can only occur within those boundaries.<sup>392</sup> When stepping out of them, the minority group becomes a legitimate object of intolerance and exclusion whose will must be suppressed.<sup>393</sup> Therefore, this regime entails the formation of permitted and unpermitted subjects, of ‘rebel Indians’ and ‘permitted Indians’,<sup>394</sup> of ‘good Muslims’ and ‘bad Muslims’.<sup>395</sup> Multiculturalism thus creates an ‘economy of otherness’, or a system of ‘producing and regulating the value of otherness’.<sup>396</sup>

For Brown, toleration as an idea of justice is born of necessity rather than virtue because it emerges from what is outside of the dominant culture’s reach, what is irrelevant to it, or what it cannot do anything about (as in Kymlicka’s view of indigenous self-determination).<sup>397</sup> In this sense, it is important to highlight that the move towards multicultural toleration is not only the result of policy choice by the dominant elites, but also the product of increased power, resistance and struggle of the minority groups.<sup>398</sup> What the regime of multiculturalist toleration achieves is an annulment of this resistance by incorporating the other while retaining her status as an outsider, or even as undesirable or marginal, and while keeping undisturbed the hegemony of the norms that marginalize them.<sup>399</sup> Consequently, as a nationalist practice of inclusion, multiculturalist toleration can administrate immigrants and indigenous populations in

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<sup>389</sup> Thomas Lemke, ‘Foucault, Governmentality and Critique’ (Rethinking Marxism Conference, University of Amherst, Massachusetts, 21-24 September 2000), 3-4.

<sup>390</sup> Markell (n 121) 40.

<sup>391</sup> Hage (n 52) 89.

<sup>392</sup> Ibid, 89.

<sup>393</sup> Ibid, 91.

<sup>394</sup> Hale, ‘Rethinking Indigenous Politics in the Era of the “Indio Permitido”’ (n 246); Xavier Albó, ‘Hacia el poder indígena en Ecuador, Perú y Bolivia’ in Ana Cecilia Betancur (ed), *Movimientos indígenas en América Latina Resistencia y nuevos modelos de integración* (IWGIA 2011).

<sup>395</sup> Melamed, *Represent and Destroy. Rationalizing Violence in the New Racial Capitalism* (n 77) 162-170.

<sup>396</sup> Hage (n 52) 128.

<sup>397</sup> Brown, *Regulating Aversion: Tolerance in the Age of identity and Empire* (n 52) 27. It should be noticed the distinction Hage makes between tolerance and endurance. Individuals in a position of power, who have a choice, exercise tolerance. In contrast, those in a position of powerlessness, those who do not have control, exercise endurance. Hage (n 52) 85-89.

<sup>398</sup> Hage (n 52) 100-101; in a similar sense, Brown, *Regulating Aversion: Tolerance in the Age of identity and Empire* (n 52) 83-85, 90. Hage is referring to multiculturalism in Australia in relation to the increased power and resistance of racialized migrants. However, as it is discussed in Chapters 2 and 3, the struggle and resistance of national and transnational indigenous movements, particularly since the 1980s, also triggered the shift towards multiculturalist policies in Latin America.

<sup>399</sup> Brown, *Regulating Aversion: Tolerance in the Age of identity and Empire* (n 52) 27, 35; Hage (n 52) 94-101.

such a way that their will remains excluded but their 'exploitable savage body and culture' are included.<sup>400</sup> The way to do this is by opening spaces for cultural inclusion as a substitute for political inclusion.<sup>401</sup>

Toleration is therefore a spatial practice of power of both multiculturalist toleration and racist intolerance that is based on the principle of desirability and undesirability.<sup>402</sup> In this context, the racialized other becomes a passive subject: those who are valued, who are tolerated and, on the negative side, those who are helpless, who are vulnerable, who can be defenceless victims of intolerance.<sup>403</sup> The white dominant subject who tolerates is the one who exercises choice and who places the other as an object within 'limits they feel legitimately capable of setting'.<sup>404</sup> Hence, the multiculturalism regime does not challenge the position of the dominant group to exercise power, to be tolerant or intolerant, to elevate or suppress what is tolerated or not tolerated.<sup>405</sup> This is an important claim because, against the image portrayed by Kymlicka of minority rights being a mechanism to elevate minority groups to a position of equality in a liberal polity,<sup>406</sup> under a liberal multiculturalist framework, what these rights do is to reinforce the position of specific racialized groups as minorities. It does not allow racialized groups' full inclusion as citizens because their cultural and legal expressions and even their very existence within the polity is merely tolerated by the dominant group.

The regime of toleration therefore permits the dominant elites to safeguard the white nationalist fantasy in post-colonial societies that situates indigenous peoples outside the nation.<sup>407</sup> Hence, it also perpetuates racial hierarchies that have been essential to the

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<sup>400</sup> Hage (n 52) 136-137.

<sup>401</sup> Ibid, 138.

<sup>402</sup> Ibid, 90-93.

<sup>403</sup> In a similar sense, ibid, 95.

<sup>404</sup> Ibid, 89.

<sup>405</sup> Ibid, 85-86 based on Jean-François Lyotard, *Heidegger and 'the Jews'* (University of Minnesota Press 1991).

<sup>406</sup> Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 47) 37-52. Kymlicka claims that the justification for group-differentiated rights is based on the idea that fairness between members of different groups requires a group-differentiated citizenship. In this regard, Kymlicka highlights that minority groups are not in a symmetrical position in relation to the dominant culture and therefore require special rights in order to acquire equal standing (thus securing equality between groups). Second, an equal standing is necessary in order to protect minority cultures (and indigenous peoples), and consequently guarantee the context of choice of individuals that are members of minority groups (and in this way securing individual freedom of members of minority groups).

<sup>407</sup> This is related to the idea of 'racial naturalization' of Carbado according to which the position and identity of an individual in society depends on her 'race'. Devon W. Carbado, 'Racial Naturalization' (2005) 57 *American Quarterly* 633, 633, 640-644; 646-651.



functioning of capitalist societies.<sup>408</sup> Another effect of multiculturalist toleration is the containment of radical demands for inclusion and political participation of racialized groups<sup>409</sup> by softening and deflecting inter-racial tensions.<sup>410</sup> These tensions are framed as problems of intolerance (or, in human rights discourse, as cultural rights issues) although they could have been framed as something else—as socio-economic issues, for example. Furthermore, the remedy proposed is tolerance, or, in the context of IHRL and constitutional law, permitting a specific minority group to exercise—to a certain degree—collective rights in conditions controlled by state organs. This remedy is positive in the sense that it is better than racist intolerance by the state or local elites, translated into displacement or annihilation of indigenous peoples in order to access land and natural resources in indigenous territories. But situating the matter as one of tolerance (or human rights) also avoids discussions of political participation, political autonomy and racial discrimination.<sup>411</sup> Melamed therefore argues that neoliberal multiculturalism polices the ‘epistemological boundaries of what counts as race matters by creating a discursive terrain that facilitates certain ways of posing and resolving questions’.<sup>412</sup>

Finally, the regime of toleration contributes to a re-legitimization of liberal universalism and a restoration of the notion of a culturally unified nation.<sup>413</sup> In this sense, it should be noted that liberal multiculturalist theories do not question the ‘actually existing liberalism’<sup>414</sup> that historically has been based on ‘white particularism’.<sup>415</sup> Rather, many of these theories presuppose that liberalism is the ideal regime for a polity<sup>416</sup> and move on to consider the way to accommodate those differences that ‘liberal equality cannot reduce, eliminate or address’.<sup>417</sup> However, as discussed previously, despite the image of an arbiter state in the liberal multiculturalism of Kymlicka, the state actually assumes a

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<sup>408</sup> Buchanan and Darian-Smith (n 53) 123.

<sup>409</sup> Hage (n 52) 19. By ‘containment’, Hage does not mean racist practices of exclusion but the aforementioned process of positioning or of regulating inclusion. Ibid, 134.

<sup>410</sup> In a similar sense, Brown, *Regulating Aversion: Tolerance in the Age of identity and Empire* (n 52) 83-84.

<sup>411</sup> In a similar sense, ibid, 85-86.

<sup>412</sup> Melamed, ‘From Racial Liberalism to Neoliberal Multiculturalism’ (n 56) 4.

<sup>413</sup> Brown, *Regulating Aversion: Tolerance in the Age of identity and Empire* (n 52) 95.

<sup>414</sup> Hindess (n 236)

<sup>415</sup> Mills (n 55) 110.

<sup>416</sup> Scott (n 50) 96.

<sup>417</sup> Brown, *Regulating Aversion: Tolerance in the Age of identity and Empire* (n 52) 36.

hostile role towards racialized minorities (physically removing them, segregating them or forcefully assimilating them<sup>418</sup>).<sup>419</sup>

Hence, multiculturalist tolerance does not escape the logic of nation-building, and it operates by eradicating the capacity of otherness to constitute itself into a counter-will<sup>420</sup> precisely by framing the ambit of what is possible, and by gathering the consent of those who are tolerated.<sup>421</sup> When looking at the case of Australia, Hage argues that racism and multiculturalism have in common that they both constitute nation-building projects in which space is structured around white culture, and indigenous peoples and other ‘non-white ethnics’ are made objects to be managed according to a ‘white national will’.<sup>422</sup> Multiculturalism in this regard reinforces the ‘white nation fantasy’ through the regime of toleration, which places the white subject at the centre of the national space.<sup>423</sup> In this sense, the notion of cultural enrichment (and, I would add, Kymlicka’s ‘accommodation’ of indigenous peoples and immigrants<sup>424</sup>) only makes sense when considering the centrality of the white dominant culture<sup>425</sup>: there is a culture that is enriching, and a culture that will be enriched.<sup>426</sup> For Hage, the main difference between racism (intolerance) and multiculturalism (tolerance) is that the practice of national inclusion and exclusion is performed at different thresholds of toleration.<sup>427</sup> In addition, as was explained in the previous section, while racism excludes on the basis of race, practices of toleration utilize a non-racist mode of ‘categorisation of otherness’ (culture and cultural identity).<sup>428</sup>

In sum, liberal multiculturalism may be seen as a step forward in relation to former liberal frameworks that demanded the annulment of difference or its confinement to the

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<sup>418</sup> In this sense, Carlos Frederico Marés de Sousa Filho, ‘Multiculturalism and Collective Rights’ in Boaventura de Sousa Santos (ed), *Another Knowledge is Possible Beyond Northern Epistemologies*, vol 3 (2nd edn, Verso 2008).

<sup>419</sup> Brown, *Regulating Aversion: Tolerance in the Age of identity and Empire* (n 52) 95.

<sup>420</sup> Hage (n 52) 109-111.

<sup>421</sup> Ibid, 100.

<sup>422</sup> Ibid, 18.

<sup>423</sup> Ibid, 118. Here ‘fantasy’ is understood in a Lacanian sense, as something that not only attempts to represent social reality but it shapes it practically ‘in order to efficiently contain the changes that cannot be incorporated within it’. Ibid, 133.

<sup>424</sup> Kymlicka for example explicitly states that his liberal theory is addressed to ‘Western democracies’. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 47) 46-47.

<sup>425</sup> Hage (n 52) 118.

<sup>426</sup> Ibid.

<sup>427</sup> Ibid, 92.

<sup>428</sup> Ibid, 92-93.

private sphere.<sup>429</sup> Indeed, this multiculturalist approach has taken indigenous rights down a route where groups can become legal subjects and difference is celebrated. However, it can also be conceived as a technology of oppression of minority and indigenous groups. This oppression comes in the form of rights and toleration that are granted only if difference is presented as something ‘recognizable’ (regime of authenticity) or manageable (regime of toleration) for the dominant society.<sup>430</sup> In other words, cultural (and legal) expressions will be divided into those that are acceptable and unacceptable, depending on how intelligible they are for the liberal observer,<sup>431</sup> and whether or not a specific trait can be assimilated or commoditized.<sup>432</sup> In this sense, the state keeps the yardstick of what is to be valued and protected,<sup>433</sup> and what should be the ultimate ends of the individual and the polity.

## **2.4. Current Representational Practices of Indigeneity in Human Rights Discourse**

This section examines how the multiculturalist approach and consequently the regimes of authenticity and toleration have been key in the treatment of cases presented by indigenous individuals before the Inter-American Court and the HRC. Section 2.4.1 will refer to what Engle terms ‘culture as heritage’, or culture as a tangible or intangible good, which I argue has been an important feature of HRC’s development of Article 27 of the ICCPR in relation to indigenous peoples. Section 2.4.2 will examine the idea of indigenous peoples’ ‘special connection to land’ as a legal justification for indigenous peoples’ right to land and culture. Finally, Section 2.4.3 focuses on indigenous peoples’ right to ‘preserve’ their own law, which is also referred to as ‘legal pluralism’ in human rights discourse.

### **2.4.1. The UN Human Rights Committee: Culture as Heritage**

As introduced in Chapter 1, there has been a process of de-linking indigenous cultures from indigenous peoples and also reifying and commoditizing these cultures. Engle

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<sup>429</sup> Markell (n 121) 170.

<sup>430</sup> In a similar sense, *ibid*, 170.

<sup>431</sup> *Ibid*, 169-170; Hale, ‘Does Multiculturalism Menace? Governance, Cultural Rights and the Politics of Identity in Guatemala’ (n 35) 507.

<sup>432</sup> Watson, ‘Sovereign Spaces, Caring for Country, and the Homeless Position of Aboriginal People’ (n 294) 39-42.

<sup>433</sup> Merry, ‘Human Rights and the Demonization of Culture (And Anthropology Along the Way)’ (n 124) 42.

refers to this as the ‘disembodied notion of culture as heritage’.<sup>434</sup> By ‘heritage’ she means cultures seen as the tangible and intangible heritage of humankind.<sup>435</sup> This view is based on the previously discussed ‘cultural survival approach’, or the idea that indigenous cultures must be protected for the survival of indigenous peoples. It is also justified in the function that representations of indigenous cultures perform in relation to Western dominant cultures: as enriching cultural diversity, holding knowledge to save humankind from environmental degradation, notions of lost paradise, etc. The HRC adheres to the essentialist view and considers that the cultural rights of minorities should be protected to ensure ‘the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.’<sup>436</sup> And since the HRC has ruled self-determination claims as inadmissible,<sup>437</sup> situations involving indigenous peoples are assessed solely in terms of the violation of cultural rights (Article 27 of the ICCPR). Hence, matters related to land, territory and natural resources are considered in terms of the rights of indigenous peoples to have their culture, language and religious practices protected by states.<sup>438</sup>

The interpretation of Article 27 of the ICCPR by the HRC has been instrumental in some positive outcomes for indigenous peoples. Nevertheless, I argue that whether decisions by human rights organs are positive or negative for indigenous applicants’ interests, when indigenous rights are justified utilising a right to culture framework that draws on reified perspectives of indigenous legal orders, political systems and cultural practices, ultimately the result is negative for indigenous peoples. The reason is that this approach to difference perpetuates colonialist representations of indigenous peoples as helpless, morally and rationally inferior, and spatially and temporally distant from modern society. This thwarts any possibility of true recognition of indigenous peoples as equal citizens and the inclusion of their epistemological and legal frameworks within the legal framework of the state, as was proposed by Bolivia’s plurinationalism project. In addition, the reduction of indigenous applicants’ situation in post-colonial societies to ‘merely cultural’ matters obscures the role of the states and of other social actors in

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<sup>434</sup> Engle, *The Elusive Promise of Indigenous Development* (n 3) 149, 155.

<sup>435</sup> Ibid, 141-145. Engle refers to the Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003) UNESCO.

<sup>436</sup> UNHRC ‘General Comment No. 23, Article 27’ (Rights of minorities) UN Doc CCPR/C/21/Rev.1/Add.5 (26 April 1994) para 9.

<sup>437</sup> UNHRC, *Lubicon Lake Band v. Canada* (1990) para 32.1. Chapter 1 (n 135)

<sup>438</sup> UNHRC General Comment No. 23, para 6.2.

their current predicament. As Engle explains, the concept of culture as ‘heritage’ or ‘cosmovision’ does not require the state to make any specific power sharing arrangements or structural changes in political or economic order.<sup>439</sup>

In practical terms, the right to culture is particularly open to a wide margin of discretion on behalf of human rights operators. Moreover, as was pointed earlier in relation to the regime of toleration, the tendency is to accompany norms related to the protection of indigenous rights with a clause that limits these rights in important ways. In the case of the HRC, the right to culture is limited by an authenticity test (although the HRC does not openly declare that it utilises such a doctrine). Hence, in its decisions, the HRC has developed the right of indigenous peoples to exercise certain economic activities but only if they are ‘an essential element of the culture of an ethnic community’.<sup>440</sup> It should be highlighted that it cannot be any ‘traditional economic activity’; rather, the HRC must deem it an ‘essential element’ of culture, without which the culture would become ‘extinct’.

The Supreme Court of Canada uses a similar rule (under what it explicitly refers to as its ‘authenticity test’) in order to determine if in a particular case indigenous communities have a right to resources or sustenance. Indigenous peoples only have a right to possess such resources to the degree that their ‘means of survival’ (as well as their socialization methods, their legal systems, and, potentially, their trading habits) are deemed by the Court to be ‘traditional’, pre-colonial, as well as ‘integral to the distinctive culture of aboriginal people’.<sup>441</sup> In the context of the HRC, the authenticity test is also applied in order to determine if there has been harm to the rights protected under Article 27 in the first place. Not just any harm to indigenous peoples’ cultural rights (which include invasion and destruction of indigenous territories for quarrying, logging, hunting, mining, etc.) constitutes a violation of the rights contained in Article

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<sup>439</sup> Engle, *The Elusive Promise of Indigenous Development* (n 3) 148-149, 12-13.

<sup>440</sup> *Sandra Lovelace v Canada*. Communication No 24/1977 (30 July 1981) CCPR/C/13/D/24/1977; *Ivan Kitok v Sweden*. Communication No.197/1985 (27 July 1988) CCPR/C/33/D/197/1985, para 9.2; *Länsman and ors v Finland*. Communication No 1023/2001 (17 March 2005) CCPR/C/83/D/1023/2001, para 9.2; *Ángela Poma Poma v Peru* Communication No. 1457/2006 (27 March 2009) UN Doc CCPR/C/95/1457/2006, para 7.6; UNHRC ‘General Comment No. 23, Article 27’, para 7.

<sup>441</sup> Dick (n 53) 971-972 citing *Mitchell v M.N.R.* (2001) para 37 and *R. v Sappier* (2006) para 45.

27, but there has to be an ‘outright denial of [the author’s] right [to enjoy their culture] or an “impact [so] substantial that it does effectively deny” this right’.<sup>442</sup>

The case *Angela Poma Poma v. Peru* (2009) helps illustrate the limitations of the cultural difference approach. The claimant alleged that there was a violation of the rights embodied in Articles 1(2) (right not to be deprived of livelihood) and 17 (right to privacy and family life) of the ICCPR because the state had for decades been diverting the groundwater from her land, causing a degradation of the land and the drying up of the wetlands. As a result, the claimant and her community were left in extreme poverty because their livestock died and they were unable to continue keeping llamas and alpacas.<sup>443</sup> The HRC reiterated its inability to refer to Article 1 of the ICCPR (which also refers to the right to self-determination) and argued that in this particular case the situation was actually one of violation of Article 27 of the ICCPR.<sup>444</sup> The rationale, which transformed the socio-environmental conflict over water to a matter of culture, was that the claimant and her community were Aymara. The HRC reasoned that there was a violation because their ‘traditional activities’ and therefore their culture and ‘way of life’ were threatened and they needed their rights to be protected in order to ensure ‘the survival and continued development of cultural identity’.<sup>445</sup> In this case, the raising of llamas and alpacas was described as the essence of Aymara culture and thus critical to the enjoyment of that culture.<sup>446</sup> This is connected to the idea that will be developed in the following section, that the enjoyment of culture may consist in a way of life ‘which is closely associated with the territory and use of resources, especially in the case of indigenous peoples’ and that includes ‘traditional activities’ such as fishing and hunting.<sup>447</sup>

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<sup>442</sup> Thomas M. Antkowiak, ‘Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court’ (2013) 35 University of Pennsylvania Journal of International Law 112 (n) 133-134 citing *Rakhim Mavlonov and Shansiy Sa’di v Uzbekistan*. Communication No. 1334/2004 (19 March 2009) CCPR/C/95/D/1334/2004, para 87, *Länsman v Finland* (2005) para 10.1, 10.3 and *Äärelä Näkkäljärvi v. Finland* (1997) para 7.6; *Anni Äärelä and Jouni Näkkäljärvi v Finland*. Communication No 779/1997 (4 February 1997) CCPR/C/73/D/779/1997. Also see *Diergaardt v Namibia*. Communication No. 760/1997 (25 July 2000) CCPR/C/69/D/760/1997. In this case, the applicants attempted to request pastoral lands as part of their cultural rights under Article 27. However, the UNHRC considered that they could not prove that they have a special relation with that land that ‘could have given rise to a distinctive culture’ (para 10.6)

<sup>443</sup> UNHRC, *Angela Poma Poma v. Peru* (2009) para 2.1-2.13, 7.5

<sup>444</sup> *Ibid*, para 6.3

<sup>445</sup> *Ibid*, para 7.2.

<sup>446</sup> *Ibid*, para 7.3.

<sup>447</sup> UNHRC, ‘General Comment 23 on Article 27’, para 7.

This case was important because the HRC was able to adjudicate in a conflict over water and land degradation between an indigenous community and the Peruvian state. Moreover, in this case the HRC derived indigenous peoples' right to prior consultation from Article 27 of the ICCPR.<sup>448</sup> Nevertheless, the HRC decision did not discuss the issue of the unequal distribution of resources perpetrated by the state and the acute socio-environmental conflict over the rechanneling of water from a poor rural indigenous community to a nearby coastal touristic location. A matter that has more to do with a shift in Latin American states towards neoliberal economic models that favour touristic enclaves and foreign investors over rural communities<sup>449</sup> was converted into a 'merely cultural' matter. In addition, the use of an essentialist concept of culture that is linked to primitivist representations of indigeneity displaced the attention from the 'misplace'<sup>450</sup> of indigenous peoples in Peruvian society. Consequently, the decision did not refer to a possible scenario of racial discrimination that could have contributed to the decision by the state to deprive the community of water and then to overlook the negative environmental impact over this community's land as a loss that required compensation.

In this train of thought, the cultural rights framework displaces attention from the relation between non-indigenous and indigenous peoples,<sup>451</sup> which, under a noble savage paradigm, are seen as distant from each other spatially (the indigenous person is located outside of the modern world)<sup>452</sup> and temporally (the indigenous person is located in the past).<sup>453</sup> In this regard, the role of specific dominant groups, companies, governments or even individuals in the deterioration of the material conditions of indigenous communities is not visibilized. Finally, since what is protected by Article 27 is a disembodied notion of culture (what is protected is the indigenous culture and not the indigenous group), had the Aymara community been performing an economic activity considered as non-traditional by the HRC (or if the HRC had considered that

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<sup>448</sup> UNHRC, *Angela Poma Poma v. Peru* (2009) para 7.6, 7.7; Göcke (n 223).

<sup>449</sup> María Paula Barrantes Reynolds, 'Costa Rica sin ingredientes artificiales': el rol del Estado en la expansión del turismo residencial en las zonas costeras' (2012) 39 *Anuario de Estudios Centroamericanos* 233.

<sup>450</sup> The expression 'misplace' is from Ramos (n 54) 11.

<sup>451</sup> Ulloa, *The Ecological Native: Indigenous Movements and Eco-governmentality in Colombia* (n 54) loc 4358.

<sup>452</sup> Carbado (n 407) 643-644. He explains that in the United States, black slaves were treated as being part of the nation (in the sense of a possession) while the Indians, despite having being in the land before the settlers, were treated as foreigners. There was an 'interterritorialization' of the blacks and an 'extraterritorialization' of the Indians.

<sup>453</sup> Egerer (n 250) 17, 24. The post-colonial subject as part of a distant past or a distant future.

this community was not indigenous but a peasant community), their situation would have been considered outside the ambit of minority rights or perhaps even as a case that could not have been processed by the HRC.

#### **2.4.2. The Inter-American Court: Indigenous Peoples' Special Connection to Land**

Under the 'special connection to land' paradigm, land and territory are essential elements for the production and reproduction of indigenous culture and spirituality, and are the basis of indigenous identity.<sup>454</sup> This paradigm is also an important component of the definition of indigeneity as presented by the Cobo report.<sup>455</sup> It is also present in the UNDRIP, in the ILO Convention 169 and in UN documents,<sup>456</sup> which otherwise do not refer to indigenous peoples' right to collective property. In this regard, Engle mentions that in 1993 the text of Article 25 of the UNDRIP was weakened by petition of Australia and other states. The proposed norm was 'indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands'. However, the word 'material' was eliminated and currently the norm only refers to a 'spiritual connection' in order to avoid recognition of land use, possession and dominium.<sup>457</sup>

Nevertheless, indigenous communities still have the possibility to claim right to land through these human rights norms. As mentioned earlier in the introduction to this chapter, the Inter-American Court has been the main institution to develop the 'special connection to land' and cultural survival arguments as legal justifications for requesting the states to safeguard indigenous territories. Indigenous rights in general and the rights to culture and to communal land in particular are not part of the American Convention of Human Rights ('American Convention') or the American Declaration of the Rights

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<sup>454</sup> Engle, *The Elusive Promise of Indigenous Development* (n 3) 162-164.

<sup>455</sup> 'Cobo Report' (n 142); ECOSOC 'Working Paper by on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples by Asbjørn Eide and Erica-Irene Daes' (n 142) para 2.

<sup>456</sup> ILO Convention 169, Article 13 (1); UNDRIP, Article 25 of; UNHRC 'General Comment No. 23 ON Article 27'; ECOSOC (Sub-commission) 'Final Report of the Special Rapporteur Erica-Irene Daes on the Prevention of Discrimination and Protection of Indigenous Peoples. Indigenous Peoples' Permanent Sovereignty over Natural Resources' E/CN.4/Sub.2/2004/30 (13 July 2004); ECOSOC 'Indigenous Peoples and Their Relationship to Land'; CESCR 'General Comment No. 21 on the Right to Everyone to Take Part of Cultural Life' para 3

<sup>457</sup> Engle, *The Elusive Promise of Indigenous Development* (n 3) 165-166.



and Duties of Man.<sup>458</sup> However, under an ‘evolutionary interpretation’<sup>459</sup> of the American Convention, the Inter-American Court has derived them from Article 21 of the American Convention (right to private property).<sup>460</sup>

Currently in IHRL there are two ways for indigenous peoples to claim lands. First, they can attempt to prove ‘ancestrality’. This entails demonstrating that their nation, ethnic group or community (depending on how they self-denominate and how they are defined by the state) has always inhabited that particular territory.<sup>461</sup> If this has not been the case (e.g. they are nomadic, were forced out of their ancestral territory, or migrated), the second option is to claim collective land by appealing to the right to culture. This option requires for the community to demonstrate that the land in question is part of their ‘way of life’<sup>462</sup> and consequently important for their spiritual and cultural activities.<sup>463</sup> Indigenous petitioners can also argue that land is essential for the performance of ‘traditional’ economic activities such as hunting or fishing.<sup>464</sup> In this context, culture is understood in Herderian terms, and economic and subsistence activities are conceived as cultural practices.

*Mayagna (Sumo) Awas Tingni v Nicaragua* (2001) was the first Inter-American Court resolution to refer to indigenous legal territories. The Court continued to refer to cultural identity and collective land in the case law from 2005 to 2012, extending these rights to the Maroons (descendants of runaway African slaves) in Surinam.<sup>465</sup> In *Awas Tingni v Nicaragua*, the community of Awas Tingni, a Mayagna indigenous community located in the Atlantic coast of Nicaragua, claimed that their human rights had been

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<sup>458</sup> The Organization of American States (OAS) is working on a declaration of indigenous rights. Draft of the American Declaration of the Rights of Indigenous Peoples OEA/Ser.K/XVI/GT/DADIN/doc.334/08rev.7 (2 May 2012) OAS.

<sup>459</sup> See Chapter 1 (n 243).

<sup>460</sup> In relation to the evolutionary interpretation of Article 21 (right to private property) of the American Convention, see *Awas Tingni v Nicaragua* (2001) para 148.

<sup>461</sup> Engle, *The Elusive Promise of Indigenous Development* (n 3) 162.

<sup>462</sup> Ibid, 165.

<sup>463</sup> Ibid, 163.

<sup>464</sup> For example, Inter-American Court, *Sawhoyamaxa Indigenous Community v. Paraguay* (2006), para 131.

<sup>465</sup> Antkowiak (n 442) 137-159; Inter-American Court: *Moiwana Community v Surinam* (Merits) Series C No 124 (15 June 2005), *Yakye Axa Indigenous Community v Paraguay* (Merits) Series C No 125 (17 June 2005), *Sawhoyamaxa Indigenous Community v Paraguay* (Merits) Series C No 146 (29 March 2006), *Xakmok Kasek Indigenous Community v Paraguay* (Merits) Series No 214 (24 August 2010), *Saramaka People v Surinam* (Merits) Series C No 172 (8 November 2007), and *Sarayaku Kichwa Indigenous People v Ecuador* (Merits) Series C No 245 (27 June 2012). Allusions to indigenous peoples’ special connection to land can be found even before it was pinned to Article 21 of the American Convention. For example, *Plan Sánchez Massacre v Guatemala* (Reparations and Costs) Series C No 116 (19 November 2004) para 85.

violated because the state had granted a logging company a concession to take timber from their lands.<sup>466</sup> The assessment of the Inter-American Court was based on the position presented by the IACHR and the petitioners, who claimed that Article 21 could encompass indigenous communal property.<sup>467</sup> The decision of the judges was also based on the testimonies and expert opinions delivered by anthropologists and lawyers. The experts stated that the Awas Tingni community was an indigenous community that had communal forms of property<sup>468</sup> and had been established in that territory for a long time. Consequently, there was ‘historical continuity’ or ancestrality,<sup>469</sup> to the point that the Inter-American Court stated that the Mayagna’s ancestors had inhabited those lands since ‘time immemorial’.<sup>470</sup> In addition, the community had a connection to the land because their livelihood was based on activities considered ‘traditional’ such as hunting, fishing and subsistence agriculture.<sup>471</sup> Finally, the territory and the animals, mountains and rivers in it, as well as a burial area, were sacred to the community, which for these reasons had a ‘very strong bond with its surroundings’.<sup>472</sup> In the words of Stavenhagen, who gave an expert opinion as an anthropologist and a sociologist,

Most indigenous peoples in Latin America are peoples whose essence derives from their relationship to the land, whether as farmers, hunters, gatherers, fishermen, etc. The tie to the land is essential for their self-identification. Physical health, mental health, and social health of indigenous peoples is linked to the concept of the land.<sup>473</sup>

The Inter-American Court resolved that indigenous peoples,

[B]y the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognised and understood as the fundamental basis of their culture, their spiritual life, their integrity, and their economic survival.<sup>474</sup>

In this sense, not only did the Inter-American Court stretch the right to private property to include communal property, but it also utilised this right as a vehicle for the right to culture and cultural identity (understanding that land as an indispensable component of

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<sup>466</sup> Inter-American Court, *Awas Tingni v Nicaragua* (2001) para 153.

<sup>467</sup> Antkowiak (n 442) 140 citing Inter-American Court, *Awas Tingni v Nicaragua*, para 140.

<sup>468</sup> Inter-American Court, *Awas Tingni v Nicaragua* (2001) para 140 (b)

<sup>469</sup> Ibid, para 140 (a)

<sup>470</sup> Ibid, para 140 (h)

<sup>471</sup> Ibid, para 140 (f)

<sup>472</sup> Ibid, testimony of anthropologist Theodore McDonald Jr, para 83 (c)

<sup>473</sup> Ibid, para 83 (d)

<sup>474</sup> Ibid, para 149.

indigenous culture).<sup>475</sup> Furthermore, the Inter-American Court considered that the Awas Tingni community's relation to their land and resources was also protected by other rights in the American Convention. These rights are the right to life, dignity, freedom of conscience and religion, liberty of association, protection of the family and freedom of movement.<sup>476</sup> A similar reasoning was applied in *Yakye Axa v. Paraguay*, where the Court considered that dispossessing indigenous peoples of their lands placed them in an 'especially vulnerable situation'. One of the reasons proffered by the Court is that dispossession affected their different form of life ('different worldview systems than those of Western culture, including their close relationship with the land').<sup>477</sup> It also affected their 'life aspirations',<sup>478</sup> and violated their right to life in its interpretation as 'decent life'.<sup>479</sup> Finally, in this case the Court even covered the social and economic rights of indigenous peoples (right to health, right to food, right to a healthy environment, right to education, right to the benefits of culture)<sup>480</sup> through their special connection to the land.

In the context of the Inter-American System for the Protection of Human Rights, the 'special connection to land' argument has had positive outcomes in terms of a favourable judicial resolution for the petitioners.<sup>481</sup> However, it has the disadvantage of drawing on essentialist definitions of culture and noble savage representations,<sup>482</sup> according to which indigenous peoples are a-historical and separate from ideals of progress, development or industry.<sup>483</sup> The noble savage representation is tacitly present in Inter-American Court resolutions in binaries such as Western culture-indigenous traditions, law-indigenous customs, and modern culture-indigenous culture. As

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<sup>475</sup> Engle, *The Elusive Promise of Indigenous Development* (n 3) 130.

<sup>476</sup> Inter-American Court, *Awas Tingni v Nicaragua* (2001) para 140 (f).

<sup>477</sup> Inter-American Court, *Yakye Axa v Paraguay* (2006) para 163.

<sup>478</sup> *Proyecto de vida*, a concept developed by the Inter-American Court for the purpose of reparations.

<sup>479</sup> '*Vida digna*' another concept developed by the Court for reparations. Ibid.

<sup>480</sup> Inter-American Court, *Yakye Axa v Paraguay* (2006) para 163. The Inter-American Court was referring to Article 26 of the American Convention, which establishes that social, economic and cultural rights (particularly the ones included in the Additional Protocol to the American Convention regarding Economic, Social and Cultural Rights) shall be guaranteed progressively. It was also referring to the 'pertinent provisions' in the ILO Convention 169.

<sup>481</sup> Which does not necessarily mean that this resolution will be implemented. In the case of *Awas Tingni v Nicaragua*, the state of Nicaragua took nearly eight years to comply with the resolution to delimit, demarcate and title the land of the members of Awas Tingni. Inter-American Court, *Mayagna (Sumo) Awas Tingni v Nicaragua (Monitoring Compliance with Judgement)* (3 April 2009)

<sup>482</sup> In a similar sense, Engle, *The Elusive Promise of Indigenous Development* (n 3) 151.

<sup>483</sup> Ulloa, 'Las representaciones sobre los indígenas en los discursos ambientales y de desarrollo sostenible' (n 232) 96, 102 citing Edward W. Said, *Orientalism* (Originally written in 1978, 3rd edn, Penguin Books 2003).

developed in Chapter 1, these binaries allude to a ‘colonial ontological difference’, or a differentiation in human rights discourse between the modern (white) self-determined individual and the racialized post-colonial subject.<sup>484</sup>

Moreover, since the complexities of human identity are reduced to a homogenous idea of indigeneity, the aspects of the lives and decisions of indigenous individuals that are not in accordance with this representation seem to be excluded from the idea of indigeneity altogether. Indigenous peoples that make deals with military governments or mining companies,<sup>485</sup> that wish to commercialize their ‘cultural patrimony’,<sup>486</sup> that wish to have private title and not communal property,<sup>487</sup> or that increasingly live in urban areas<sup>488</sup> are not covered by indigenous rights discourse because they do not fit the representations of indigenous peoples as stewards of nature and as having a spiritual connection to land.<sup>489</sup> Petitioners would have to conceal these activities and portray themselves as noble savages in order to successfully claim rights to culture and communal land.

Essentialist and primitivist representations are also present in the use of anthropologists by the Inter-American Court to define what indigenous cultures and customs are, and to determine whether or not a specific group is truly indigenous. In this sense, judicial narratives on indigeneity are partly based on the authoritative gaze and knowledge of the judges, anthropologists, and human rights advocates, and supported by human rights instruments that describe indigenous character (i.e. their special relation to land).<sup>490</sup> In this regard, Engle mentions that when anthropologists are asked to testify in domestic and international forums, they are requested to describe the indigenous groups that are

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<sup>484</sup> Maldonado-Torres (n 55) 254-259.

<sup>485</sup> Ramos (n 54) 2-5 referring to the Tukano in Brazil.

<sup>486</sup> Ulloa, ‘Las representaciones sobre los indígenas en los discursos ambientales y de desarrollo sostenible’ (n 232) 105.

<sup>487</sup> For example the case of Salvadoran indigenous peoples. Tilley (n 86)

<sup>488</sup> In Bolivia for example, 63% of the population that self-identifies as indigenous lives in urban areas. Ramiro Molina Barrios, Milenka Figueroa and Isabel Quisbert, *Los pueblos indígenas de Bolivia: diagnóstico sociodemográfico a partir del censo del 2001* (Comisión Económica para América Latina y el Caribe (CEPAL) 2005) 45.

<sup>489</sup> An example of a Court ruling that an indigenous group does not conform to the legal definition of indigeneity (defined in terms of racial purity, occupation of ancestral land and self-government) and therefore are not entitled to land is the Mashpee in the United States. Gerald Torres and Kathryn Milun, ‘Stories and Standing. The Legal Meaning of Identity’ in Karen Engle and Dan Danielsén (eds), *After Identity: A Reader in Law and Culture* (Routledge 1995)

<sup>490</sup> In this sense, *ibid.* I say partly because they are also influenced by the accounts of the indigenous petitioners concerning their own identity, culture and law. In a similar sense, Anker, ‘The Law of the Other. Exploring the Paradox of Legal Pluralism in Australian Native Title’ (n 265).

seeking rights and to explain their connection with a specific land or practice. The end result is the over-essentialisation of indigenous groups as well as gaps, conflicts and ambiguities in the narrative to make it apt for human rights advocacy.<sup>491</sup> In this connection, Ramos reflects that transnational human rights advocates and judges prefer to deal with the anthropologists than with indigenous individuals. Anthropologists thus become the surrogates of indigenous communities and they ‘translate their lived experience among the Indians in the language of symbolic consumption of alterity’, thus making available ‘abridged images of those Indians that will be vicariously lived by the industry of indigenous activism’.<sup>492</sup>

In this connection, the use of the special connection to land argument by the Inter-American Court also entails resorting to an authenticity regime. For example, in *Sarayaku v. Ecuador*, the Court determined some of the possible criteria that could contribute to determine whether indigenous peoples have a relation with their ‘traditional lands’. These criteria included spiritual or ritualistic bonds, the presence of settlement or seasonal crops, ‘traditional’ forms of subsistence like hunting, gathering and fishing, and the use of natural resources in a way that is in accordance with their customs or with ‘characteristic elements’ of their culture.<sup>493</sup> In *Sarayaku v Ecuador*, the Inter-American Court seemed to draw on the expert opinions and testimonies from the members of the community mainly to the extent that they could prove the connection between land and culture.<sup>494</sup> This is typical of the cultural difference approach. Thus,

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<sup>491</sup> Engle, *The Elusive Promise of Indigenous Development* (n 3) 11-13. In a similar sense, Anker, ‘The Law of the Other. Exploring the Paradox of Legal Pluralism in Australian Native Title’ (n 265) 9. For Anker, who takes a critical approach to the role of the anthropologists in Court, in the context of judicial processes the anthropologists are meant to provide meaning and significance to what aboriginal witnesses say or do and explain it as a coherent narrative.

<sup>492</sup> Ramos (n 54) 14; Tennant goes further and affirms that anthropologists become the custodians of an essence, the witnesses of authenticity, and he highlights that their discipline acquired scientific status in the first place in relation to particular representations of a savage that needed to be studied. Tennant (n 123) 11.

<sup>493</sup> For example, *Sarayaku v. Ecuador* (2012) para 148.

<sup>494</sup> *Sarayaku v Ecuador* (2012) paras 150-153, in which testimonies of the members of the Sarayaku community and the testimony of an expert were quoted in order to prove the strong spiritual bond that the community has with the land. In contrast, in the first ‘special connection to land’ case *Awas Tingni v Nicaragua*, it is interesting to note that except for the Secretary of the Territorial Commission of Awas Tingni, the community members that testified did not appeal to the discourse of their spiritual connection to the land, their cultural rights or their survival as a group. It was mainly the expert testimonies of lawyers and anthropologists that drew on essentialist perspectives. The community members did refer however to how they use of their lands for different subsistence activities and for how long they had been there, possibly in order to substantiate the argument of ancestrality. They referred also to the fact that the state has not given them legal title and to the conflict with other communities over the land. Inter-American Court, *Awas Tingni v Nicaragua* (2001) summary of testimonies of Jaime Castillo Felipe (pp.19-20), of Charly Webster Mclean Cornelio, Secretary of the Territorial Commission of Awas Tingni

even if the Inter-American Court resolutions refer briefly to the political situation surrounding the lands, in order to substantiate a ‘special connection to land’ and the rights tied to it, the considerations of the Court have to emphasize primitivist and essentialist representations of indigenous subjects and cultures. They must also leave aside the structural conditions that keep indigenous peoples in a vulnerable situation and that pushed them to claim land rights in the first place. Finally, as argued in Chapter 1, the cultural difference approach displaces a judicial interpretation that would see communal land as derived from the right to self-determination. Rather, the noble savage reinforces specific power relations in which indigenous peoples are situated in a subordinated position requiring state protection in order to survive as cultural artefacts.

In a similar vein, for Hale, who participated in *Awas Tingni v Nicaragua* as an expert, there were positive outcomes for the community under a ‘multiculturalist judicial framework’. However, the framing of the problem as an indigenous rights issue also permitted the state and ‘neoliberal development institutions’ to meddle in the community’s internal affairs, ‘regulating the details of the claim, shaping political subjectivities, and reconfiguring internal relations’.<sup>495</sup> ‘Recognition’ (or rather, toleration) therefore ‘comes at the cost of compliance with economic and political constraints’.<sup>496</sup> More importantly, Hale considers that international and state institutions have little control over the effects of opening spaces to indigenous peoples through the indigenous rights and cultural difference discourse. Yet they do have an important role in the struggle that ensues, in which the meaning of specific rights (and, as my preceding analysis demonstrates, the meaning of the indigenous subject, law and culture) becomes central. This makes the outcome of judicial struggles for indigenous rights ‘ambiguous and highly contingent’.<sup>497</sup> In this sense, Hale argues that the efficacy of neoliberal multiculturalism ‘resides in powerful actors’ ability to restructure the arena of political contention, driving a wedge between cultural rights and the assertion of the control over resources necessary for those rights to be realized’.<sup>498</sup>

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(pp.20-21), Brooklyn Rivera Bryan (pp.32-34), Humberto Thompson Sang (pp.34-35), Wilfredo Mclean Salvador (pp. 35-36).

<sup>495</sup> Hale, ‘Neoliberal Multiculturalism: The Remaking of Cultural Rights and Racial Dominance in Central America’ (n 8) 16.

<sup>496</sup> Ibid, 20.

<sup>497</sup> Ibid, 13.

<sup>498</sup> Ibid.

### 2.4.3. Indigenous Law as a Cultural Practice

#### i. The Regulation of Legal Pluralism in International Human Rights Law

In this thesis, legal pluralism should be understood not only as the presence in a social field of more than one legal system,<sup>499</sup> but as the acknowledgment by Constitutions and human rights instruments of non-state legal systems present within a state territory and that belong to non-dominant groups.<sup>500</sup> In the specific case of IHRL, legal pluralism means granting the status of a human right to the preservation of the ‘customary law’ or ‘religious law’ of minorities and indigenous peoples.<sup>501</sup> In the case of indigenous peoples, to tolerate ‘customary law’ is conceived also as a precondition for the effective protection of other human rights.<sup>502</sup> In both cases (maintenance of customary law as a human right and toleration of customary law as necessary for the exercise of human rights), legal pluralism would be accompanied by obligations on behalf of the state to respect ‘customary law’ and ‘religious law’.

However, under a human rights system, were the state to recognize the existence of non-state legal systems, it would need to subordinate the acknowledgment and acceptance of this ‘customary law’ to the protection of individual rights, in accordance with international obligations acquired with the signing and ratification of human rights treaties.<sup>503</sup> Consequently, as explained in Chapter 1, under a liberal multiculturalist approach, indigenous legal orders are regulated in IHRL by a regime of toleration. Therefore, they are subject to verification by the state and international human rights organizations using individual rights and individual autonomy endorsement as parameters.

In the case of the body of minority rights instruments, the right to use ‘customary law’ is derived from the right to culture.<sup>504</sup> In principle, the right to maintain customary law can also be derived from the right to self-determination established in Article 1 of ICCPR and in Article 1 of the International Covenant for Economic, Social and Cultural

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<sup>499</sup> John Griffiths, ‘What is Legal Pluralism’ [1986] *Journal of Legal Pluralism and Unofficial Law* 1, 1.

<sup>500</sup> *Ibid.*, 5.

<sup>501</sup> As mentioned in Chapter 1, although the legal definition in IHRL of minorities and indigenous peoples is practically the same, they are treated as different categories and subject to different paradigms (non-discrimination approach in the former case, and multiculturalist approach in the latter).

<sup>502</sup> Quane (n 343) 26-27.

<sup>503</sup> *Ibid.*, 8.

<sup>504</sup> ICCPR, Article 27.

Rights ('ICESCR').<sup>505</sup> However, as mentioned previously, only the right to culture is justiciable before the HRC. The right of minority groups to exercise their own 'customs' is also mentioned in the Declaration of the Rights of Persons Belonging to National, or Ethnic, Religious and Linguistic Minorities as part of the right to culture. This Declaration is no exception in establishing 'international standards' as well as national law as limitations to 'customs'.<sup>506</sup>

In relation to indigenous peoples, their right to preserve their legal institutions is explicitly mentioned in the ILO Convention 169 and the UNDRIP.<sup>507</sup> The ILO Convention 169 establishes 'fundamental rights' as defined by 'the national legal system and internationally recognised human rights' as the limitations for indigenous peoples right to 'retain their own customs and institutions'. The UNDRIP also sets 'international human rights standards' as parameters of toleration for indigenous peoples' right to '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'.<sup>508</sup>

As mentioned in the Introduction, in the case of indigenous peoples, the right to maintain their own law can be derived not only from the right to culture and cultural identity, but from the right to access to justice<sup>509</sup> and the right to self-determination.<sup>510</sup>

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<sup>505</sup> UNDRIP, Articles 3-4; Robin Perry, 'Balancing Rights or Building Rights? Reconciling the Right to Use Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty' (2011) 24 Harvard Human Rights Journal 71, 83,89.

<sup>506</sup> Declaration of the Rights of Persons Belonging to National, or Ethnic, Religious and Linguistic Minorities, Article 4.2.

<sup>507</sup> Indigenous peoples' right to maintain their legal institutions is mentioned in ILO Convention 169, Articles 6, 8 (1), 8(2), 9 (1), 9 (2), and UNDRIP, Articles 5, 26, 27, 34, 40.

<sup>508</sup> UNDRIP, Article 34.

<sup>509</sup> The recognition of indigenous legal orders by the state would be considered an alternative resolution mechanism to guarantee access to justice to indigenous peoples and for them not to be exposed to human rights violations by the state judiciary agents. IACHR. 'Acceso a la justicia e inclusión social: el camino hacia el fortalecimiento de la democracia en Bolivia. Capítulo IV. Derechos de los Pueblos Indígenas y Comunidades Campesinas' OEA/Ser.L/V/II. Doc 34 (28 June 2007) para 278 on proposal of peace judges in Bolivia (before the entry into force of the Constitution of 2009); HRC 'Access to justice in the promotion and protection of the rights of indigenous peoples. Study by the Expert Mechanism on the Rights of Indigenous Peoples' A/HRC/24/50 (30 July 2013) It should not however be considered a substitute to state judicial institutions, unless it is fully incorporated to the state through the figure of 'peace judges'. See for example the case of peace judges in Peru, Mercedes Manriquez Roque, 'Estatus jurídico político de los pueblos indígenas del Perú: perspectivas del modelo de Estado Constitucional de Derecho' (2011) 9 Anuario de Acción Humanitaria y Derechos Humanos 103.

<sup>510</sup> Not everyone would agree however that self-determination and cultural integrity should be seen as separate justifications of legal pluralism. Anaya for example affirms that 'the principle of self-determination joins other human rights precepts, including that of cultural integrity, to uphold the right of indigenous people to maintain and develop their own customary law systems of self-governance'. Anaya, 'International Human Rights and Indigenous Peoples: The Move Toward the Multiculturalist State' (n



However, as is the case with other indigenous collective rights, IHRL opens its doors to the possibility of toleration of indigenous legal orders mainly through a cultural difference approach.<sup>511</sup> In this connection, Quane considers that while the religious law or customary law of minorities is merely permitted in IHRL,<sup>512</sup> because of the case law of the Inter-American Court, the ‘customary law’ of indigenous peoples is protected.<sup>513</sup> The reason for this ‘special treatment’ of indigenous legal orders has to do once more with the argument laid out in Chapter 1 of ‘cultural survival’.<sup>514</sup> This is, the well-being and even the physical survival of indigenous groups would depend on the ability of the government and other entities to secure external protections in order to safeguard indigenous cultures, which are understood in essentialist terms.

## ii. The Essentialist View of Indigenous Legal Orders and its Implications

The predominant image in IHRL is that of indigenous law as a cultural practice. This is evidenced in UNDRIP where indigenous legal orders are mentioned in the same article as the right to culture. It is also evidenced in the ambiguous use of the term ‘custom’. This term implies a legal positivist definition of the law according to which only the

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154) 49, where he Anaya holds a similar view in Anaya, *Indigenous Peoples in International Law* (n 166) 97. I argued *supra*, however, that self-determination and cultural difference constitute very different paradigms—an argument that is supported by Kymlicka. Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (n 64) loc 1682.

<sup>511</sup> Although social, economic and cultural rights and collective rights that are not justiciable are sometimes linked conceptually or in a cause-effect argument to recognised individual rights in order to make them justiciable. For example, when the Inter-American Court links the right to cultural integrity to the right to life or the right to private property, and when the recognition of indigenous law is related to the right to access to justice.

<sup>512</sup> Except for the case of Sharia law, which is not tolerated in the context of the European Court of Human Rights (ECHR). According to Quane, Sharia law is deemed by the ECHR to be incompatible with the European Convention on Human Rights because of its diverging views on criminal law and procedure, the status of women and the lack of division between the public and the private when it comes to religious precepts. Quane (n 343) 15 referring to *Gunduz v Turkey* (2005) EHRR 5, para 51; *Refah Partisi v Turkey* No 1 (2002) 35 EHRR 3 para 72 and *Refah Partisi v Turkey* No 2 (2003) 37 EHRR 1, para 123.

<sup>513</sup> *Ibid*, 17-18. The Inter-American Court has referred to customary law in relation to land title: *Awas Tingni v Nicaragua* (2001) paras 138, 151, 164. It has also referred to indigenous legal orders in *Aloeboetoe et al v Suriname* (Merits) Series C No 11 (4 December 1991) (to determine to whom to give reparations in a polygamist society), *Bámaca Velázquez v Guatemala* (Reparations and Costs) Series C No 91 (22 February 2002) para 79, 81 (to determine in relation to reparations the importance in the Maya cultures of the burial rituals) and *Plan Sánchez v Guatemala* (2004) para 85 (in order to characterize for the purpose of reparations Plan Sánchez as a Mayan indigenous community with their own ‘traditional authorities and forms of community organisation’ who have a special connection to land and who are attached to their customs).

<sup>514</sup> Quane (n 343) 17-18. The vulnerability and special circumstances of indigenous groups are also reasons given in IHRL to argue that differentiated rights for indigenous peoples do not violate the principle of non-discrimination. ECOSOC ‘Report of the Special Rapporteur Rodolfo Stavenhagen on the Situation of Human Rights and Fundamental Freedoms of Indigenous People’ E/CN.4/2004/80 (26 January 2004); Anaya, *Indigenous Peoples in International Law* (n 166) 98.

norms that emanate from state organs through pre-defined procedures can be considered law, while indigenous peoples and minorities have ‘customs’.<sup>515</sup> The term is also related to colonial forms of domination as, under colonial legal pluralism, the validity of indigenous legal orders depended on the central authority of the colonial power.<sup>516</sup> The very notion of ‘customary law’ does not refer to pre-colonial indigenous normative systems but initially referred to the colonizers’ idea of what these legal systems were.<sup>517</sup>

The perspective of indigenous law as cultural practice has various implications. First, as is the case with indigenous peoples’ and minorities’ cultures, indigenous law will be treated in essentialist terms and subject to authenticity tests.<sup>518</sup> Thus, the relation between indigenous legal orders and other indigenous and non-indigenous legal systems will be perceived as in Tully’s billiard-ball metaphor: as self-contained spheres that can clash with each other.<sup>519</sup> This stands in opposition to conceiving indigenous legal orders as open systems in constant interaction with other legal systems, constituting and reconstituting each other depending upon the encompassing political structure and the relations of power at play.<sup>520</sup> Second, representations of indigenous legal orders in IHRL also draw from noble savage representations thus conceiving indigenous law as pre-colonial (or ‘ancestral’) and static.<sup>521</sup> Hence, they will be referred to as ‘coherent, uncontested and widely understood norms’ which are uncontaminated by colonial and post-colonial laws.<sup>522</sup> As part of the noble savage representation, indigenous legal orders are at times also presented as promoting a harmonious society and operating mainly through principles of retribution and restoration of community peace.<sup>523</sup> Such an

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<sup>515</sup> Boaventura de Sousa Santos, *Toward a New Legal Common Sense. Law, Globalization and Emancipation* (Second edn, Butterworths LexisNexis 2002), 90; Anker, ‘Law, Culture, Fact: Indigenous Rights and the Problem of Recognition’ (n 5).

<sup>516</sup> Griffiths (n 499) 6-8; Merry, ‘Legal Pluralism’ (n 30) 874.

<sup>517</sup> Merry, ‘Legal Pluralism’ (n 30) 875.

<sup>518</sup> Sieder, ‘The Challenge of Indigenous Legal Systems: Beyond Paradigms of Recognition’ (n 53) 104-106.

<sup>519</sup> See Chapter 1, pp. 10-11. Tully (n 73) 9-10.

<sup>520</sup> Boaventura de Sousa Santos, ‘Law: a Map of Misreading. Toward a Postmodern Conception of Law’ (1987) 14 *Journal of Law and Society* 279, in relation to the concept of ‘translegality’; Sieder and Witchell, ‘Advancing Indigenous Claims Through the Law: Reflections on the Guatemalan Peace Process’ (n 38), 201.

<sup>521</sup> Van Cott (n 53) 212.

<sup>522</sup> *Ibid.*, 212-213.

<sup>523</sup> *Ibid.*; María Teresa Sierra, ‘Human Rights, Gender, and Ethnicity: Legal Claims and Anthropological Challenges in Mexico’ (2001) 24 *Political and Legal Anthropology Review* (POLAR) 76, 78; For an example of an idealised version of indigenous legal orders see Elba Flores Gonzales, ‘La Justicia Comunitaria, Un Verdadero Sistema’ in Vladimir Gutiérrez Pérez (ed), *Justicia Comunitaria de los Pueblos Originarios de Bolivia* (Consejo de la Judicatura de Bolivia 2003) or the allusions to indigenous ‘customs’ in Inter-American Court of Human Rights, *Plan Sánchez v Guatemala* (2004) para 85.

idealisation will inevitably conceal forms of social oppression within the communities, dissent and political power struggles.<sup>524</sup>

Third, under colonialist forms of domination there is no ‘meeting of cultures’ or ‘inter-cultural dialogue’ but an encounter of the dominant culture with a ‘less sophisticated version of themselves’.<sup>525</sup> In this context, legal pluralism would be implemented in terms of seeing indigenous legal orders as a deviation from the norm.<sup>526</sup> In other words, indigeneity and indigenous laws will be understood in terms of their relation with human rights norms, as well as in relation to representations of indigeneity in human rights instruments and official documents. The laws of the other and their complex social context will not be grasped. Rather, indigenous ‘customs’ will be defined by the judges and expert witnesses in relation to a pre-existing positivist legal understandings of the law and liberal views of the good life that are considered universally applicable and morally and juridically superior.<sup>527</sup> As mentioned earlier, indigenous law will also be understood in relation to primitivist representations of what indigenous ‘customs’ are (pre-colonial, friendly with nature, conducive to harmonious social relations, etc.).

In this regard, human rights operators will show less interest in ‘the Other qua Other’.<sup>528</sup> and more interest in being able to regulate difference in order to make it adaptable to a specific political, legal and economic regime.<sup>529</sup> Engle explains in this sense that indigenous rights operate in a similar way to the British colonial ‘repugnancy clause’.<sup>530</sup> The purpose of such a clause was not to reach a compromise between different normative systems but to provide standards for the toleration of the practices and customs of non-dominant groups, who were considered inferior.<sup>531</sup> Thus, the case of

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<sup>524</sup> Sieder and Witchell, ‘Advancing Indigenous Claims Through the Law: Reflections on the Guatemalan Peace Process’ (n 38) 202; Van Cott (n 53) 213; a similar argument was presented in Chapter 1 in relation to the treatment by multiculturalist theories of culture. See Benhabib (n 50).

<sup>525</sup> Egerer (n 250) 24.

<sup>526</sup> Engle, ‘On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights’ (n 173) 162.

<sup>527</sup> In a similar sense, Egerer (n 250) 26.

<sup>528</sup> Ibid, 26 citing Emmanuel Lévinas, ‘Transcendence and Intelligibility’ in Adriaan T. Peperzak, Simon Critchley and Robert Bernasconi (eds), *Emmanuel Lévinas Basic Philosophical Writings* (Indiana University Press 1996) 147.

<sup>529</sup> In this regard, Kymlicka states, for example, that his theory of minority rights being addressed to the problem of difference of the dominant culture who wishes to live in a stable liberal democratic system. Kymlicka, ‘Introduction’ (n 169); Rawls’ present a similar justification for his political liberalism theory. John Rawls, *Political Liberalism* (Columbia University Press 1993) 133.

<sup>530</sup> Engle, ‘On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights’ (n 173) 132.

<sup>531</sup> Ibid, 132-133 citing Leon Sheleff, *The Future of Tradition. Customary Law, Common Law and Legal Pluralism* (Routledge 1999) 123.

legal pluralism is a good example of the argument that indigenous rights operate under a regime of conditional toleration. The conditions at play are not only individual autonomy endorsement, but also that indigenous persons assume the role of the other in the construction of the idea of the nation and the modern political subject.

Finally, I take Anker's argument that indigenous law in the judicial context tends to be treated as a fact instead of a discursive practice. Consequently, it is seen as existing on a separate plane than state law (state law is real law and indigenous law is fact).<sup>532</sup> Anker looks at the case of Australia, which constitutes a good example because, as in judgments of the Inter-American Court since *Awes Tingni v Nicaragua* (2001), indigenous laws are examined not only to understand if there is special connection to land, but also to assess the existence of 'native title'.<sup>533</sup> In other words, it is indigenous law and not state law that determines whether or not indigenous peoples are in possession of a specific land.<sup>534</sup>

The effect of this perspective is that indigenous law is something to be observed and is inextricably linked to a specific society.<sup>535</sup> It is something static and can be presented as a unified text.<sup>536</sup> Hence, new laws will be a symptom of acculturation or the presence of a society different from the ancestral one.<sup>537</sup> Thus, recent indigenous laws do not have to be tolerated by the state, which is the only legitimate and authorised producer of law.<sup>538</sup> Since the definition of law is not in question in these judicial procedures (which take a positivist, monistic and centralist approach, as opposed to a critical legal pluralism approach<sup>539</sup>), under a 'law as fact' paradigm, it is the duty of the anthropologist to determine what is a cultural practice, a habit or a law, and the Court will translate this into rights and interests.<sup>540</sup> Ultimately the consequence of seeing

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<sup>532</sup> Anker, 'The Law of the Other. Exploring the Paradox of Legal Pluralism in Australian Native Title' (n 265). Anker also explores this argument in Anker, *Declarations of Interdependence. A Legal Pluralist Approach to Indigenous Rights* (n 53) 87-100.

<sup>533</sup> Inter-American Court, *Awes Tingni v Nicaragua* (2001) para 164 where the Court requested the state to create an effective mechanism for the delimitation and titling of the property of the Awes Tingni community 'in accordance with the customary law, values, customs and mores of the Community'.

<sup>534</sup> Anker, 'The Law of the Other. Exploring the Paradox of Legal Pluralism in Australian Native Title' (n 265) 1-2.

<sup>535</sup> Ibid, 3-4.

<sup>536</sup> Ibid, 13.

<sup>537</sup> Ibid, 13.

<sup>538</sup> Ibid, 3-4.

<sup>539</sup> MacDonald 22.

<sup>540</sup> Anker, 'The Law of the Other. Exploring the Paradox of Legal Pluralism in Australian Native Title' (n 265) 2-7.

indigenous law as fact is that, despite the best intentions of judges and legislators to incorporate indigenous legal orders into the judgments, state law (and human rights instruments and their official interpretations) remains the only source of law. Indigenous law is something ‘out there’<sup>541</sup> to be discovered, interpreted and partially incorporated into the reasoning of the judgement in terms that are in accordance with the Court’s existing legal framework.

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<sup>541</sup> Ibid,13.

## Chapter 3. Multicultural Constitutionalism in Latin America

### 3.1. Introduction

The previous two chapters established that IHRL takes a multiculturalist approach to indigenous rights. This approach employs essentialist and primitivist views of indigenous identity, law and culture with homogenizing, reifying and depoliticizing effects. Chapter 2 further argued that indigenous claims for recognition and redistribution are processed in IHRL through regimes of toleration and authenticity. These regimes confine indigenous claims to what is intelligible and acceptable in a (white) liberal democratic society. This chapter examines the multiculturalist shift in Latin American constitutions in the 1990s. The ‘recognition’ of indigenous peoples and indigenous collective rights in Latin American Constitutions<sup>542</sup> is referred to here as ‘Multicultural Constitutionalism’.<sup>543</sup> The analysis of the socio-political context in which Multicultural Constitutionalism was adopted in Latin America will contribute to explain the adoption of multiculturalist policies in Bolivia in the 1990s (Section 4.2 of the following chapter). In addition, plurinationalism as an anti-colonialist project (developed in Sections 4.3 and 4.4) cannot be properly understood without examining the colonial heritage in Latin American constitutionalism and state formation, which is also examined in this chapter.

More than just the adoption of indigenous rights, Multicultural Constitutionalism alludes to specific notions of citizenship, race and nation that in some aspects are a continuation of the racial hierarchies and categories of previous constitutional regimes

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<sup>542</sup> Generally, studies of Latin American Constitutions refer to the ‘recognition’ of indigenous peoples and indigenous rights, as opposed to taking a legal positivist approach and referring to the declaration of pluri-ethnicity of the nation and the adoption of indigenous collective rights by the state. See, for example, Gonzalo Aguilar and others, ‘The Constitutional Recognition of Indigenous Peoples in Latin America’ (2010) 2 *Pace International Law Review Online Companion* 44; Donna Lee Van Cott, *The Friendly Liquidation of the Past. The Politics of Diversity in Latin America* (University of Pittsburg Press 2000); Ana Irene Méndez, ‘Los derechos indígenas en las constituciones latinoamericanas’ (2008) 41 *Cuestiones Políticas* 101. Latin American constitutions also refer to ‘recognition’. For example, Article 171 of the Constitution of Bolivia of 1967 (following the multicultural reforms of 1994) is entitled ‘recognition of indigenous rights’.

<sup>543</sup> Raquel Z. Yrigoyen Fajardo, *El Pluralismo Jurídico en la Historia Constitucional Latinoamericana: de la Sujeción a la Descolonización* (Instituto Internacional de Derecho y Sociedad (IIDS) 2010). This will be further explained below.

for managing difference. In other ways, however, Multicultural Constitutionalism constitutes a new racial project specific to the neoliberal period and the transition to democracy of several Latin American countries. As will be explained in Section 3.2, previous constitutional models reproduced colonial forms of domination even when advocating for equal citizenship and universal suffrage. This was partly because the political project of the elites did not envision the inclusion of indigenous peoples, who since the colony were perceived as inferior, and whose inclusion was viewed as a threat to the status quo.<sup>544</sup> Thus, the white-mestizo elites led the independence processes from the Spanish Crown and gradually built nation-states whose sovereignty was based on the colonial dispossession of indigenous peoples, their political subordination and their cultural annulment.<sup>545</sup>

Furthermore, the legitimacy of these new states was based on a dual system of citizenship in which indigenous peoples were invisible as political subjects but whose exploited labour was indispensable to the capitalist economic project of the creole elites and regional hegemonic powers. The discourse shifted dramatically after the Mexican revolution in the early 20<sup>th</sup> century and the introduction of Social Constitutionalism. Yet colonial racial hierarchies continued, and utilizing Marxist jargon, indigenous peoples (now referred to as peasants or *campesinos*) continued to be depicted as a burden for the progress of Latin American states. Thus, despite the concerns in this historical context with social justice, rural indigenous populations were cast by the ideologues of the time as a class doomed to extinction, and were therefore excluded from full citizenship.

Section 3.3 explains how the shift towards a multicultural approach to indigenous peoples both in Latin American Constitutionalism and in IHRL was propitiated by the mobilization of indigenous peoples locally and transnationally. However, this section also argues that multiculturalism has operated as a form of neoliberal governmentality when utilized by (some) state agents and transnational actors (such as international financial organizations and human rights organs), and when petrified in official discourses and domestic and international legislation. As a form of neoliberal governmentality, multiculturalism defuses indigenous radical demands for political

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<sup>544</sup> Juan Pablo Pérez Sáinz, *Mercados y bárbaros. La persistencia de las desigualdades de excedente en América Latina* (FLACSO 2014), 358-359, referring how the creoles' independence projects excluded the masses not because they were oblivious to their revolts, but because these revolts were a threat to their status quo.

<sup>545</sup> Yrigoyen Fajardo, 'Hitos del reconocimiento del pluralismo jurídico y el derecho indígena en las políticas indigenistas del constitucionalismo andino' (n 2) 10.

inclusion and produces permitted and unpermitted Indians. Furthermore, under this ‘neoliberal multicultural’<sup>546</sup> regime, indigenous subjects and communities are valued in relation to their place in a market economy.

### **3.2. Latin American Constitutionalism and the Colonial Heritage**

Indigenous populations and blacks were racialized in the processes of European conquest, settlement and colonial rule of the Americas<sup>547</sup> and their biological inferiority (and consequent cultural inferiority) was used to justify their annihilation, dispossession and enslavement.<sup>548</sup> The Controversy of Valladolid in 1550-1551, in which Spanish theologians and jurists discussed the justification for war against the Indians, is representative of the ideas of the time in relation to indigenous peoples. Those who like Ginés de Sepúlveda justified the violent subjugation of the Indians, saw them as heretics and barbarians with perfidious practices, unable to reason—or at least with less ability to do so—and less civilized and cultivated than the Spanish.<sup>549</sup> Therefore, it was both the right and duty of the Spanish to colonise and evangelise the Indians. Sepúlveda based his ideas on Aristotle’s theory of natural servitude, as well as on interpretations of Thomas Aquinas about the possibility of forcibly converting ‘infidels’ through the medium of war.<sup>550</sup> Bartolomé de las Casas, who was the other main figure in the debate of Valladolid, believed the Indians to be rational and free and to have a nobler soul than that of the greedy and violent Spanish.<sup>551</sup> Therefore, Indians were not naturally under the jurisdiction of the Spanish Crown or the Catholic Church, although there was a duty of the Spanish conquerors to evangelize them by pacific means because of the papal bull of Alexander VI.<sup>552</sup> De las Casas nevertheless also conceived the Indians as

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<sup>546</sup> Hale introduced the term in relation to Latin American countries. Hale, ‘Does Multiculturalism Menace? Governance, Cultural Rights and the Politics of Identity in Guatemala’ (n 35); Hale, ‘Neoliberal Multiculturalism: The Remaking of Cultural Rights and Racial Dominance in Central America’ (n 8). Melamed has also utilized it for the United States. Melamed, ‘From Racial Liberalism to Neoliberal Multiculturalism’ (n 56); Melamed, *Represent and Destroy. Rationalizing Violence in the New Racial Capitalism* (n 77).

<sup>547</sup> Mills (n 55) 91.

<sup>548</sup> Omi and Winant (n 55) 113.

<sup>549</sup> Ana Manero Salvador, ‘La controversia de Valladolid: España y el análisis de la legitimidad de la conquista de América’ (2009) 3 *Revista Electrónica Iberoamericana* 85, 99, 101.

<sup>550</sup> *Ibid*, 95-96.

<sup>551</sup> *Ibid*, 97, 112.

<sup>552</sup> *Ibid*, 87.



barbarians because they did not know Christ, could not read or write, and were not governed by institutions. Yet they were good barbarians living in a state of nature.<sup>553</sup>

During the colonial period, white supremacy was the basis of a caste system in which Indians (and further below, the blacks) were at the bottom of a complex pyramidal social organization based on the colour of the skin, and also on cultural differences and wealth.<sup>554</sup> During the colonial and post-independence periods, white supremacy also justified regimes for managing indigenous peoples, which varied depending on whether or not indigenous groups had been conquered and colonized during the 16<sup>th</sup> century.<sup>555</sup> In the case of Bolivia, this created a difference in the regulation of the indigenous peoples of the highlands (Andean peoples), who were conquered and colonized, and those of the lowlands (Amazon and Chaco), who had not been colonized before the 19<sup>th</sup> century.<sup>556</sup> As will be explained in the following chapter, in the 21<sup>st</sup> century these differences in historical trajectories have also led to separate agendas and different ways of mobilization of highland and lowland indigenous organisations.

In the case of the highlands, since the period of conquest in the 1530s and 1540s, the Spanish took over the territories of the Quechua (part of the former Inca Empire) and

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<sup>553</sup> Ibid, 89-93.

<sup>554</sup> Herbert S. Klein, *Bolivia: the Evolution of a Multiethnic Society* (2nd edn, Oxford University Press 1991) 31. In this system, the Spanish or *peninsulares* were at the top, followed by the *criollos* or descendants of Spanish parents born in America. Then there was the *mestizos* or the mix of Spanish and indigenous, *mulatos* or the mix of black and Spanish, *zambo* or the mix of black and Indian, the indigenous peoples, and at the bottom the black slaves from African descent. There were other categories in between based on the racial mixture between different racial categories, but always ordered in accordance to the white supremacy paradigm: fairer skin was superior to darker skin. The system of castes was not rigid in the sense that there was the possibility of social ascension based on assuming Spanish mores and wealth. For example, Wilhelm Roscher, *The Spanish Colonial System* (Edward G. Bourne ed, Henry Holt and Company 1904) 19-20; Carlos López Beltrán, 'Sangre y temperamento. Pureza y mestizajes en las sociedades de castas americanas' Institute of Philosophical Investigations, UNAM <<http://www.filosoficas.unam.mx/~lbeltran/articulos.html>> accessed 10 March 2015, 292-294.

<sup>555</sup> Yrigoyen Fajardo, 'Hitos del reconocimiento del pluralismo jurídico y el derecho indígena en las políticas indigenistas del constitucionalismo andino' (n 2) 6.

<sup>556</sup> I do not refer here to a third group of indigenous peoples that was mentioned by Yrigoyen Fajardo in her systematization of Latin American constitutions because it refers to the territories of what is now Argentina and Chile (Mapuches, Pehuenques, Renqueles, etc.) and thus have little relation to Bolivia. These groups were never conquered by the Spanish and received an entirely different treatment. The Spanish signed treaties with them and during the Independence those treaties were broken, the Indian territories taken (under the model of the Constitution of 1787 of the United States) and the states of Chile and Argentina engaged in the military campaigns for the extermination of these populations during the 19<sup>th</sup> century. Afterward these indigenous peoples were subject to assimilationist and integrationist policies but in different periods than the peoples of the Andean region and the lowlands. This has also meant that liberal multiculturalist policies have not been applied with the same vigour in Argentina and especially in Chile as they were in other Latin American countries. Ibid, 5-6.

Aymara, forcing them to work and pay tribute.<sup>557</sup> During the 1570s, with Toledo's reforms, the highland peoples and those in the valleys, whose population had been significantly diminished by the Spanish conquest, were organized in 'reductions' (*reducciones*) or 'indigenous communities' for the purpose of controlling and exploiting them. Hence, several *ayllus* (a pre-colonial form of social and territorial organisation among highland Quechua and Aymara that persists to this day) were disarticulated, and indigenous groups that used to live separately were forced to live in larger communities under Spanish rule for the purpose of collecting tributes for the Crown and providing workers for the mines.<sup>558</sup> At the same time, the Spanish regulated these communities under a dual system according to which indigenous peoples were subject to different laws than the Spanish and their descendants. Thus, the Spanish established the Republic of the Indians and the Republic of the Spanish.<sup>559</sup> This system permitted the existence of a colonial form of legal pluralism and therefore relative independence for indigenous communities to self-regulate and resolve their conflicts through legal systems developed during this colonial period.<sup>560</sup>

In contrast, the lowlands people of South America—specifically of the countries surrounding the Amazon basin, such as Venezuela, Colombia, Ecuador, Peru, Bolivia, Paraguay and Brazil—are located in areas that were not conquered or where the agricultural frontier did not reach until relatively recently.<sup>561</sup> The reason for this is that the Spanish focused on the highland regions dominated by the Inca Empire and the lowlands were considered border areas difficult to access and without settled populations that could be exploited.<sup>562</sup> Lowland groups in the Andean region were consequently left to the missionaries, scattered settlers and eventually rubber barons.<sup>563</sup>

During the 'post-independence period' (1820 to 1860-1870), Latin American states were characteristically weak, with chronic political instability, low legitimacy and low

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<sup>557</sup> Ibid, 3-4. The Andean region of modern Bolivia was conquered between 1538 and 1548 with the fall of Cuzco. The Spanish kept the Inca patterns of domination and also divided the indigenous peasant communities into *encomiendas* in order to collect taxes. Klein (n 554) 33-37.

<sup>558</sup> Klein (n 554) 38-40.

<sup>559</sup> Nancy Grey Postero, *Now we are Citizens: Indigenous Politics in Postmulticultural Bolivia* (Stanford University Press 2007) 27-30.

<sup>560</sup> Klein (n 554) 46-49.

<sup>561</sup> David Maybury-Lewis, 'Lowland Peoples on the Twentieth Century' in Frank Salomon and Stuart B. Schwartz (eds), *The Cambridge History of the Native Peoples of the Americas*, vol 3 (online edn, Cambridge University Press 1999), 872-873.

<sup>562</sup> Ibid, 872.

<sup>563</sup> Ibid, 903-905.

income.<sup>564</sup> Newly independent states established a republican system based on popular sovereignty and elections (for a constricted definition of citizens) and a capitalist system dependent on exportation.<sup>565</sup> There was a continuity of colonial institutions and economic structures (except for direct external mercantilist controls),<sup>566</sup> so much so that in Bolivia there was even a continuity of the taxation of indigenous communities.<sup>567</sup> In this regard, the formation of the nation-state in Latin America was founded upon the idea that the indigenous other constituted a separate and inferior human group that could not quite be integrated into the main society but at the same time needed somehow to be assimilated in order to create a modern nation-state.<sup>568</sup> Symptomatic of the exclusion of indigenous peoples from the new nations was the fact that until the mid-20<sup>th</sup> century, governments referred to matters related to indigenous peoples as the ‘Indian Problem’ (*‘el problema indígena’*).<sup>569</sup>

The ‘Indian Problem’ was dealt with in the American constitutions in three ways, which correspond to three periods: the period of Liberal Assimilationist Constitutionalism (1811-1917),<sup>570</sup> the period of Social Constitutionalism (1917 with the Constitution of Mexico until the ratification of ILO 169 in the early 1990s) and the Multiculturalist period (1990s onward).<sup>571</sup> These forms of constitutionalism coincide with the periodization of Latin American states’ history according to their economic models. Hence, Liberal Assimilationist Constitutionalism roughly coincides with the ‘liberal

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<sup>564</sup> Alan Knight, ‘El Estado en América Latina desde la independencia’ (2014) 1 *Economía y Política* (Universidad Adolfo Ibáñez) 7, 16.

<sup>565</sup> *Ibid.*, 16.

<sup>566</sup> *Ibid.*

<sup>567</sup> *Ibid.*, 15-17.

<sup>568</sup> For example, Xavier Albó, ‘Etnicidad y movimientos indígenas en América Latina’ (Primer Congreso Latinoamericano de Antropología Rosario, 12 July 2005) 8.

<sup>569</sup> For example, Xavier Albó, ‘Andean People in the Twentieth Century’ in Frank Salomon and Stuart B. Schwartz (eds), *The Cambridge History of the Native Peoples of the Americas*, vol 3 (online edn, Cambridge University Press 1999), 792-793.

<sup>570</sup> Yrigoyen Fajardo actually identifies three constitutional models in the early 1800s. First, a colonial segregationist model of federal tutelage that appears with the United States Constitution of 1787 for non-conquered indigenous peoples who had signed treaties with the colonizers (not applicable to Bolivia). Second, the ‘liberal assimilationist’ model that begins with the Constitution of Venezuela of 1811. It was applied to indigenous peoples subordinated under the system of ‘*pueblos de indios*’ (Indian communities). The third is constitutional system for the ‘infidel’ or ‘uncivilized’ Indians, which she denominates ‘missionary-civilizing’ and that starts with the Constitutions of Cadiz of 1812 and Nueva Granada (Colombia) of 1811. It sought to expand the agricultural frontier and to conquer and discipline indigenous populations that had not yet been colonized. Yrigoyen Fajardo, ‘Hitos del reconocimiento del pluralismo jurídico y el derecho indígena en las políticas indigenistas del constitucionalismo andino’ (n 2) 10-12.

<sup>571</sup> *Ibid.*, 10-24. This periodization is also mentioned in Albó, ‘Andean People in the Twentieth Century’ (n 517). The periodization is of course a generalization, and not all countries followed the same trajectory. For example, as mentioned in Chapter 1, some Latin American countries did not ratify the ILO Convention 169 and continue to enforce the ILO Convention 107.

period' of global integration and 'outward development' or promotion of exportations (1860-1870 to 1930). Social Constitutionalism corresponds to the period of import substitution industrialization and 'populist' governments (1930-1980). Finally, the Multiculturalist period coincides with the period of neoliberal reforms (1985-2009 in Bolivia) and the transition to democracy of several Latin American states.<sup>572</sup>

The continuation of colonial forms of thought and domination is not only patent in the legislation but is central in the explanation of inequalities in Latin America.<sup>573</sup> Bolivia, known before independence as Charcas or Upper Peru, was an epicentre of the Spanish conquest because of its vast mineral resources and large populations of Indians. The city of Potosí, with its Cerro Rico bursting with silver, was the symbol in the New World of the colonial logic of merciless exploitation of people and nature.<sup>574</sup> The Bolivian economy has since then more or less followed a dependency path of being a provider of primary resources for the developed economies.<sup>575</sup> But instead of silver and gold, those products are now mainly gas, soybeans, crude petroleum, zinc, ore and tin,<sup>576</sup> which are exported mainly to Argentina, Brazil, the United States and Japan.<sup>577</sup> This richness in resources, however, has not prevented Bolivia from being one of the poorest countries of Latin America, and its human development indicators are below those of its South American neighbours.<sup>578</sup> Bolivia is also one of the most unequal countries of South America.<sup>579</sup> Indigenous peoples in Bolivia, who represent over half of the population,

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<sup>572</sup> This periodization is explained Knight (n 564) 15-24.

<sup>573</sup> Pérez Sáinz (n 544) 359; Gillette Hall, Heather Marie Layton and Joseph Shapiro, 'Introduction: The Indigenous Peoples' Decade in Latin America' in Gillette Hall and Harry Anthony Patrinos (eds), *Indigenous Peoples, Poverty and Human Development in Latin America 1994-2004* (Palgrave Macmillan 2006) (n) 12-23; Rosemary Thorp and Maritza Paredes, *Ethnicity and the Persistence of Inequality. The Case of Peru* (Frances Stewart ed, Palgrave Macmillan 2010); Álvaro Bello and Marta Rangel, *Etnicidad, "Raza" y Equidad en América Latina y el Caribe* (United Nations Economic Commission for Latin America and the Caribbean 2000), 27.

<sup>574</sup> Klein (n 554) 34-35.

<sup>575</sup> Rosemary Thorp, *Progress, Poverty and Exclusion: an Economic History of Latin America in the 20th Century* (International Development Bank 1998), 178-179, 189-190 in relation to Bolivia's tin economy during Latin America's industrialization period (1950s-1980s).

<sup>576</sup> Instituto Boliviano de Comercio Exterior, *Bolivia: principales productos exportados al mundo según volumen y valor. Gestiones 2010-2011 (datos preliminares)* (Instituto Nacional de Estadística de Bolivia 2012).

<sup>577</sup> Instituto Boliviano de Comercio Exterior, *Bolivia: Exportaciones al Mundo Según Países de Destino. Gestiones 2010-2011 (Datos Preliminares)* (Instituto Nacional de Estadística de Bolivia 2012).

<sup>578</sup> Verónica Paz Arauco (ed) *Informe Nacional sobre Desarrollo Humano en Bolivia. Los Cambios Detrás del Cambio. Desigualdades y Movilidad Social en Bolivia* (Programa de las Naciones Unidas para el Desarrollo (PNUD) 2010) 92-98. According to this 2010 UNDP report, 60% of Bolivians are poor. In addition, the rate of infant mortality in Bolivia is the highest in Latin America after Haiti (41 deaths per 1000 live births).

<sup>579</sup> Klein (n 554) 19-21; Paz Arauco (n 578) 58, 92. The Gini coefficient in Bolivia is 0,564, which makes Bolivia one of the most unequal countries in the region next to Brazil, Guatemala, Colombia and

suffer higher poverty rates than the rest of the population, as well as social exclusion through labour market discrimination and limited access to public education and health services.<sup>580</sup>

### 3.2.1. Liberal Assimilationist Constitutionalism

The 'Liberal Period' (1860-1930) was one characterised by Latin American elites promoting exports and capital importation in order to achieve economic growth and political stability, as well as to guarantee investment, private property and social discipline.<sup>581</sup> In the context of post-colonial Latin American states,<sup>582</sup> liberalism was a modernizing rationality utilized by the creole elites to encourage entrepreneurial talent and justify the imperialist and capitalist project, while at the same time permitting the continuation of 'hierarchy and adscription'.<sup>583</sup> Hence, racial divisions would be retained during the liberal period. However, the criterion for belonging to a specific category was not only skin colour or 'purity of blood' but was increasingly cultural.<sup>584</sup> For Pérez Sainz, the continuation of colonial institutions and racial divisions during the liberal period was prompted by creoles' fear of and contempt for the subaltern classes—feelings that were prompted by previous insurrections lead by indigenous groups or Afro-Americans.<sup>585</sup> Furthermore, as advanced in the introduction to this chapter, elites

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Honduras. Ibid, 92. In the first decade of the 21<sup>st</sup> century, 60% of income concentrated in the richest group in society, which constituted 5% of the population, and 2% of national income went to the poorest stratum of society, which constituted 59.1% of the population. Ibid, 58, 88 (with data of the National Census of Bolivia of 2007).

<sup>580</sup> Hall, Layton and Shapiro, 'Introduction: The Indigenous Peoples' Decade in Latin America' (n 573) 12-23; Wilson Jiménez Pozo, Fernando Landa Casazola and Ernesto Yañez Aguilar, 'Bolivia' in Gillette Hall and Harry Anthony Patrinos (eds), *Indigenous Peoples, Poverty and Human Development in Latin America 1994-2004* (Palgrave Macmillan 2006), 57-63. Despite social mobility and the increase of an Aymara merchant elite, according to data from 2002, 73.9% of indigenous peoples in Bolivia lived in poverty (versus a total of 52.5% of non-indigenous living in poverty). In 2002, 39% of the population lived in extreme poverty, of which 52.5% were indigenous individuals. Ibid, 42-43. Being indigenous in Bolivia increased the probabilities of being poor by 13%, and indigenous women in Bolivia had a probability of being poor of 74.5% in contrast with 50.8% among non-indigenous women. Ibid, 45. These poverty rates were partly explained by indigenous peoples' employment situation: 28.6% of employed indigenous peoples in 2002 did not receive any remuneration for their work (versus 13% of non-indigenous), and 70% of indigenous peoples were self-employed (the self-employed earn less money than those who are employed). As in the rest of Latin America, the informal sector (self-employed) is much larger than the formal sector. 78% of Bolivians work in the informal sector, of which 84% are indigenous individuals. Ibid, 46-53.

<sup>581</sup> Knight (n 564) 17.

<sup>582</sup> By 'post-colonial' I mean a state that has become formally independent from its foreign colonizers. The use of the term does not intend to question the existence of internal colonialism and relations of subordination and dependency with the global North.

<sup>583</sup> Pérez Sainz (n 544) 359 citing Richard M. Morse, *El espejo de Próspero. Un estudio de la dialéctica del nuevo mundo* (2nd edn, Siglo XXI Editores 1999) 120.

<sup>584</sup> Pérez Sainz (n 544) 373.

<sup>585</sup> Ibid, 357-364.

considered the inclusion of racialized groups as jeopardising their political and land privileges, and compromising the capitalist system that was based on the exploitation of racialized groups' labour.<sup>586</sup>

As Appelbaum, Macpherson and Roseblatt explain, the challenge during that period was one of 'creating citizens out of colonial subjects' and making a nation out of colonial societies based on strict racial divisions.<sup>587</sup> The solution was the adoption of citizenship modalities based on the privilege of the white subjects (who were imagined in opposition to racialized groups)<sup>588</sup> and the exclusion of indigenous peoples, Afro-Americans, women and subordinate classes from citizenship.<sup>589</sup> At the same time, since the colonial heritage was considered a burden for the new republics, these citizenship modalities were justified using social Darwinism, neo-Lamarckian ideas and other European racial theories popular in the 19<sup>th</sup> century that were adapted to local racial ideologies.<sup>590</sup> Ultimately, this regime left indigenous peoples in a liminal position: neither outside the nation as in the colony (the Republic of Indians), nor inside it, except for their exploitable bodies.<sup>591</sup> Since they were not citizens, indigenous peoples could not participate in politics or even represent themselves.<sup>592</sup>

During the liberal period, indigenous peoples were regulated without any explicit mention in the Constitution.<sup>593</sup> Yrigoyen Fajardo calls this a 'constitutional silence' on the matter.<sup>594</sup> In the case of Bolivia, indigenous peoples were not explicitly mentioned in the eleven constitutions that preceded the Constitution of 1938.<sup>595</sup> The 'silence' reflects Mariatégui's concern that the 'Indian Question' was treated by the white

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<sup>586</sup> Ibid, 363-364. Conservatives were particularly prone to preserve colonial privilege in constitutional texts. Ibid, 363-364 based Roberto Gargarella, *The Legal Foundations of Inequality. Constitutionalism in the Americas, 1776-1860* (Cambridge University Press 2010) [Spanish version, Siglo XXI 2005].

<sup>587</sup> Nancy P. Appelbaum, Anne S. Macpherson and Karin Alejandra Roseblatt, 'Introduction: Racial Nations' in Nancy P. Appelbaum, Anne S. Macpherson and Karin Alejandra Roseblatt (eds), *Race and Nation in Modern Latin America* (The University of North Carolina Press 2003) 4.

<sup>588</sup> Ibid, 14.

<sup>589</sup> Yrigoyen Fajardo, *El Pluralismo Jurídico en la Historia Constitucional Latinoamericana: de la Sujeción a la Descolonización* (n 543) 1. In this period, it was common for constitutions to declare that only males with property could vote. Pérez Sáinz (n 544) 363-364; for the case of Bolivian constitutions of the 1800s, there were other requisites like being twenty-one years old or being married, possessing capital, being professional and not being a servant or dependant. Fernández Osco (n 297) 24.

<sup>590</sup> Pérez Sáinz (n 544) 384-385; Appelbaum, Macpherson and Roseblatt (n 587) 6, 13.

<sup>591</sup> Pérez Sáinz (n 544) 373-377.

<sup>592</sup> Ibid, 374-375.

<sup>593</sup> Fernández Osco (n 297) 22-23.

<sup>594</sup> Yrigoyen Fajardo, 'Hitos del reconocimiento del pluralismo jurídico y el derecho indígena en las políticas indigenistas del constitucionalismo andino' (n 2) 13.

<sup>595</sup> This conclusion is based on my own analysis of the Constitutions of Bolivia from 1826 until 1967. Source: <http://www.lexivox.org/>

political elites in Peru as a humanitarian, philosophical or cultural issue. With this they ignored the historical material dimension, or the way the colonial and independence period determined the circumstance of indigenous peoples.<sup>596</sup> In sum, indigenous peoples were reduced during this period to ‘ethnic subjects’ (and labour) under the tutelage of the state.<sup>597</sup>

Considering the above, the first constitutions of Latin America may be an example of what has been earlier referred to as authoritarian liberalism.<sup>598</sup> As advanced in Chapter 1, despite the commitment to freedom of different strands of liberal political thought, when looking at liberalism as a historical phenomenon, there is continuity in its treatment of indigenous peoples as not fit to self-govern.<sup>599</sup> The underlying premise is that individuals are not born free, but freedom is acquired through discipline and moral progress. Hence, subjects who are considered inferior, such as indigenous peoples (who allegedly do not have the capacity to be free), are yet to acquire their freedom through the help of the government in their moral development.<sup>600</sup> The practical outcome of this premise is that the state displayed authoritarian forms of government in relation to those who were considered to possess limited agency. Thus, ‘governing through freedom’ entailed a division between the self-governing individual and its ‘others’, who required liberal policing.<sup>601</sup>

In this train of thought, during the liberal period in Latin America, indigenous peoples were considered barbaric and potentially violent against the white, and their education under the tutelage of the state was their only possibility of regeneration and civilization.<sup>602</sup> Moreover, the elites considered that subordinated racialized groups had to undergo a process of biological and cultural whitening in order to modernize.<sup>603</sup> The

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<sup>596</sup> Roxanne Dunbar Ortiz, ‘Indigenous Peoples and the Left in Latin America’ (2007) 59 *Monthly Review* 85, 91 based on José Carlos Mariátegui, *Seven Interpretive Essays on Peruvian Reality* (Marjory Urquidí tr, University of Texas Press 1971) 157, 163-164.

<sup>597</sup> Pérez Sáinz (n 544) 375.

<sup>598</sup> Hindess (n 236).

<sup>599</sup> McCallum (n 238) 608-609.

<sup>600</sup> Hindess (n 236) 348-349.

<sup>601</sup> McCallum (n 238) 608-611.

<sup>602</sup> Pérez Sáinz (n 544) 373-374.

<sup>603</sup> Appelbaum, Macpherson and Roseblatt (n 587) 6. As mentioned earlier, in some countries such as Chile and Argentina there was even an implementation of policies of extermination of indigenous populations. Ibid, 6. There were also policies in the late 1800s and early 1900s promoting migration of white Europeans for the purposes of ‘whitening’ the nation (and thus allegedly secure progress). These were the cases of Argentina, Chile and Costa Rica (although in the latter case, whitening was mainly based on the diffusion by liberal elites of a myth of white homogeneity, and the segregation of indigenous and blacks). Pérez Sáinz (n 544) 366-369.

repression or ‘disciplining’ of the ‘lazy Indians’ was particularly prominent in countries with a higher percentage of indigenous populations (Mexico, the Andean and Central American countries).<sup>604</sup> In these countries, there was also a continuation of some Spanish colonial institutions of forced labour (*peonaje* and *mandamiento*).<sup>605</sup>

For the purposes of consolidating the state as the main form of social control, and of creating a single nation and a single market, the elites during this authoritarian liberal period dismantled colonial legal pluralism and indigenous communal property.<sup>606</sup> Legal pluralism was also eliminated because it was incompatible with legal monism, which was the prevailing conception of the law during the formation of Latin American states. On the other hand, the colonial system of indigenous communal land was deemed to obstruct the establishment of private property and the integration of indigenous individuals to the market economy.<sup>607</sup>

With this the state undermined the relative political and territorial autonomy that conquered indigenous populations had during the colony. By eliminating communal property, the state also compromised the main form of material, cultural and political reproduction of these indigenous populations.<sup>608</sup> As Pérez Sainz eloquently explains for the Bolivian case, ‘with their eyes fixed in the European horizon, the persistence of the colonial-Andean *ayllu* appeared as an anachronistic obstacle that persistently postponed the time for Bolivia to take its place among the “free nations”’.<sup>609</sup> The elimination of indigenous communities came in tandem with the expansion of the large estate model (*hacienda*), which in Bolivia operated as a feudal regime that drew on indigenous forced labour and pauperized labour.<sup>610</sup>

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<sup>604</sup> Knight (n 564) 18.

<sup>605</sup> Ibid, 18. Although Yrigoyen Fajardo clarifies that one of the features of the liberal assimilationist period is the gradual release of the Indians from their colonial duties (paying tribute and *mita*, or work in the mines) while at the same time eliminating their colonial protections. Raquel Yrigoyen Fajardo, ‘Reconocimiento constitucional del derecho indígena y la jurisdicción especial en los países andinos’ (2000) 4 Revista Pena y Estado 1, 5.

<sup>606</sup> In a similar sense Appelbaum, Macpherson and Roseblatt (n 587) 4.

<sup>607</sup> Tristan Platt, *Estado boliviano y ayllu andino: tierra y tributo en el norte de Potosí* (Instituto de Estudios Peruanos 1982), 6.

<sup>608</sup> Appelbaum, Macpherson and Roseblatt (n 587) 4; Yrigoyen Fajardo, ‘Reconocimiento constitucional del derecho indígena y la jurisdicción especial en los países andinos’ (n 490) 1-3, 10-11; Pérez Sáinz (n 544) 376.

<sup>609</sup> Pérez Sáinz (n 544) 371 (own translation from Spanish).

<sup>610</sup> Albó, ‘Hacia el poder indígena en Ecuador, Perú y Bolivia’ (n 341) 134. In this sense Albó explains that this system was prominent in the highlands, but after the massacre and subjugation of the Guaraní in the lowland in 1982, they were also pushed to forced labour in the *haciendas*; Pérez Sáinz (n 544) 372-



In the case of the lowlands, the state had an interest in sending settlers to the borders of the newly established nation-states and to ‘civilize’ the Indians and subordinate them to state law.<sup>611</sup> They would be modernised by teaching them Spanish, converting them to Christianity, halting their nomadic lifestyle and relocating them to towns or missions that would make it possible to control them and articulate their work to the wider internal market.<sup>612</sup> The exception to this pattern was Brazil, where lowland peoples were the only native population. From early on they were enslaved, annihilated or forced to flee deep into the forests by the Portuguese, who then had to resort to shipping slaves from Africa to work in the colonies. In the rest of the Amazon, though, indigenous peoples remained largely marginal until the Rubber Boom (1850-1920)—a period during which they were brutally tortured, enslaved and killed by rubber tapping gatherers and barons.<sup>613</sup>

### **3.2.2. Social Constitutionalism and the Ideology of *Mestizaje***

The two World Wars (1914-1918, 1939-1945) and the Great Depression (1929-1939) put an end to the promotion of the exportation model of the liberal period. In the early 20<sup>th</sup> century and until the economic crisis of the 1980s, Latin American states increased their role in the economy and promoted industrialization and protectionism as a way of avoiding being affected by external shocks.<sup>614</sup> In this sense, dependency theories generated in Latin America between the 1950s and the 1970s highlighted the neo-colonial situation of dependency of Latin American states and their peripheral position in relation to hegemonic industrialized countries, and structuralist currents promoted domestic industry.<sup>615</sup> Under the new economic model, workers’ movements and unions became stronger across Latin America and part of corporatist and authoritarian states that would seek to co-opt them.<sup>616</sup> This was also a period of increased political and economic intervention by the United States government in Latin America in the context

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373. Pérez Sainz explains that in Bolivia and Peru indigenous peoples became serfs in haciendas and, therefore, it cannot be said that they were citizens. They were only considered Bolivians because of their presence in the national territory and their exploitation.

<sup>611</sup> Yrigoyen Fajardo, ‘Hitos del reconocimiento del pluralismo jurídico y el derecho indígena en las políticas indigenistas del constitucionalismo andino’ (n 2) 7.

<sup>612</sup> Ibid, 7.

<sup>613</sup> Maybury-Lewis (n 561) 872.

<sup>614</sup> Knight (n 564) 19-20.

<sup>615</sup> Fernando Henrique Cardoso and Enzo Faletto, *Dependency and Development in Latin America* (Marjory Urquidí tr, University of California Press 1971); Marcia Solorza and Moisés Cetré, ‘La teoría de la dependencia’ (2011) 10 *Revista Republicana* 127, 129;130; Cristóbal Kay, ‘Teorías latinoamericanas del desarrollo’ (1991) 113 *Nueva Sociedad* 101.

<sup>616</sup> Knight (n 564) 19.

of the Cold War. The United States government supported Latin American authoritarian regimes that favoured their interests and destabilized those that sought structural change.<sup>617</sup>

Social Constitutionalism<sup>618</sup> expanded the previously constrained constitutional notion of citizenship in order to include a greater part of the population, which was to be entitled to social and economic rights and engaged in projects of national industrialization.<sup>619</sup> These rights were to be implemented through agrarian reforms (including the recognition of indigenous collective lands), the recognition of collective entities such as unions, cooperatives and indigenous communities, the recognition of certain indigenous cultural practices and permitting indigenous peoples to use their languages, and giving the state a significant role in the integration of indigenous peoples to the state and the market, and in the provision to indigenous peoples of health services and formal education.<sup>620</sup> The indigenous peoples of the lowlands, however, continued to be regarded as outsiders and were subject to segregation and special regulation in Criminal and Civil Codes.<sup>621</sup> Since race was not a factor to be considered in this vision of nation and indigenous individuals were referred to as peasants or proletarians, social inequality and income inequality was explained solely in terms of class analysis.<sup>622</sup>

At the same time, inspired by the Mexican revolution ideology, the post-national revolution Constitutions of Latin America were based on the premise that a country requires the integration of all groups into a single nation that has as a common denominator the biological mix of races and cultures following the colonial encounter (*mestizaje*).<sup>623</sup> Appelbaum, Macpherson and Roseblatt explain that the *mestizaje* discourses, articulated in the early 20<sup>th</sup> century by Latin American intellectuals such as Gilberto Freyre, Manuel Gamio, José Vasconcelos and Uriel García, were a reaction to the scientific racism and geographical determinism theories held in the United States

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<sup>617</sup> Ibid, 21.

<sup>618</sup> In Bolivia Social Constitutionalism became particularly prominent after the National Revolution of 1952 and it began its demise in 1991 with the ratification of the ILO Convention 169.

<sup>619</sup> Appelbaum, Macpherson and Roseblatt (n 587) 6-7.

<sup>620</sup> Yrigoyen Fajardo, 'Hitos del reconocimiento del pluralismo jurídico y el derecho indígena en las políticas indigenistas del constitucionalismo andino' (n 2) 14-15.

<sup>621</sup> Ibid, 16; Luis Tapia Mealla, 'Consideraciones sobre el Estado Plurinacional' in Gonzalo Gosálvez and Jorge Dulon (eds), *Descolonización en Bolivia Cuatro ejes para comprender el cambio* (Vicepresidencia del Estado Plurinacional de Bolivia; Fundación Boliviana para la Democracia Multipartidaria 2010) 138.

<sup>622</sup> Albó, 'Hacia el poder indígena en Ecuador, Perú y Bolivia' (n 341) 135.

<sup>623</sup> Appelbaum, Macpherson and Roseblatt (n 587) 7.

that considered Latin Americans degenerate hybrids.<sup>624</sup> Instead, *mestizaje* presented the mixing of races as beneficial, producing ‘a cosmic race’, in the words of Vasconcelos.<sup>625</sup> *Mestizaje* was therefore not only a nation-building discourse that alluded to a distant colonial past, but also a state project to prepare indigenous individuals for modern citizenship through education and biopolitics<sup>626</sup> of nutrition, hygiene and birth control.<sup>627</sup> In this regard, *mestizaje* combined notions of race and culture (or rather, *mestizaje* defined race in cultural terms) in such a way that cultural and educational policies were meant to purify the souls of racialized subjects, and the state could legitimately suppress racial and cultural difference for the purposes of national modernisation.<sup>628</sup> In this regard, colonial hierarchies and racism were present in this period but under the guise of cultural justifications: the urban, educated, civilized and decent versus the illiterate, poor, dirty peasants.<sup>629</sup> Finally, *mestizaje* was related to the disciplining of indigenous populations through ideals of hard work and forced military service.<sup>630</sup>

Along with *mestizaje* came indigenism (*indigenismo*), a complementary ideology developed in the 1950s that would de-link contemporary indigenous peoples from their pre-colonial past while at the same time leaving them out of the idea of modernity.<sup>631</sup> In the Andean countries, the pre-colonial history of the Inca Empire was appropriated by the white-mestizo elites to give the nation a glorious past and compete with the idealized Greco-Roman heritage of the Europeans.<sup>632</sup> But the existing indigenous communities were considered distant from this glorious past as a consequence of their

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<sup>624</sup> Ibid, 7; Also Pérez Sáinz (n 491) 387 based on Antonio S.A. Guimarães, ‘El mito del anti-racismo en Brasil’ (1996) 144 Nueva Sociedad 32, 13.

<sup>625</sup> Appelbaum, Macpherson and Roseblatt (n 587) 7.

<sup>626</sup> This refers to Foucault’s notion of governmentality as the regulation of populations including, for what is relevant here, race, lifestyle, patterns of migration, standards of living, levels of economic growth and the biosphere in which people live. Dean (n 387) 118. Populations are conceived as resources to be fostered, used or optimized and they are to be framed within apparatuses of security (ibid, 28). Incidentally, biopolitics also have to do with the management of groups that are considered to retard the welfare and life of the population (ibid, 118) which in Latin America have included indigenous peoples. Therefore, it is here that Foucault locates racism of the state (ibid, 119).

<sup>627</sup> Appelbaum, Macpherson and Roseblatt (n 587) 7-8, 14.

<sup>628</sup> Marisol de la Cadena, ‘¿Son los mestizos híbridos? Las políticas conceptuales de las identidades andinas’ (2005) 61 Universitas Humanística 51, 63-64.

<sup>629</sup> Valérie Robin Azevedo, ‘Linchamientos y legislación penal sobre la diferencia cultural’ in Valérie Robin Azevedo and Carmen Salazar Soler (eds), *El regreso de lo indígena Retos, problemas y perspectivas* (FEA; CBC; MASCIPO; LISST; Cooperación Regional Francesa para los Países Andinos 2009) 84; Pérez Sáinz (n 491) 383.

<sup>630</sup> Pérez Sáinz (n 491) 390, 394, 400.

<sup>631</sup> Robin Azevedo (n 629) 84-85; Pérez Sáinz (n 491) 378.

<sup>632</sup> Robin Azevedo (n 629) 84-85; Pérez Sáinz (n 491) 383; Appelbaum, Macpherson and Roseblatt (n 587) 7.

conquest and colonization, which had degraded them.<sup>633</sup> The virtuous and exalted ‘real Incas’ were declared extinct in the highlands of Bolivia and Peru.<sup>634</sup> The contemporary rural indigenous peoples were peasants, ‘petit bourgeois’ attached to their lands who constituted an obstacle to progress and to the formation of the proletarian subject of the revolution.<sup>635</sup> The indigenous subject of Social Constitutionalism coincides chronologically and ideologically with the ignoble savage of the ILO Convention 107<sup>636</sup> (which, as mentioned before, is still in force in eighteen countries<sup>637</sup>). International indigenous rights under that framework advocated for the integration into the modern world of indigenous peoples as a way of saving them from their material (and moral) poverty.<sup>638</sup> With this convention the alleged inferiority of indigenous populations was once more reinforced and indigenous rights became a tool for domestic governments in their quest for modernisation.

In the specific case of Bolivia, in the Constitutions of 1938, 1945 and 1947, indigenous communities were ‘legally recognised’ and the education of the indigenous population was promoted.<sup>639</sup> The National Revolution of 1952 took Social Constitutionalism a step further by carrying out an agrarian reform and eliminating the semi-feudal system that had highland indigenous peoples living in conditions of serfdom. Consequent with the *mestizaje* approach in the region, in the Constitution of 1967 the word ‘indigenous’ or any other alluding to indigenous peoples disappeared. Instead, the word peasant (‘*campesino*’) was used to refer to indigenous communities and to grant them social and collective rights such as rights to communal land, the right to organize in unions and the right to education.<sup>640</sup> Under this new constitutional paradigm, highland indigenous peoples gained social and economic rights, but they were also forced to abandon their identification as part of an ethno-cultural group and assume an identity as peasants and

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<sup>633</sup> Robin Azevedo (n 576) 84-85.

<sup>634</sup> Ibid, 83-84.

<sup>635</sup> Álvaro García Linera, ‘El desencuentro de dos razones revolucionarias. Indianismo y Marxismo’ (2007) 3 Cuadernos del Pensamiento Crítico Latinoamericano (CLACSO) 1, 5.

<sup>636</sup> See Chapter 1; Tennant (n 168)

<sup>637</sup> See Chapter 1.

<sup>638</sup> Tennant (n 168) 11.

<sup>639</sup> For example, Constitution of Bolivia of 1938, Articles 165-167. The Constitutions of Bolivia were available in [bib.cervantesvirtual.com](http://bib.cervantesvirtual.com).

<sup>640</sup> Constitution of Bolivia of 1967 (the version previous to the reforms of 1994) Articles 166-169, 171, 172 and 174.

workers. They were also encouraged to organize in unions, cooperatives and federations that were then subordinated to the state through corporatist and clientelistic ties.<sup>641</sup>

As will be developed below, the constitutional recognition of diversity was not achieved until the liberal multiculturalist reforms of the 1990s. In this regard, it should be taken into account that each constitutional model was also a result of the resistance or opposition of the subaltern classes to specific racial projects or the idea of a homogenous nation to the detriment of the toleration of difference.<sup>642</sup> Hence, ideals of citizenship and nationhood should not be seen solely as tools of oppression but as ‘contested terrains’ born of the negotiation and conflict between elites and subaltern sectors<sup>643</sup>—an argument that will be further supported and illustrated in Chapters 4 and 5, when looking at the process by which the Constitution of Bolivia of 2009 was formed.

### 3.3. Multicultural Constitutionalism

For the specific case of indigenous peoples in Latin America, multiculturalist policies encompass the following: collective land rights, self-government rights, cultural rights, the right to maintain their own law, constitutional or legislative affirmation of distinct status, representation in the central government, and affirmative action.<sup>644</sup> Except for the last two, these policies are explicitly present as collective rights in the ILO Convention 169 (1989) and the United Nations Declaration on the Rights of Indigenous

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<sup>641</sup> Van Cott, *The Friendly Liquidation of the Past. The Politics of Diversity in Latin America* (n 542) 126-127; Ramón Pajuelo Teves, *Reinventando comunidades imaginadas. Movimientos indígenas, nación y procesos sociopolíticos en los países centroandinos* (IFEA (Instituto Francés de Estudios Andinos); IEP (Instituto de Estudios Peruanos) 2007) 57.

<sup>642</sup> Appelbaum, Macpherson and Roseblatt (n 587) 15; Pérez Sainz in this regard explains that even the discourse of *mestizaje* was advanced by subaltern classes as a reaction against racism. Pérez Sáinz (n 491) 402.

<sup>643</sup> Appelbaum, Macpherson and Roseblatt (n 587) 18-21. They utilize a Gramscian framework of state-formation to formulate this argument; Pérez Sáinz (n 491) 382.

<sup>644</sup> I have adopted Van Cott’s classification of multiculturalist policies. Donna Lee Van Cott, ‘Multiculturalism v. Neoliberalism in Latin America’ in Keith Banting and Will Kymlicka (eds), *Multiculturalism and the Welfare State Recognition and Redistribution in Contemporary Democracies* (Oxford University Press 2006) (n 9) 3439, 3451. Her classification was made specifically for the case of indigenous peoples of Latin America, and it was based on Keith Banting and others, ‘Do Multiculturalism Policies Erode the Welfare State? An Empirical Analysis’ in Keith Banting and Will Kymlicka (eds), *Multiculturalism and the Welfare State: Recognition and Redistribution in Contemporary Democracies* (Oxford University Press 2006), 61-63. It should be highlighted that the original classification of Banting et al included the upholding and ratification of treaties with indigenous peoples. However, since Van Cott considered that the signing of treaties was not a prominent model in the relation between indigenous peoples and Spanish colonizers, she leaves this policy out. Ibid, loc 3451.

Peoples (UNDRIP, 2007). They were constitutionalised throughout Latin America in the 1990s, following the ratification by various Latin American states of ILO Convention 169.<sup>645</sup> As mentioned in the introduction to this chapter, the multiculturalist shift in Latin American constitutions was triggered by the multiculturalist turn in IHRL. As elucidated in the next sub-section, both these ‘cultural turns’ (in IHRL and Latin American constitutionalism) occurred concomitantly with the rise of an international movement of indigenous peoples.

I follow Yrigoyen Fajardo in considering that these constitutional reforms gave rise to a new constitutional regime, Multicultural Constitutionalism.<sup>646</sup> It is characterised by the challenging of the idea of a mono-cultural nation-state because of the declaration in the constitutions of the ‘pluri-cultural’ and ‘multi-ethnic’ character of the nation.<sup>647</sup> Furthermore, Yrigoyen Fajardo considers that this type of constitutionalism calls into question the idea of legal monism by recognising indigenous authorities and judicial functions in indigenous communities.<sup>648</sup> In this regard, with the exception of Argentina, all other Latin American countries that underwent multicultural reforms included indigenous peoples’ right to use their own law.<sup>649</sup>

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<sup>645</sup> Yrigoyen Fajardo, *El Pluralismo Jurídico en la Historia Constitucional Latinoamericana: de la Sujeción a la Descolonización* (n 543), 8-9; Van Cott, *The Friendly Liquidation of the Past. The Politics of Diversity in Latin America* (n 542) 262. It should be noted however that not all countries that made constitutional reforms during the 1990s to acknowledge indigenous peoples ratified the ILO Convention 169. Notable exceptions were the states of Venezuela and Argentina, which did not ratify the convention until the 2000s (see [www.ilo.org](http://www.ilo.org) in relation to the ratification by country of the ILO Convention 169).

<sup>646</sup> Yrigoyen Fajardo, *El Pluralismo Jurídico en la Historia Constitucional Latinoamericana: de la Sujeción a la Descolonización* (n 543) 12-13. Yrigoyen Fajardo makes a division between Multicultural Constitutionalism (1982-1988) and ‘Pluricultural Constitutionalism’ (1989-2005), which she considers started with the ratification of the ILO Convention 169 (this Convention was signed in June 1989 and entered into force in September 1991). I do not follow Yrigoyen Fajardo’s sub-periodization for three reasons. First, as explained in Chapter 2, notwithstanding the advancement of multiculturalist policies during the previous decades, the ILO Convention 169 marks the shift from integrationist policies to multiculturalism in IHRL and in Latin America. Second, I do not consider in this thesis the period 1982-1988 because it does not refer to the Andean countries (it refers to Canada, Nicaragua, Brazil and Guatemala). Finally, Yrigoyen Fajardo’s ‘first cycle’ of multiculturalist reforms does not include the right to use ‘customary law’, which is the collective right that is being examined in more detail in this thesis. Other authors also utilize the term ‘Multicultural Constitutionalism’. See, for example, Van Cott, *The Friendly Liquidation of the Past. The Politics of Diversity in Latin America* (n 542) 257-280.

<sup>647</sup> Yrigoyen Fajardo, *El Pluralismo Jurídico en la Historia Constitucional Latinoamericana: de la Sujeción a la Descolonización* (n 543) 8-9.

<sup>648</sup> Ibid, 8-9. Again, I am taking what she denominates the ‘Pluricultural Constitutionalism’ period as multiculturalist constitutional reforms.

<sup>649</sup> See, for example, the comparative table provided by Van Cott of Latin American Constitutions and Indigenous Rights. Van Cott, *The Friendly Liquidation of the Past. The Politics of Diversity in Latin America* (n 542) 266-267.

Multicultural Constitutionalism was adopted in the context of the post-1978 ‘wave of democratization’, or the transition from authoritarian regimes to procedural democracy regimes<sup>650</sup> of a number of Latin American countries including Brazil, Argentina, Chile, Uruguay, Peru, Bolivia and Guatemala.<sup>651</sup> ‘Multicultural citizenship’ can be thought of as an attempt by the political elites to restore democratic legitimacy by expanding citizenship to racialized groups, particularly indigenous peoples.<sup>652</sup> This occurred in a period in which the economic crisis of the 1980s no longer permitted the state to meet the material demands of citizens.<sup>653</sup> In the case of Bolivia, as will be explained in Chapter 4, the economic crisis and neoliberal reforms also meant the loss of capacity of the corporatist state to maintain its influence over civil society organisations.<sup>654</sup> The transition to democracy also occurred as part of the change in the United States’ foreign policy toward the region from the Carter administration’s (1977-1981) support to dictatorships, to Reagan’s (1981-1989) promotion of democracy. Thus, in the name of liberal democracy, in the 1980s there was a strong political, economic and military involvement of the United States in Latin America in order to advance the former’s security and economic agenda and to ‘prevent’ communism.<sup>655</sup> In the United States, neoliberal ideology and multiculturalism became hegemonic in the Clinton years (1993-2001) and continued during the Bush administration (2001-2009).<sup>656</sup>

In Latin America, multiculturalist policies were implemented at the same time as the second generation of neoliberal policies. Hence, multiculturalist policies may be related to the ‘good governance’ policies promoted by international financial organisations to

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<sup>650</sup> Castoriadis makes a differentiation between the procedural democracy (free and fair elections) that is often emphasized by neo-institutionalist research of Latin America and a substantial democracy, which would include actual political participation and a strong citizenship. Cornelius Castoriadis, *La montée de l'insignifiance. Les carrefours du labyrinthe IV* (Seuil 1996).

<sup>651</sup> Scott P. Mainwaring, ‘Transitions to Democracy and Democratic Consolidation: Theoretical and Comparative Issues’ in Scott P. Mainwaring, Guillermo O'Donnell and J. Samuel Valenzuela (eds), *Issues in Democratic Consolidation The New South American Democracies in Comparative Perspective* (University of Notre Dame Press 1992) 294.

<sup>652</sup> Hooker (n 54) 286, 289, 290; Van Cott, *The Friendly Liquidation of the Past. The Politics of Diversity in Latin America* (n 542) 1-3; For Brown, (multicultural) toleration is a solution to the problem of legitimacy in the face of ‘weakening nation-state sovereignty and thinning notions of nation-state citizenship’. Brown, *Regulating Aversion: Tolerance in the Age of identity and Empire* (n 52) 95.

<sup>653</sup> Hooker (n 54) 290.

<sup>654</sup> Pajuelo Teves (n 641) 59.

<sup>655</sup> Scott P. Mainwaring and Aníbal Pérez Liñán, ‘Latin American Democratization since 1978: Democratic Transitions, Breakdowns and Erosions’ in Frances Hagopian and Scott P. Mainwaring (eds), *The Third Wave of Democratization in Latin America: Advances and Setbacks* (Cambridge University Press 2005) 39-43; Thomas Carothers, *In the Name of Democracy. U.S. Policy Toward Latin America in the Reagan Years* (University of California Press 1991), 1-12.

<sup>656</sup> Melamed, *Represent and Destroy. Rationalizing Violence in the New Racial Capitalism* (n 77) 147-148.

advance the ‘post-Washington Consensus’, or the revised version of the neoliberal recipe of economic and political policies for Latin America.<sup>657</sup> The ‘lost decade’ in Latin America (the 1980s) was, according the International Monetary Fund (IMF), the result of not going far enough and deep enough with neoliberal reforms.<sup>658</sup> This financial organisation deemed that this occurred partly because the economic reforms were executed in the context of poor governance in Latin America, corruption and weak institutions.<sup>659</sup> Thus, in 1990s neo-institutionalist policies accompanied the traditional list of neoliberal economic reforms.<sup>660</sup> Their purpose was to strengthen state institutions in order to tackle corruption and inefficiency, as well as to create ‘social safety nets’ and promote targeted poverty reduction.<sup>661</sup> Following the pattern of the rest of the region, in Bolivia the ‘cultural opening’ occurred in the midst of the continuation of the privatization of national industries and efforts to restructure the judiciary, the health system and the pensions system.<sup>662</sup>

Accordingly, some authors consider that the neoliberalism and multiculturalism did not only happen to coincide chronologically, but multiculturalism became a neoliberal practice of governance that promoted the self-regulation of civil society.<sup>663</sup> This includes indigenous communities, which, as will be further explained below, state agents would actively seek to re-constitute and re-empower, although in the state’s own

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<sup>657</sup> According to Nolte and Schilling Vacaflor, the reforms related to ‘good governance’ can be grouped in four clusters: (1) constitutional reforms for the implementation of the neoliberal economic model, (2) decentralization of state functions and power (3) the reform of the judiciary and the creation of institutions of horizontal accountability, (4) and the promotion of political participation through changes in the electoral system. Detlef Nolte and Almut Schilling-Vacaflor, ‘Introduction: The Times they are Changin’: Constitutional Transformations in Latin America since the 1990s’ in Detlef Nolte and Almut Schilling-Vacaflor (eds), *New Constitutionalism in Latin America Promises and Practices* (Kindle Edition, Kindle edn, Ashgate 2012), loc 640, 650.

<sup>658</sup> Dani Rodrik, ‘Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank’s Economic Growth in the 1990s: Learning from a Decade of Reform’ (2006) XLIV Journal of Economic Literature 973 (n) 977. Rodrik mentions that this position was unique of the IMF, while the World Bank took a more ‘humble’ approach to the shortcomings of the reforms. Ibid, 974-977.

<sup>659</sup> Ibid, 977-978. For a critique of the neoliberal reforms in Latin America, see Joseph E. Stiglitz, ‘El rumbo de las reformas. Hacia una nueva agenda para América Latina’ (2003) 80 Revista de la CEPAL (ECLAC Journal) 7.

<sup>660</sup> Neo-institutional reforms became an essential component of the revised version of the Washington Consensus in the 1990s, after the neoliberal reforms did not give the expected results. In relation to the ‘New Consensus’ or the ‘Post-Washington Consensus’, Rodrik (n 605).

<sup>661</sup> Ibid, 977-979.

<sup>662</sup> Bret Gustafson, ‘The Paradoxes of Liberal Indigenism: Indigenous Movements, State Processes and Intercultural Reform in Bolivia’ in David Maybury-Lewis (ed), *Politics of Ethnicity: Indigenous Peoples in Latin American States* (Harvard University Press 2002) 175.

<sup>663</sup> Muehlmann (n 385) 469.



image.<sup>664</sup> Neoliberal rule would seek to shape indigenous communities and individuals as agents and citizens capable of taking control of their own risk—as opposed to the state taking care of them as vulnerable groups.<sup>665</sup> Neoliberalism in this sense operates with a view of society as a source of energies (and not of needs) generated by free and responsible individuals who engage in autonomous action and association, which is to be facilitated and cultivated by the state.<sup>666</sup>

Neoliberalism is therefore treated here at two levels. First, it is conceived as a set of economic policies consisting mainly of deregulation, liberalization and privatization.<sup>667</sup> Neoliberal economic reforms, also known as orthodox or monetarist measures, are economic policies based on classic and neo-classic theories of economy and society. In Latin America, they became the preferred method of dealing with inflation and fiscal deficit after the failure in 1985-1986 in the implementation of heterodox or structuralist policies (based on Keynesian, post-Keynesian or Marxist approaches to inflation and the role of the state) in a number of countries like Argentina, Brazil and Peru. They were also strongly pushed by the IMF and the World Bank in exchange for credit directly after the debt crisis of 1981-1982.<sup>668</sup>

However, what is to be emphasized in this section is the dimension of neoliberalism in its capacity of subject formation, or the ‘cultural project’ of neoliberalism.<sup>669</sup> Dean explains in this regard that the subject of neoliberalism ‘is a subject whose freedom is conditioned to subjection’. In other words, in order to exercise freedom (in this case, rights) the subject must be shaped and guided ‘into one capable of responsibly exercising this freedom’<sup>670</sup>—a line of thinking similar to authoritarian liberalism. Thus, the free subject functions as a technical instrument to achieve governmental purposes

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<sup>664</sup> Hale, ‘Does Multiculturalism Menace? Governance, Cultural Rights and the Politics of Identity in Guatemala’ (n 35) 496.

<sup>665</sup> Dean (n 387) 196.

<sup>666</sup> Ibid, 178.

<sup>667</sup> For example, Stiglitz (n 659).

<sup>668</sup> For example, Victor Bulmer-Thomas, *Life After Debt: The New Economic Trajectory in Latin America* (Institute of Latin American Studies of the University of London 1992); Eva Paus, ‘Adjustment and Development in Latin America: The Failure of Peruvian Heterodoxy, 1985-90’ (1991) 19 *World Development* 411; Van Cott, ‘Multiculturalism v. Neoliberalism in Latin America’ (n 644) loc 3495-3526; Ute Pieper and Lance Taylor, ‘The Revival of the Liberal Creed: the IMF, the World Bank, and Inequality in a Globalized Economy’ in Dean Baker, Gerald Epstein and Robert Pollin (eds), *Globalization and Progressive Economic Policy* (Cambridge University Press 1998).

<sup>669</sup> Hale, ‘Does Multiculturalism Menace? Governance, Cultural Rights and the Politics of Identity in Guatemala’ (n 35) 493-496.

<sup>670</sup> Dean (n 387) 192.

and objectives.<sup>671</sup> Dean further explains that the aim of this cultural reformation is the reconfiguration of the social to take the form of markets (which are meant to embody the rules of conduct that guarantee freedom).<sup>672</sup>

Following the theoretical framework presented in previous chapters, as well as anthropological literature on 'neoliberal multiculturalism' in Latin America, the following sub-sections will explain how in Latin America the shift to multiculturalist policies was pushed from below and co-opted from above. Hence, the shift was the result of local and international indigenous mobilizations that altered the balance of power<sup>673</sup> and pushed the political elites to change legal discourse from one of *mestizaje* to one of multiculturalist toleration. In Latin America, the move towards multiculturalism was also catalysed by the neoliberal economic policies' threat to indigenous peoples' legal and political autonomy and livelihoods, which forced them to mobilize.<sup>674</sup>

Using Albó's terminology, I will refer to this as the mobilization of the 'rebel Indian' (*indio alzado*).<sup>675</sup> These are the mobilization of indigenous organisations and communities under a paradigm of an indigenous political subject who is at the centre of her own liberation process from colonialist and capitalist forms of exploitation. However, as mentioned in the introduction to this chapter, once integrated into state official discourse and legal framework, multiculturalism in Latin America has functioned as a mechanism of neoliberal governmentality. As such, it contributes to defusing radical demands and to the formation of the 'permitted Indian' (*indio permitido*) that will govern herself 'in accordance with the logic of globalized capitalism'.<sup>676</sup> It also produces her other, the 'rebel Indian', who is perceived as creating conflict and chaos.<sup>677</sup> The rebel Indian therefore is not entitled to collective rights, toleration or the label of authentic.<sup>678</sup> The idea is not to romanticise the 'rebel Indian' or to place indigenous movements beyond critique, but to challenge the regime of

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<sup>671</sup> Ibid, 181.

<sup>672</sup> Ibid, 200-201.

<sup>673</sup> Albó, 'Hacia el poder indígena en Ecuador, Perú y Bolivia' (n 341) 153; Hage (n 52) 101.

<sup>674</sup> Alison Brysk and Carol Wise, 'Liberalization and Ethnic Conflict in Latin America' (1997) 32 *Studies of Comparative International Development* 76, 78-79. They look at the cases of Bolivia, Mexico and Peru; Rachel Sieder (ed) *Multiculturalism in Latin America. Indigenous Rights, Diversity and Democracy* (Palgrave MacMillan 2002) (n) 3-4.

<sup>675</sup> Albó, *Movimientos y poder indígena en Bolivia, Ecuador y Perú* (n 57) 26-27.

<sup>676</sup> ibid Hale, 'Rethinking Indigenous Politics in the Era of the "Indio Permitido"' (n 246) 17. Hale attributes the expression to the Bolivian sociologist Silvia Rivera Cusicanqui.

<sup>677</sup> Hale, 'Rethinking Indigenous Politics in the Era of the "Indio Permitido"' (n 246) 19-20.

<sup>678</sup> In a similar sense, ibid, 20.

toleration that produces the dichotomy permitted-unpermitted Indians in the first place.<sup>679</sup> In this regard, multiculturalism functioned as a practice of inclusion (thereby managing the opening of the national space to indigenous peoples in a way that favoured the elites) in the historical juncture of the transition to democracy, the adoption of ‘good governance policies’ (such as decentralization), and the rise of identity politics in Latin America.<sup>680</sup>

Multicultural Constitutionalism extends to domestic legislation the representation of racialized groups as culturally bound that is present in IHRL. The notion of the culturally bound, as explained in Chapter 1, reproduces the logic of civilization and barbarism of the colony—a logic that, as explained in the previous section, has also continued to be present in post-independence Latin American countries through its different economic, racial and legal regimes. In this regard, ‘neoliberal multiculturalism’ can be considered not only part of neoliberalism’s cultural project but also constitutive of its racial project.<sup>681</sup> In her analysis of racial formations in the United States, Melamed argues that ‘neoliberal multiculturalism’ constitutes a separate racial project<sup>682</sup> from racial liberalism and white supremacy,<sup>683</sup> because new configurations of capitalism incorporate new forms of racial domination.<sup>684</sup> ‘Neoliberal multiculturalism’ as a racial project is characterized firstly by the appropriation on behalf of the state of anti-racist discourse, in a way that obfuscates the connection between race and

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<sup>679</sup> In a similar sense, *ibid.*, 20.

<sup>680</sup> *Ibid.*, 17. Sieder also attributes the multiculturalist shift in the region to the democratization process, the rise of indigenous identity movements in the 1980s and 1990s, the changes in IHRL, and to neoliberal reforms that pushed indigenous peoples to mobilize. See Rachel Sieder, ‘Introduction’ in Rachel Sieder (ed), *Multiculturalism in Latin America Indigenous Rights, Diversity and Democracy* (Palgrave Macmillan 2002) 1-3.

<sup>681</sup> Melamed, ‘From Racial Liberalism to Neoliberal Multiculturalism’ (n 56) 2-6.

<sup>682</sup> Melamed utilizes the term ‘racial formation’. However, when taking into account the theory of racial formation of Omi and Winant, I consider that the term ‘racial project’ is more accurate to refer to neoliberal multiculturalism. Racial formation can be defined as ‘socio-historical process by which racial identities are created, lived out, transformed and destroyed’ Omi and Winant (n 55) 108. Racial project however is not only a process of construction of racial identities but ‘an effort to organize and distribute resources (economic, political, cultural) along particular racial lines’ (*ibid.*, 124). This is precisely what multiculturalism does, and it is evident in the judicial treatment of indigenous collective rights under a multiculturalist approach.

<sup>683</sup> White supremacy and racial liberalism are defined in Melamed as capitalist racial regimes. White supremacy was the main form of racial domination in the United States until the Second World War and it justified slavery and segregation. Racial liberalism, which became the US State official discourse since the 1950s, recognized racial inequality as a problem. It also linked anti-racist discourse with US nationalism thus contributing to produce the ‘white American subject’ as a privileged racial formation on a global level. Melamed, ‘From Racial Liberalism to Neoliberal Multiculturalism’ (n 56) 2-6.

<sup>684</sup> *Ibid.*, 11-12.

inequality or between racial formations and capitalism.<sup>685</sup> In this sense, neoliberal multiculturalism not only replaces biological conceptions of race with a normative cultural model (in the way racial liberalism did in the United States and *mestizaje* did in Latin America), but it displaces race altogether.<sup>686</sup> In other words, the ‘merely cultural’ displaces racial reference by detaching itself from racial conflict and anti-racist struggle.<sup>687</sup>

Second, neoliberal multiculturalism produces a two-tier citizenship that is different from authoritarian liberalism in that it is legitimated by ‘new systems of ascribing privilege and stigma and laying these over previous racial logics’.<sup>688</sup> In this sense, the ethnicization of race explained in Chapter 1 contributes to maintain racial hierarchies but presents its effects (social and income inequality) as a result of individual choice and trajectory.<sup>689</sup> On the other hand, neoliberal multiculturalism incorporates other categories used to represent those who are cut off from capitalist wealth (such as class) to ‘produce lesser personhoods’ and therefore subjects that will become outsiders of liberal subjectivity.<sup>690</sup> In other words, in neoliberal multiculturalism there is a combination of pre-existing ‘ethno-racial schemes’ with new ways of governing that value populations according to market calculations.<sup>691</sup> Thus, building on what was mentioned in Chapter 1 concerning the self-determined subject and the culturally bound subject of human rights, multiculturalism as a racial project produces two types of subjects. The first is the ‘global multicultural citizens’, who are the beneficiaries of neoliberalism and who are represented as reasonable, law abiding and open-minded. Their other is the culturally bound, who are perceived as ‘mono-cultural’, deviant, inflexible, criminal, irrational, patriarchal and regressive.<sup>692</sup>

### **3.3.1. The ‘Rebel Indian’: Indigenous Movements and Multiculturalism**

Engle explains that since the late 1980s, pan-indigenous identity movements as well as local movements changed their discourse for the pursuance of autonomy, distributive

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<sup>685</sup> Ibid, 14.

<sup>686</sup> Ibid, 19.

<sup>687</sup> Ibid, 19.

<sup>688</sup> Melamed, *Represent and Destroy. Rationalizing Violence in the New Racial Capitalism* (n 77) 138; Melamed, ‘From Racial Liberalism to Neoliberal Multiculturalism’ (n 56) 14.

<sup>689</sup> Melamed, *Represent and Destroy. Rationalizing Violence in the New Racial Capitalism* (n 77) 139.

<sup>690</sup> Ibid, 151.

<sup>691</sup> Ibid, 151.

<sup>692</sup> Ibid, 137-138, 152.

justice and recognition.<sup>693</sup> Consequently, the language of self-determination and decolonization became secondary to the articulation of demands in the language of human rights and recognition.<sup>694</sup> This change in strategy is related to the mutation mentioned in Chapter 1 of self-determination into a human right and therefore into a domestic matter for states.<sup>695</sup> In addition, the privileging of indigenous rights discourse was propitiated by the adoption of the ILO Convention 169 in 1989.<sup>696</sup> In this regard, Moyn argues that the relation between decolonization and self-determination movements on the one hand, and human rights discourse on the other has been one of ‘displacement’ rather than ‘succession and fulfilment’.<sup>697</sup>

At the time of its signing, the ILO Convention 169 was criticised by pan-indigenous organisations because of the exclusion of indigenous movements from its drafting, and because of the refusal of the states to include the right to self-determination.<sup>698</sup> Nonetheless, it later became an important tool for indigenous contestation.<sup>699</sup> However, as explained in Chapter 2, indigenous demands would need to be expressed in terms of the right to culture, even when referring to demands for land, territory, political autonomy or the right to use their own institutions.<sup>700</sup> Furthermore, the stretching of the right to culture by IHRL organs to the protection of a number of collective rights has prompted indigenous and peasant communities to refer to themselves as ‘indigenous’.<sup>701</sup>

In this connection, anthropological research in Latin America indicates that human rights and indigenous rights discourses are not only prevalent in the international pan-indigenous organisations. In some local contexts, these discourses are overtaking previous ways of framing and understanding indigenous resistance and social struggle. Thus, communities and local movements that for long had not self-identified as indigenous (to a great extent because of the assimilationist policies in Latin America since the post-independence period) are reasserting their local identities.<sup>702</sup> In this

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<sup>693</sup> Engle, *The Elusive Promise of Indigenous Development* (n 3) 17-44.

<sup>694</sup> Ibid, 100-102.

<sup>695</sup> Ibid; Engle, ‘On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights’ (n 173) 151; Moyn (n 53) loc 505.

<sup>696</sup> Engle, *The Elusive Promise of Indigenous Development* (n 3) 101.

<sup>697</sup> Moyn (n 53) 1354.

<sup>698</sup> Engle, *The Elusive Promise of Indigenous Development* (n 3) 108-109.

<sup>699</sup> Ibid, 108.

<sup>700</sup> Ibid, 101.

<sup>701</sup> Antkowiak (n 442) 136.

<sup>702</sup> Speed (n 35) 207; Shanon Speed and Xochitl Leyva Solano, ‘Introduction’ in Pedro Pitarch, Shanon Speed and Xochitl Leyva Solano (eds), *Human Rights in the Maya Region Global Politics, Cultural*

regard, it should be acknowledged that human rights discourse is changing the understanding that social movements and indigenous communities have of their laws, social relations, identities and even space and time. At the same time, however, indigenous actors have become sources of human rights norms and interpretations, assimilating, adapting and vernacularizing human rights discourse to their own circumstance and agendas.<sup>703</sup>

The situation therefore is not just one of human rights discourse influencing indigenous struggle, but one of indigenous struggle opening spaces for toleration in IHRL and domestic legislation. In this respect, Niezen considers that indigenous movements and IHRL organs developed a symbiotic relation in which indigenous movements pushed for the advancement of indigenous rights beyond assimilationist models. At the same time, the opening of IHRL institutions created spaces for networking and led to the creation of a 'transnational indigenous peoples' movement' that has helped indigenous demands gain visibility and legitimacy in international fora.<sup>704</sup> Tilley defines this movement as follows,

[T]he global network of native peoples' movements and representatives – or sympathetic institutions, non-governmental organisations (NGOs) and scholars – which, through decades of international conferences, has formulated certain framing norms for indigenous politics, now expressed in in several international legal instruments.<sup>705</sup>

Pan-indigenous movements and the organisations that support them have influenced the formation of indigenous organisations throughout the Americas, their ways of struggle, and the way indigenous peoples are perceived worldwide.<sup>706</sup> They have advanced ideas such as 'sacred connection to land' or popularised phrases such as 'since time

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*Contentions and Moral Engagements* (Duke University Press 2008) 4-7; Mark Goodale, *Dilemmas of Modernity. Bolivian Encounters with Law and Liberalism*. (Kindle Edition, Stanford University Press 2009) loc 1540; Rosalva Aída Hernández Castillo, 'Indigenous Law and Identity Politics in Mexico: Indigenous Men's and Women's Struggles for a Multicultural Nation' (2002) 25 *Political and Legal Anthropology Review* 90, 95-97.

<sup>703</sup> Speed and Leyva Solano, 'Introduction' (n 702) 10-13; Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (n 7) 134-138; Matthew Nelson, 'Persistent Legal Pluralism and the Challenge of Universal Human Rights' (2010) 2 *Journal of Human Rights Practice* 401, 401-404.

<sup>704</sup> Niezen (n 88) xvi, 31-43.

<sup>705</sup> Tilley (n 86) 526.

<sup>706</sup> Charles R. Hale, 'Between Che Guevara and the Pachamama: Mestizos, Indians and Identity Politics in the Anti-Quincentenary Campaign' (1994) 14 *Critique of Anthropology* 9, 14; Engle, *The Elusive Promise of Indigenous Development* (n 3) 2-3.

immemorial', 'tradition' and 'ancestral lands'. These are notions that, as observed in Chapter 2, have now been incorporated to indigenous rights instruments, the discourse of local and global indigenous organisations,<sup>707</sup> and the official discourse of governments, IHRL organs and the Inter-American Court.<sup>708</sup>

In Latin America, the use of identity politics and indigenous collective rights discourse by local and pan-indigenous organisations reached new heights in the 1980s and particularly the 1990s. It occurred after the aforementioned ratification of the ILO Convention 169 in the 1990s by several Latin American countries. It also took place in the context of the celebration in 1992 of the 'five hundred years of resistance', or the anti-quincentenaries' campaign of the arrival of Columbus in the Americas in 1492.<sup>709</sup> The celebration of five hundred years of European colonization ('Encounter of Two Worlds') was promoted separately by the United States and Spain.<sup>710</sup> It carried with it a message of forced assimilation for indigenous peoples, and of the predominance and superiority of the culture of the conquerors, which was associated with science, progress and modernization.<sup>711</sup> Consequently, the choice for indigenous communities was between embracing Hispanic culture or remaining at the margins of national life.<sup>712</sup>

With the rise of 'new social movements' around the world, as well as the reduction of spaces for the left in Latin America, the indigenous movement shared spaces with the 'popular' movement, composed by indigenous and non-indigenous individuals and organisations that gave priority to a discourse of class and of gaining control of the state apparatus.<sup>713</sup> In contrast, Hale's ethnographic work on the pan-indigenous Quetzaltenango Conference (Xela Conference) held in Guatemala in 1991 reveals that indigenous movements emphasized anti-colonial struggle and autonomy from the state (which they perceived as a source of violence and repression), as well as their spirituality

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<sup>707</sup> In a similar sense, see Charles R. Hale, 'Cultural Politics of Identity in Latin America' 26 *Annual Review of Anthropology* 567, 578.

<sup>708</sup> Tilley (n 86) 528.

<sup>709</sup> Albó, 'Hacia el poder indígena en Ecuador, Perú y Bolivia' (n 394) 153; Hale, 'Between Che Guevara and the Pachamama: Mestizos, Indians and Identity Politics in the Anti-Quincentenary Campaign'; Katinka Weber, 'Chiquitano and the Multiple Meanings of Being Indigenous in Bolivia' (2013) 32 *Bulletin of Latin American Research* 194, 196.

<sup>710</sup> Hale, 'Between Che Guevara and the Pachamama: Mestizos, Indians and Identity Politics in the Anti-Quincentenary Campaign' (n 653) 21-22.

<sup>711</sup> *Ibid.*, 21-22.

<sup>712</sup> *Ibid.*

<sup>713</sup> *Ibid.*, 23-27.

and their own forms of political organisation and decision-making.<sup>714</sup> Despite the conflicts between the popular and the indigenous branches, the transnational indigenous-popular movement in the 1990s contributed to the creation of a heterogeneous social subject of revolutionary politics that included in addition to rural and urban indigenous, women, black and non-Indian popular sectors<sup>715</sup>—a heterogeneous subject that, as Tilley points out, was to be supported (and partly shaped) by human rights advocacy, environmentalist NGOs and international financial organisations and donors.<sup>716</sup>

Some academics critique the use of identity politics<sup>717</sup> by individuals and organisations because of the reification of identity and the ‘creation of discrete categories to the exclusion of more nuanced, hybrid and context-dependent accounts of identity.’<sup>718</sup> They argue that when identity markers such as ethnicity and race are utilised as ‘fundamental organizing principles from which to position theoretical perspectives and political strategies for changing relations of powers’, contradictions and internal tensions in the discourse seem inevitable.<sup>719</sup> Indeed, politics of identity among indigenous movements are not bereft of the problems of ‘ethnic absolutism’ and the consequent internal homogenization of both indigenous and white-mestizos.<sup>720</sup>

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<sup>714</sup> Ibid, 17-22.

<sup>715</sup> Ibid, 21-24.

<sup>716</sup> Tilley (n 86) 526; in a similar sense, Hale, ‘Between Che Guevara and the Pachamama: Mestizos, Indians and Identity Politics in the Anti-Quincentenary Campaign’ (n 653) 25 in relation to the figure of Rigoberta Menchú; Niezen (n 88) 44-45.

<sup>717</sup> ‘Identity politics’ refers to ‘the premise that a unified subject ‘could “represent” (both “depict” and “speak for”) heterogeneous identities and social processes.’ Hale, ‘Cultural Politics of Identity in Latin America’ (n 654) 577 based on Hall, ‘New Ethnicities’ (n 34) The appeal to indigeneity has also been referred to as ‘politics of recognition’ referring to recognition in Hegelian terms. Nancy Fraser, ‘From Redistribution to Recognition? Dilemmas of Justice in a ‘Post-Socialist’ Age’ (1995) 212 *New Left Review* 68 (n) 82; Fraser, ‘Rethinking Recognition’ (n 306) 109-110. It has also been referred to as ‘cultural politics of difference’, or the critical examination of the ‘internal relations of difference within any given form of political initiative, the effort to unsettle all forms of essentialism, emphasizing the invention of tradition, the hybridity of cultures, and the multiplicity of identities’. Hale, ‘Cultural Politics of Identity in Latin America’ (n 654) 577-578. Finally, it has been referred to as ‘ethnic politics’ or the ‘politics of ethnicity’. See for example, David Maybury-Lewis (ed) *The Politics of Ethnicity: Indigenous Peoples in Latin American States* (David Rockefeller Center on Latin American Studies, Harvard University 2002).

<sup>718</sup> The wording is of Anker, ‘Law, Culture, Fact: Indigenous Rights and the Problem of Recognition’ 2. She is referring however to the reification of identity in courts. For the critique of the reification of identity in politics of recognition see Fraser, ‘Rethinking Recognition’ (n 306) 112-113.

<sup>719</sup> The quote is from Carolyn D’Cruz, *Identity Politics in Deconstruction. Calculating with the Incalculable* (Ashgate 2008) 2. Tilley holds a similar position when she states that ‘all ethnic politics always entail some codification or standardisation of the identity, to make sense of solidarity, to define boundaries and to justify political claims’. Tilley (n 86) 546.

<sup>720</sup> Hale, ‘Between Che Guevara and the Pachamama: Mestizos, Indians and Identity Politics in the Anti-Quincentenary Campaign’ (n 653) 26-31. Hale takes the term ‘ethnic absolutism’ from Paul Gilroy, *Ain’t*



I see the use of essentialist categories by indigenous organisations from two perspectives. The first has to do with the concept introduced in Chapter 1 of ‘racial resistance’<sup>721</sup> and the consequent appropriation of colonial categories such as ‘indigenous’ and ‘black’ by identity movements in order to highlight the continuation of colonial racial hierarchies as well as affirm their humanity and agency. As will be further developed in Chapter 4, the Bolivian Andean cultural and political movement Katarism confronted since the 1970s the ideology of *mestizaje* evidencing that racial discrimination cannot be properly addressed when annulling race and indigeneity from official discourse.<sup>722</sup> As for the affirmation of humanity, in her interpretation of Fanon, Cornell explains that in the ‘colonial situation’, black subjectivity is denied its existence by the colonial other.<sup>723</sup> Consequently, for the black person to assert herself as a human being, there has to be an ‘aesthetic and ethical rebellion’ against the relegation of blackness to that which is not human,<sup>724</sup> and movements like ‘*négritude*’ are able to accomplish this task. This same idea is present in the Indianism of the Bolivian thinker Fausto Reinaga (1906-1994). For Reinaga, the Indian is not a peasant or a proletarian; he is an Indian. Therefore, the Indian must be the leading figure of her own liberation process from slavery and subjugation.<sup>725</sup>

A second perspective is to see in the privileging of the use of indigenous collective rights and identity politics by indigenous organisations an act of ‘strategic essentialism’,<sup>726</sup> or the instrumental use of specific representations of indigeneity (the ecological native) for the purpose of making both redistributive and recognition

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*no Black in the Union Jack* (Hutchinson 1987). Hale explains that Gilroy is referring to the essentialization of race by middle-class blacks.

<sup>721</sup> Omi and Winant (n 55) 130.

<sup>722</sup> A similar point is made by Mills (n 55) 103.

<sup>723</sup> Drucilla Cornell, ‘Fanon Today’ in Costas Douzinas and Conor Gearty (eds), *The Meanings of Rights The Philosophy and Social Theory of Human Rights* (Kindle edn, Cambridge University Press 2014) 122.

<sup>724</sup> Ibid, 122.

<sup>725</sup> Fabiola Escárzaga, ‘Comunidad indígena y revolución en Bolivia: el pensamiento indianista-katarista de Fausto Reinaga y Felipe Quispe’ (2012) 37 *Política y Cultura* 185, 192.

<sup>726</sup> Spivak originally coined the term in 1985. Gayatri Spivak, *The Post-Colonial Critique: Interviews, Strategies, Dialogues* (Sarah Harasym ed, Routledge 1990). For critical positions in relation to strategic essentialism see D’Cruz, who considers that granting that articulations of an essence will vary in meaning depending on whether they are connected to structures of domination or resistance, still they will carry the problems of establishing a regime of authenticity that obscures the differences between individuals and groups under that identity marker. Ibid, 18-19. Hale questions the term altogether and considers that instead of focusing on the dichotomy between essentialism and social constructivism, it is worth focusing who is utilizing essentialism, how it is deployed, and where its effects are concentrated. I agree with his position. Hale, ‘Cultural Politics of Identity in Latin America’ (n 654) 578.

demands.<sup>727</sup> In this sense, Albó considers that changes in name (from peasant to indigenous, for example) do not necessarily reflect a change of identity but a change of strategy for obtaining certain political objectives and even survival<sup>728</sup> (in the face of state and elites' genocidal policies). Thus, this change in strategy is a response to a change in circumstances, particularly the degree of toleration displayed by the state and the elites towards indigenous groups.<sup>729</sup> In the neoliberal multiculturalist context, the shift towards self-identification as indigenous has to do with the availability of collective rights, legitimacy and visibility, as well as financial resources and legal and administrative support from official donors, international financial organisations and NGOs for those who identify themselves as indigenous.<sup>730</sup>

Herrera Sarmiento gives an example of strategic use in his analysis of the revival of the Tacana identity among peasant communities of the lowlands of Bolivia dedicated to collecting Brazilian nuts and rubber.<sup>731</sup> These communities are descendants of displaced indigenous peoples who were utilized as forced labour during the rubber boom in the late 19<sup>th</sup> century.<sup>732</sup> They were prompted by a local pan-indigenous organisation, CIRABO (Indigenous Central of the Amazon Region of Bolivia),<sup>733</sup> to self-identify as indigenous in order to gain land title under the Bolivian agrarian reform law of 1994 that recognized indigenous territories. Initially they were not willing to do so because of the pejorative connotation of the word 'indigenous' as savage (a conception that is not uncommon among indigenous sectors in Bolivia, more so before the multicultural turn<sup>734</sup>), and also because some individuals were not really sure if they were of Tacana

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<sup>727</sup> A similar position is held by Engle, *The Elusive Promise of Indigenous Development* (n 3) 9-10.

<sup>728</sup> Albó, 'Hacia el poder indígena en Ecuador, Perú y Bolivia' (n 394) 158-159.

<sup>729</sup> Ibid 158-159.

<sup>730</sup> Ibid; Robert Andolina, Sarah Radcliffe and Nina Laurie, 'Development and Culture: Transnational Identity Making in Bolivia' (2005) 24 *Political Geography* 678.

<sup>731</sup> Enrique Herrera Sarmiento, 'Derechos territoriales indígenas en la Amazonía boliviana y la creación de lo "tacana"' in Valérie Robin Azevedo and Carmen Salazar Soler (eds), *El regreso de lo indígena Retos, problemas y perspectivas* (FEA; CBC; MASCIPO; LISST; Cooperación Regional Francesa para los Países Andinos 2009) 183.

<sup>732</sup> Ibid, 160-161.

<sup>733</sup> The CIRABO was composed by individuals of the chácobo, ejja, cavineño, yaminahua, machineri, pacahuara and araona peoples, who, according to Herrera Sarmiento, were trained in the 1970s by a missionary group ILV to become modern leaders for their communities. Ibid, 165-166.

<sup>734</sup> Weber (n 656) 198 citing Andrew Canessa, 'Todos Somos Indígenas: Towards a New Language of National Political Identity' (2006) 25 *Bulletin of Latin American Research* 241 in relation to the Aymara in Pucobaya who though indigenous were only Amazon people, and Grisaffi, '"We Are Originarios... We Just Aren't from Here": Coca Leaf and Identity Politics in the Chapare, Bolivia' (2010) 29 *Bulletin of Latin American Research* 425 in relation to the coca growers of the Chapare, who associated indigeneity with being backward, illiterate and dirty.

descent or not.<sup>735</sup> The process of ‘becoming Tacana’ was gradual, and the number of communities who decided to self-denominate as such increased from 17 to 31 between 1997 and 2005.<sup>736</sup> Once they decided to do so, they had to demonstrate to the state and indigenous organisations their possession of the land. But they also had to prove their authenticity by building a discourse about their common origin and the survival of the language, despite the relatively low percentage of speakers. They also had to respond to the questioning of their authentic Tacana ethnicity by Brazilian nut collector companies who were against the creation of indigenous territories as it threatened their economic interests and their political hegemony over those lands.<sup>737</sup> Ultimately, to mobilize as indigenous communities and fight to be legally recognised as such allowed them to become political actors, instead of the invisible forced labour of the 19<sup>th</sup> century and the invisible poor peasant communities of the 20<sup>th</sup> century.<sup>738</sup> It also allowed them to have access to land, even if it had to be communal property and not individual title as they had expected.<sup>739</sup>

After interviewing a renowned Aymara intellectual,<sup>740</sup> I also understood that the critique of the discourse of some indigenous movements such as Aymara restorationism as ‘folklorism’ or ‘*pachamamic*’<sup>741</sup> (alluding to the appeals to the Pachamama or Mother Earth in Andean discourse) or even as reversed-racism<sup>742</sup> is fairly misplaced. These discourses are not necessarily describing what *is* when they resort to essentialist definitions or idealised representations, but what *could be* or even *should be*. Hence, they are a normative proposal for ‘*buen vivir*’ (living well)<sup>743</sup>, ‘sacred connection to land’, and ‘harmonious and restorative legal orders’ coming from pan-indigenous movements and indigenous intellectuals for the building of pluri-ethnic nations.

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<sup>735</sup> Herrera Sarmiento (n 678) 174.

<sup>736</sup> Ibid.

<sup>737</sup> Ibid, 177-179.

<sup>738</sup> Ibid, 183.

<sup>739</sup> Ibid, 181.

<sup>740</sup> Aymara intellectual. La Paz, 15 May 2014.

<sup>741</sup> García Linera (n 582) 7; Pablo Stefanoni, ‘Indianismo y pachamamismo’ *Rebelión*, 4 May 2010 <<http://www.rebelion.org/noticia.php?id=105233>> accessed 10 December 2014; Pablo Stefanoni, ‘¿Adónde nos lleva el pachamamismo?’ *Rebelión*, 28 April 2010 <<http://www.rebelion.org/noticia.php?id=104803>> accessed 10 December 2014; and in the context of the Constituent Assembly Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48)

<sup>742</sup> Verushka Alvizuri, ‘Mecanismos de cristalización aymara en Bolivia’ in Valérie Robin Azevedo and Carmen Salazar Soler (eds), *El regreso de lo indígena Retos, problemas y perspectivas* (FEA; CBC; MASCIPO; LISST; Cooperación Regional Francesa para los Países Andinos 2009).

<sup>743</sup> This is an Andean paradigm that was incorporated to the Constitution to Bolivia of 2009. I will refer to it further in the following chapters.

In this discourse the indigenous subject is worthy and not worthless, as in the nation-building projects of the liberal and social constitutional periods. Moreover, the indigenous subject is an agent and not a victim that must be protected by the white dominant group, as in multiculturalism. Some of these discourses are based on an utopia set in the past, such as Katarism (instead of an utopian future, like Marxism), but still refer to an ideal, a political project based on the positive value of indigenous cultures. Therefore, pachamamism can be a racial resistance discourse that has the potential to construct a revolutionary indigenous subject. Pachamamism can also coincide with the IHRL representation of the ecological native—and perhaps as part of the transnational indigenous movement ‘pachamamics’ contributed to create the image of the ecological native in the first place.<sup>744</sup>

Finally, for some anthropologists, to refer to spiritual beings or Mother Nature or, in the case of Indianists, to explain Indian culture as an alternative ‘civilizational matrix’ to that of the colonizer<sup>745</sup> may respond to forms of doing politics that allude to different subjectivities, sensitivities, epistemologies and forms of struggle to the prevailing modern liberal or Marxist discourses.<sup>746</sup> Some leftist sectors in Latin America do not agree with ‘pachamamics’ because the latter reject mainstream notions of development as economic growth, consumerism and urbanization. In contrast, some of the ‘new left’ governments work with these mainstream ideas of development and progress. In addition, ‘pachamamics’ emphasize indigenous autonomy and indigenous forms of organisation over the strengthening of the state, while, as will be further discussed in the following chapters, popular organisations and the current Bolivian government seek to strengthen the state and enforce a monistic legal approach. Pachamamics therefore evidence the contradictions in the ‘new left’ governments between their ‘pro-indigenous’ policies and the continuation of an extractive economy that displaces

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<sup>744</sup> It is worth clarifying that I am not stating that the normative nature of these discourses saves them from the previously mentioned issues of ethnic absolutism and homogenization that accompany identity politics. What I wish to emphasise is that ‘pachamamism’ can be racial resistance discourse, and should not be discarded *at portas* on account of its ideal of indigeneity, or worse, as discussed below, on account of its lack of authenticity.

<sup>745</sup> For example, Simón Yampara Huarachi, ‘Los kataristas en el proceso político boliviano’ in Janet Mamani Vargas and Tatiana Ramos Borda (eds), *Historia, coyuntura y descolonización Katarismo e indianismo en el proceso político del MAS en Bolivia* (Fondo Editorial Pukara 2010) 185-192.

<sup>746</sup> For example, Marisol de la Cadena, ‘Indigenous Cosmopolitics in the Andes: Conceptual Reflections Beyond “Politics”’ (2010) 25 *Cultural Anthropology* 334; similarly Arturo Escobar, ‘¿"Pachamámicos" versus "Modérnicos"?’ *Política y Economía Miradas Latinoamericanas Heterodoxas* <<http://www.politicayeconomia.com>> accessed 10 December 2014.

indigenous communities from their lands and destroys the conditions of possibility of subsistence and peasant economies in the highlands and the lowlands.<sup>747</sup>

Importantly, pachamamics are criticised because some of their ideas are not only derived from community life experiences but draw from ideas of Latin American intellectuals or NGOs.<sup>748</sup> Therefore, their authenticity (and thus legitimacy) is called into question because their political proposals do not derive from ‘traditional knowledge’. Moreover, the influence of NGOs, intellectuals or even Evangelic Churches is seen as a symptom of acculturation of the pachamamic.<sup>749</sup> Whether or not these movements are co-opted by third parties, this line of critique on behalf of indigenous and non-indigenous sectors against the pachamamic reflect the use of a regime of authenticity to delegitimise certain proposals on account of their lack of authenticity (based on an essentialist idea of culture as a closed and static whole), and the fact that their enunciators are not truly indigenous (and therefore should not speak on behalf of those who are considered indigenous).

### 3.3.2. The ‘Permitted Indian’: Multiculturalism and Neoliberalism

Weber explains that the Chiquitano in Eastern Bolivia also started self-identifying as indigenous (normally they refer to themselves as Chiquitanos, peasants or community members, ‘*comunarios*’) in order to have access to (communal) land title.<sup>750</sup> They did so not without awareness and concern about the primitivist conceptions that are at the basis of indigenous rights discourse. They did so not without awareness and concern about having to resort to ‘government-sanctioned identities’ in order to have access to differentiated rights.<sup>751</sup> Therefore, an important variation of the second perspective (indigenous peoples use the noble savage representation in an instrumental way) is the argument that indigenous movements resort to ‘strategic essentialism’ partly because

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<sup>747</sup> In this sense, Eduardo Gudynas, ‘La Ecología Política del Giro Biocéntrico en la Nueva Constitución de Ecuador’ (2009) 32 *Revista de Estudios Sociales* 34 (for the case of Ecuador); Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 46, 556-560. Schavelzon also mentions that Stefanoni rejects the use of racial analysis order to understand Bolivian politics and covertly privileges the idea of *mestizaje* when considering indigenous movements not to be authentically indigenous but *mestizos*.

<sup>748</sup> For example, the critique that Stefanoni makes of these discourses as influenced by Mignolo, Walsh and NGOs in Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 556.

<sup>749</sup> The example of de-legitimizing identity politics because of the conversion of indigenous individuals to Evangelism is given in *ibid*, 556.

<sup>750</sup> Weber (n 656) 200.

<sup>751</sup> *Ibid*, 195.

they have to. They did so because in the neoliberal multiculturalist period, class discourse had little purchase or was even repressed, while anedulcorated version of racial discourse gave indigenous organisations legitimacy and access to resources. In sum, the way indigenous organisations and communities choose to mobilize and how they choose to self-identify is a result of a process of negotiation with forces outside the community and even outside the nation-state.

As discussed in previous chapters, under an IHRL framework, collective rights are currently accessible to racialized groups mainly through the cultural difference approach. Furthermore, under Multicultural Constitutionalism, cultural difference has become ‘the primary legal avenue to reverse political exclusion and racial discrimination in the region’.<sup>752</sup> Consequently, on an international and domestic level, both indigenous and black communities have to subordinate their struggles to the language of indigenous rights and noble savage representations. Sometimes they do so at the expense of the articulation of their demands in terms of racial discrimination and socio-economic exclusion.<sup>753</sup> As discussed in Chapter 2 in relation to the regime of authenticity, translating issues that affect indigenous peoples into the language of human rights also has the effect of depoliticizing these issues. For example, in the Amazon region of different South American countries including Bolivia, currently the indigenous collective right to prior consultation is having the unintended effect of defusing socio-environmental conflicts. It is relocating the debate about development models, natural resources and indigenous territories to the sterile debate over whether or not the state consulted indigenous populations about projects that would affect them (prior consultation does not mean prior consent).<sup>754</sup>

Albó considers (for the case of indigenous peoples) that from a strategic perspective, it was easier in the 1990s for hegemonic elites in Latin American countries with large indigenous populations to locate the conflicts in terms of culture and ethnicity (in their de-politicized version) instead of class, redistribution and anti-imperialism—a discussion that would have entailed attacking the neoliberal model and neoliberal

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<sup>752</sup> Hooker (n 54) 291.

<sup>753</sup> Ibid, 307-308.

<sup>754</sup> César Rodríguez Garavito, ‘From Belo Monte to Sarayaku. Extractive Capitalism, Indigenous Peoples and Human Rights in Social Minefields’ (International Colloquium Epistemologies of the South, Coimbra, 10-12 July 2014).

globalisation.<sup>755</sup> Thus, neoliberal multiculturalism draws on the image of the primitive Indian and her location in a pristine nature. At the same time, it casts a shadow over the deterioration of the living conditions of the indigenous peasantry, the dispossession of indigenous peoples in the Amazon, the increasing urbanization of indigenous populations, their integration to activities such as maquila, commerce, tourism and remittance services, and the role of neoliberal economic policies in this economic, cultural and spatial shift.<sup>756</sup> Neoliberal multiculturalism permits economic and political elites in Latin America to achieve this co-optation through the regimes of toleration and authenticity explained in Chapter 2. In the case of the regime of toleration, as Hale explains for the case of Guatemala, it permits elites (and state organs) to separate ‘appropriate’ demands for cultural rights from ‘inappropriate’ ones.<sup>757</sup> In the case of the regime of authenticity, it controls the way demands are legitimately articulated by policing what is culturally unique (and what can be protected by cultural rights) and what is a cultural pathology in indigenous cultures.<sup>758</sup>

Andolina, Radcliffe and Laurie arrive at similar conclusions when looking at the way ‘ethno-development’ was implemented in Bolivia.<sup>759</sup> Ethno-development is based on the idea that culture can be an asset (or more precisely, a source of social capital) that can be developed in ‘marketable projects’ like ethno-tourism. Consequently, culture is not seen as an obstacle to progress as in previous development models, but as an investment.<sup>760</sup> In the context of neoliberal multiculturalism in Latin America (and therefore when ‘ethnicity became a legitimate organising principle’) international organisations such as the European Union, the World Bank and the Inter-American Development Bank institutionalised ‘indigenous movements’ concepts and platforms’ in official agencies and policy frameworks.<sup>761</sup> Hence, in response to the ‘five-hundred years of resistance’ campaign of indigenous organisations, state and official development organisations took elements of indigenous discourse in order to strengthen their own governance agenda.<sup>762</sup> Thus, they processed indigenous demands for

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<sup>755</sup> Albó, ‘Hacia el poder indígena en Ecuador, Perú y Bolivia’ (n 394) 153; Rivera Cusicanqui (n 58).

<sup>756</sup> Hale, ‘Rethinking Indigenous Politics in the Era of the “Indio Permitido”’ (n 246) 20.

<sup>757</sup> Hale, ‘Does Multiculturalism Menace? Governance, Cultural Rights and the Politics of Identity in Guatemala’ (n 35) 507.

<sup>758</sup> Hale, ‘Neoliberal Multiculturalism: The Remaking of Cultural Rights and Racial Dominance in Central America’ (n 8) 20, 24 referring to the Maya in Guatemala.

<sup>759</sup> Andolina, Radcliffe and Laurie (n 677)

<sup>760</sup> Ibid, 690, 694, 695.

<sup>761</sup> Ibid, 681-682.

<sup>762</sup> Ibid, 681-682.

‘culturally appropriate government and development’ as policies for ‘governmentally and developmentally appropriate culture’.<sup>763</sup> ‘Governmentally appropriate culture’ is achieved by privileging certain forms of representation (as ecological natives) over other forms of identification (as peasants, for example) as well as certain discourses (human rights and ethnicity) over others (class, racial discrimination, and redistribution).<sup>764</sup> Thus, these institutions (as well as the Bolivian state at the time) operate under a regime of authenticity according to which only indigenous communities and organisations that utilise the human rights and ethnicity language are truly indigenous. In contrast, organisations such as the Bolivian Unitary Syndicalist Peasant Workers Confederation (CSUTCB), which (in some periods) has privileged class discourse, are not.<sup>765</sup>

Another example of ethno-development (and therefore of how domestic and international actors co-opt indigenous discourse and demands) is Tilley’s analysis of the implementation in El Salvador of the European Union’s ‘Programme of Support for the Indigenous Peoples of Central America’ (€7,500,000) launched in 1993, and UNESCO’s ‘Support to the Salvadorian Indigenous Communities’ (US\$555,621) started in the same year.<sup>766</sup> Tilley concludes that these institutions established a regime of authenticity to which indigenous organisations had to conform in order to access funding.<sup>767</sup> In this sense, she considers that these organisations took the transnational indigenous peoples’ movements’ vindications and identity discourse, as well as the ILO Convention 169 essentialist and primitivist views of indigeneity, as strict rules for the standardisation of indigeneity.<sup>768</sup> Salvadoran indigenous (and non-indigenous) organisations willing and able to apply for this EU funding (which, according to Tilley, were not necessarily the most representative of the Nahuat and Lasca communities<sup>769</sup>) had to organise and relate to each other as well as produce grant proposals and other documents in accordance with European Union standards.<sup>770</sup> This meant also leaving aside their most pressing demands and modifying their petitions in order to fit the European Union agenda for indigenous peoples of Central America.

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<sup>763</sup> Ibid, 682.

<sup>764</sup> Ibid, 693-694.

<sup>765</sup> Ibid, 679, 682, 685. 690-692.

<sup>766</sup> Tilley (n 86) 542-554.

<sup>767</sup> Ibid, 553.

<sup>768</sup> Ibid, 546.

<sup>769</sup> Ibid, 544-545.

<sup>770</sup> Ibid, 548



The case of UNESCO on the other hand was one of imposing a ‘merely cultural’ agenda under the assumption that indigenous peoples’ problems were cultural, where culture is reduced to language, religion, arts, and crafts.<sup>771</sup> Thus, the funding was destined for a number of programmes to diffuse indigenous culture but that were in disjunction with the daily lives of rural indigenous communities of El Salvador (i.e. radio shows when there is no radio transmission) and disregarded demands for farming credit, land title, market access and fertilizers.<sup>772</sup>

Neoliberal multiculturalism not only means representing oneself and articulating demands in a certain way, but also assuming specific modes of struggle (in this sense Comaroff and Comaroff mention the judicialization of politics that is attached to human rights governance<sup>773</sup>) and ways of organisation, and even changing the set of demands to fit the expectations of the NGOs, governments and international donors. Hence NGOs are also part of this critique. As mentioned before, organisations that form part of the ‘transnational indigenous peoples’ movement’ provide ‘institutional development’, marketing and lobbying, political leverage as well as technical support in law, education and administration.<sup>774</sup> Yet many a time the role of human rights NGOs is also one of adjusting the image of the real Indian with the fantasy of the Indian that is in demand.<sup>775</sup> In addition, for authors like Postero, the role taken by NGOs is an indicator of the reduction of the state and the delegation of state functions to private entities. In this

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<sup>771</sup> Ibid, 550.

<sup>772</sup> Ibid, 550-552.

<sup>773</sup> John L. Comaroff and Jean Comaroff, *Ethnicity, Inc.* (Kindle edn, The University of Chicago Press 2009) loc 761-830.

<sup>774</sup> Tilley (n 86) 529. Examples of larger organisations that support indigenous identity movements are the Work Group of Indigenous Affairs (IGWIA) based in Copenhagen and established in 1968, Survival International (UK, 1968) Cultural Survival (United States, 1974), The Netherlands Centre for Indigenous Peoples (Amsterdam, 1969), Rainforest Foundation (1989), World Wildlife Fund of the Inter American Development Bank (1987) and the World Bank. Ibid; Niezen (n 88) 44-45.

<sup>775</sup> Ramos (n 54); Henri Favre, ‘El movimiento indianista: un fenómeno glocal’ in Valérie Robin Azevedo and Carmen Salazar Soler (eds), *El regreso de lo indígena Retos, problemas y perspectivas* (FEA; CBC; MASCIPO; LISST; Cooperación Regional Francesa para los Países Andinos 2009) 36-37; Salazar Soler and Ulloa provide a similar opinion in relation to environmentalist NGOs, which are considered responsible for encouraging the ‘ethnicization’ of discourse and its environmentalist turn in the context of socio-environmental conflicts. Carmen Salazar Soler, ‘Los tesoros del Inca y la madre naturaleza: etnoecología y lucha contra las compañías mineras en el norte del Perú’ in Valérie Robin Azevedo and Carmen Salazar Soler (eds), *El regreso de lo indígena Retos, problemas y perspectivas* (IFEA; CBC; MASCIPO; LISST; Cooperación Regional Francesa para los Países Andinos 2009); Ulloa, ‘Las representaciones sobre los indígenas en los discursos ambientales y de desarrollo sostenible’ (n 232)

sense, NGOs are actually taking the role of implementing neoliberal multiculturalist policies and forming neoliberal citizens.<sup>776</sup>

Having said this, interview analysis revealed that not all NGOs operate in the same way or have the same goals and ideologies.<sup>777</sup> There seems also to be significant variation between the way local and international NGOs work. In addition, the academic critiques to NGOs because of their role in neoliberal governance have become an excuse for the Bolivian current government to perpetrate questionable actions (in the context of an democratic regime), such as expelling them from the country because of meddling with indigenous affairs, in the manner it was done with IBIS-Denmark in 2013.<sup>778</sup> NGOs in this regard seem to become a scapegoat for the government, which appears to navigate the tensions with some indigenous organisations and their international supporters by blaming NGOs for manipulating indigenous communities into being environmentalists.<sup>779</sup> In sum, I am reluctant to make generalizations about the role of NGOs in the Bolivian context without further study.

Sarfaty puts forward a similar argument in relation to the World Bank not being a homogenous institution 'with uniform interests and a single voice'. Rather, she argues that there is a multiplicity of perspectives within the institution.<sup>780</sup> In addition, as

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<sup>776</sup> Nancy Grey Postero, 'Bolivia's Indígena Citizen: Multiculturalism in a Neoliberal Age' (Latin American Studies Association, Miami, Florida, 16 March 2000) 6.

<sup>777</sup> Interview with the Head of the Regional Programme on Indigenous Peoples' Political Participation of the Konrad Adenauer Foundation in Bolivia (La Paz, 25 April 2014); Interview former head of CEJIS. (Santa Cruz, 12 May 2014); Interview with former constituent delegate for the MAS Party (La Paz, 26 April 2014).

<sup>778</sup> Carlos Corz, 'Gobierno expulsa de Bolivia a la ONG IBIS por injerencia política' *La Razón* (La Paz, 20 December 2013) Nacional: Gobierno <[www.la-razon.com](http://www.la-razon.com)> . This article also states that the Government of Bolivia expelled USAID in 2012 and the government expressed that it will continue to expel any NGO that interferes with their tasks. A head of an NGO also expressed frustration because of the cutting of funding to NGOs because of indirect actions from the government. Head of national NGO, May 2014.

<sup>779</sup> For García Linera, the current Vice-President of Bolivia, NGOs are not neutral institutions but they have their own agenda and they do not necessarily represent indigenous identity movements but help to shape them and to reproduce ideologies that are foreign to them, like environmentalism. Álvaro García Linera, *El "oenegismo", enfermedad infantil del derechismo (o cómo la "reconducción" del Proceso de Cambio es la restauración neoliberal* (Vicepresidencia del Estado Plurinacional de Bolivia; Presidencia de la Asamblea Legislativa Plurinacional de Bolivia 2011), 151, 159-166. The government of Evo Morales confronts the questioning of lowland peoples of discrepancies between government policies for the protection of the Amazon and extractivist policies by adducing a complementarity between the two, and expressing that 'the green economy' is an external imposition promoted by NGOs and a new form of colonialism. Evo Morales Ayma, 'La Economía Verde es el Nuevo Colonialismo para Someter a los Pueblos' (Plenary Session of the United Nations Conference on Sustainable Development, Rio de Janeiro, 21 June 2012).

<sup>780</sup> Sarfaty, 1817; Galit A. Sarfaty, 'Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank' (2009) 103 *American Journal of International Law* 647, 677 in relation to the 'instrumental' and the 'intrinsic' perspective to human rights among World Bank staff members

advanced in Chapter 2, Sarfaty explains that whether or not policies that benefit indigenous peoples will be implemented, and how they will be implemented, depends on a number of variables. Most notably, it depends on the policies of a given state in relation to indigenous peoples, and the pressure put forward by civil society organisations, such as the indigenous organisations in Latin America and the international NGOs that support them.<sup>781</sup> Hence, Sarfaty argues that the role assumed by an international financial organisation in a country is not one of unilateral imposition, but both state organs and social movements can have a degree of influence in the way the World Bank shapes its own norms in relation to indigenous peoples.<sup>782</sup> In more recent work, however, Sarfaty concludes that despite external pressure and the presence of a contingency of lawyers in the World Bank supporting a human rights approach (thus seeing human rights as ends in themselves), human rights occupy a secondary place in the World Bank's agenda. The primary approach is an instrumental view that subordinates human rights goals to economic growth and the strengthening of the market economy.<sup>783</sup> In the case of policies related to indigenous peoples, there is an economic focus on land rights and the 'commercial development of cultural resources.'<sup>784</sup> Therefore, one may conclude that in the case of the World Bank, goals of achieving 'culturally appropriate development'<sup>785</sup> that accords with neoliberal governmentality are prioritised over the strengthening of a human rights approach, or over the support of more radical demands of indigenous self-determination.<sup>786</sup>

Finally, it is relevant to emphasize here the distinction made by Tilley as well as Andolina et al between the effects of an essentialist discourse mobilized by indigenous organisations for the purposes of claiming recognition and redistribution, and that essentialist discourse when it is appropriated by the state and transnational actors. In this sense, Tilley explains that when indigenous identity discourses (i.e. sacred connection to land, harmonious legal orders, etc.) are adopted as 'a master frame' by official donors, (some) human rights advocacy NGOs and state organs, 'those same

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<sup>781</sup> Sarfaty, 'The World Bank and the Internalization of Indigenous Rights Norms' (n 345) 1804-1808.

<sup>782</sup> Ibid, 1809.

<sup>783</sup> Sarfaty, 'Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank' (n) 677-678; Galit A. Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford University Press 2012) 133-134 where she concludes that there is a tension within the World Bank between a neoliberal market rationality and a social liberalism-human rights approach.

<sup>784</sup> Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (n) 84-85.

<sup>785</sup> Andolina, Radcliffe and Laurie (n).

<sup>786</sup> In a similar sense, Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (n 783) 84.

precepts tend to gel and reify as a new definition for indigeneity that can bring considerable pressure on those indigenous peoples whose “fit” in that master frame is less than exact’.<sup>787</sup> In this regard, Dean explains that through technologies of subject formation, ‘contemporary liberal rule’ is able to translate the demands of social movements into ‘a set of practical formulas for the review, rationalization and renewal of governmental practice’.<sup>788</sup> Thus, one contribution of this thesis to the discussion on critical legal theory about the radical potential of human rights is to emphasize that the function and meaning of human rights discourse varies depending on its locus of enunciation.<sup>789</sup> Hence, while I concur with some authors that human rights can structurally determine the context of enunciation of political demands and the result of these demands,<sup>790</sup> the contribution of indigenous movements in shaping these discourses and their specific uses of it should not be overlooked.

It is worth concluding this chapter with the words of EZLN (Zapatista Army for Liberation) representative Commander Esther, uttered before the Mexican Congress in 2001, which I believe encapsulate the opportunities and challenges brought by the multiculturalist approach to indigenous demands: ‘My name is Esther, but that does not matter here. I am a Zapatista, but that does not matter either. I am an Indian and I am woman, and this is the only thing that matters right now.’<sup>791</sup> Her words seem to hint at the fact that, at that time, the opening of a space for the Zapatista movement and indigenous women organisations to address the Mexican Congress was partly possible because of a global multiculturalist human rights discourse that empowered indigenous peoples and indigenous women in particular. Esther was part of women’s indigenous organisations in Mexico that were attempting to represent indigenous cultures and legal orders in non-essentialist terms in order to redefine gender power relations in indigenous communities. Nevertheless, her words seemed to point to the fact that she

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<sup>787</sup> Tilley (n 86) 528.

<sup>788</sup> Dean (n 387) 181.

<sup>789</sup> A similar point has been made in the context of Latin American decolonial theory arguing that the Eurocentric nature of official human rights discourse does not foreclose the possibility of re-conceptualizations of human rights discourse Walter D. Mignolo, ‘Who Speaks for the "Human" in Human Rights? Human Rights in Latin American and Iberian Cultures’ (2009) 5 *Hispanic Issues* 7; José Manuel Barreto, ‘Decolonial Strategies and Dialogue in the Human Rights Field’ in José Manuel Barreto (ed), *Human Rights from a Third World Perspective Critique, History and International Law* (Cambridge Scholars Publishing 2013)

<sup>790</sup> Brown, ‘“The Most We Can Hope For...”: Human Rights and the Politics of Fatalism’ (n 8); Hale, ‘Neoliberal Multiculturalism: The Remaking of Cultural Rights and Racial Dominance in Central America’ (n 8)

<sup>791</sup> The quotation and its translation are from Hernández Castillo (n 702) 101.

was using a discourse in which her individuality and the specificities of the armed revolutionary movement to which she belonged were lost in the human rights imaginary of indigeneity.<sup>792</sup>

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<sup>792</sup> In a similar sense *ibid*, 102 when explaining that in their speeches before the Congress, representatives of indigenous movements have had to face the ghost of '*usocostumbrismo*' or the essentialist perspective of indigenous legal orders and cultures.

## **Chapter 4. Multiculturalism and Plurinationalism in Bolivia**

### **4.1. Introduction**

Chapter 3 examined how in Latin America multiculturalism was adopted in the 1990s right after the multiculturalist turn in IHRL. It argued that both at an IHRL level and at a domestic level, multiculturalism was pushed from below by the rising indigenous movements and co-opted from above. Hence, when deployed by the state and certain transnational actors, the multiculturalist approach contributes to the co-opting of indigenous demands and discourses and shapes permitted and unpermitted subjects through regimes of authenticity and toleration. Multicultural Constitutionalism also perpetuates racial divisions present in previous constitutional models through the noble savage representation and reified views of indigenous cultures and legal orders—all of which are present also in IHRL.

Chapter 4 now articulates how Bolivia was no exception in the region to a situation in which indigenous peoples' demands were translated into multiculturalist policies that were integrated into the juridical framework through constitutional reforms and legislation. The Bolivian government disregarded the proposals of the social movements and undertook reforms that were more favourable to the elites' agenda of neoliberal reforms and strengthening legal centralism<sup>793</sup>—reforms that were also more aligned with the demands and suggestions of international creditors and donors. However, the Bolivian trajectory dramatically changed from that of other Latin American countries in the 21<sup>st</sup> century, when indigenous and peasant movements were successful in overthrowing the neoliberal government. For this purpose, as in the 1990s, they resorted to the language of indigenous rights. However, this chapter argues that indigenous rights were only one mode of struggle among others, and their content and meaning was not always informed by IHRL, but by alternative discourses arising from autochthonous racial resistance and decolonization projects. In this regard, this chapter

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<sup>793</sup> Legal centralism means that 'the law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions.' In addition all other normative orderings ought to be subordinated to state law. Griffiths (n 499) 3.

introduces plurinationalism or the ‘Pluri-National State’ as an alternative constitutional paradigm to multiculturalism.<sup>794</sup>

This chapter is structured as follows. Adhering to the theoretical framework and structure of Chapter 3, Section 4.2.1 explains the role of highland and lowland indigenous movements in pushing for structural change in the 1980s and 1990s (‘the rebel Indian’). Section 4.2.2 moves on to explain the adoption of multicultural policies in Bolivia in the 1990s (‘the permitted Indian’). Section 4.3 provides an account of the revolutionary period in Bolivia (2000-2005) distinguishing the different interest groups involved and their contribution. Finally, Section 4.4 analyses plurinationalism in the terms set below and compares it with multiculturalism.

## **4.2. Multicultural Constitutionalism in Bolivia**

### **4.2.1 The ‘Rebel Indian’: Indigenous Movements in the Neoliberal Multicultural Period**

Reorganised indigenous and peasant organisations (no longer linked to the corporate state) became prominent in Bolivia during the transition to democracy (1982).<sup>795</sup> According to Van Cott, they filled the space left by the military forces and the labour confederation, which had been dismantled with the privatization of state mining companies.<sup>796</sup> At that time, the discourse of human rights and particularly that of indigenous rights became more pronounced among indigenous organisations. It also displaced (or at least became more prominent than) other discourses that had been

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<sup>794</sup> The ‘Plurinational State’ (el Estado Plurinacional), ‘plurinationalism’ (*plurinacionalismo*) or ‘plurinationality’ (*plurinacionalidad*) are also terms utilized in Ecuador to refer to indigenous demands. See for example, Pablo Ospina Peralta, ‘Estado Plurinacional y Autogobierno Territorial. Demandas Indígenas en Ecuador’ in Miguel González, Araceli Burguete Cal y Mayor and Pablo Ortiz (eds), *La Autonomía a Debate Autogobierno Indígenas y Estado Plurinacional en América Latina* (FLACSO; GTZ; IGWIA; CIESAS; UNICH 2010); Alberto Acosta and Esperanza Martínez (eds), *Plurinacionalidad. Democracia en la diversidad* (Ediciones Abya-Yala 2009). However, in this thesis I focus on the use of the term in Bolivia.

<sup>795</sup> Bolivia started its transition to democracy in 1982, after 18 years of dictatorship (1964-1981) Klein (n 554)

<sup>796</sup> It was also taken over by local and departamental civic committees and business organizations that represented the elites. Van Cott, *The Friendly Liquidation of the Past. The Politics of Diversity in Latin America* (n 542) 131.

central in Bolivia during the Social Constitutionalism period, such as class, centralized national unionism and ‘revolutionary nationalism’.<sup>797</sup>

In this regard, particularly since the transition to democracy, there was a convergence between the peasant (*campesino*) identity promoted by the MNR (National Revolutionary Movement Party) state and the indigenous identity (*‘indígena originaria’*).<sup>798</sup> Hence, organisations created in the late 1970s such as the CSUTCB or the lowland CIDOB acquired more prominence with their ‘indigenization’.<sup>799</sup> Indigenization became more patent in the 2000s, when some highland peasant organizations modified their names in order to claim indigenous collective rights and the legitimacy tied to indigeneity (now linked in IHRL to the noble savage representation). This was the case of the Union Confederation of Settlers of Bolivia (1971), which changed its name in the context of the Constituent Assembly (2006-2009) to National Confederation of Inter-Cultural Communities of Bolivia.<sup>800</sup> The Federation of Peasant Women ‘Bartolina Sisa’ did likewise, amending its name to Confederation of Indigenous Autochthonous Peasant Women of Bolivia ‘Bartolina Sisa’.<sup>801</sup>

In the case of the lowlands, since the 1980s and early 1990s the Amazon region of Bolivia started being populated by NGOs, which offered administrative and legal assistance to indigenous communities. These communities also began to receive significant amounts of funding from international financial organisations like the World Bank, which would carry out development projects in the communities.<sup>802</sup> One reason for the increased presence of international donors and NGOs was the ethno-development and ‘social capital’ paradigms. As explained in Chapter 3, under these perspectives, indigenous communities were ‘untapped human resources’ that needed to be connected with development planning, under a neoliberal and ‘participatory

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<sup>797</sup> Gustafson (n 662) 274.

<sup>798</sup> Albó, ‘Hacia el poder indígena en Ecuador, Perú y Bolivia’ (n 394) 135-136.

<sup>799</sup> Gustafson (n 662) 274 drawing on Alison Brysk, *From Tribal Village to Global Village: Indian Rights and International Relations in Latin America* (Stanford University Press 2000).

<sup>800</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Etnografía de una Asamblea Constituyente* (n 48) 113-114.

<sup>801</sup> *Ibid.*, 99.

<sup>802</sup> Andolina, Radcliffe and Laurie (n 677) 686; Hans Heijdra, *Participación y exclusión indígena en el desarrollo. Pueblos indígenas de las tierras bajas en Bolivia* (Jürgen Riestler ed, Banco Mundial; CIDOB; Pueblo Ayoreo 1997).



development' approach.<sup>803</sup> Another reason for the increased presence of NGOs was the prevalence among some of these transnational actors of the cultural survival approach. Therefore, lowland communities were perceived as endangered groups on the brink of extinction.<sup>804</sup> Thus, during the neoliberal multicultural period, transnational organisations had an important role in defining indigeneity and in characterising development projects that affected or involved indigenous peoples as productive, sustainable and participatory.<sup>805</sup>

It is worth clarifying that although some lowland indigenous groups are in a situation of vulnerability, the image of human groups living a nomadic or semi-nomadic life in the Amazon jungle is far from the reality for the majority of these communities. As Gustafson explains, in the 21<sup>st</sup> century most lowland indigenous peoples live in 'agrarian regions intertwined with multiple forms of state power, Hispanic latifundist elites, extractive markets for natural resources, and forms of Catholic and Protestant tutelage and mission activity'.<sup>806</sup> According to Díez Astete, currently only around ten communities (some which belong to larger ethnic groups who have settled), composed each by only a few families, either live in 'voluntary isolation' or are nomadic or semi-nomadic with intermittent contact with individuals who are not from their group. The families living in 'voluntary isolation' along with other lowland communities are currently exposed to malnutrition, forced labour, physical aggression, being forced objects of ethnic tourism, dispossession and displacement, and forced settlement by missionaries.<sup>807</sup>

#### **i. Lowland Indigenous Peoples: Mobilizing for Dignity and Territory**

The increase in the number of national and international NGOs and the receiving of funding and other forms of aid contributed to the organisation of lowland indigenous peoples.<sup>808</sup> Since the mid 1980s, these communities were prompted to organise and mobilize for various reasons: disputes over land with the large number of Aymara

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<sup>803</sup> Nina Laurie, Robert Andolina and Sarah Radcliffe, 'The Excluded 'Indigenous'? The Implications of Multi-Ethnic Policies for Water Reform in Bolivia' in Rachel Sieder (ed), *Multiculturalism in Latin America Indigenous Rights, Diversity and Democracy* (Palgrave Macmillan 2002) 252.

<sup>804</sup> Andolina, Radcliffe and Laurie (n 677) 686.

<sup>805</sup> Laurie, Andolina and Radcliffe (n 794) 252.

<sup>806</sup> Gustafson (n 662) 271.

<sup>807</sup> Álvaro Díez Astete, *Compendio de etnias indígenas y ecoregiones. Amazonía, Oriente y Chaco* (CESA (Centro de Servicios Agropecuarios y Socio-Comunitarios); Plural Editores) 485-486, 504-505.

<sup>808</sup> Postero, *Now we are Citizens: Indigenous Politics in Postmulticultural Bolivia* (n 559) 49.

internal migrants that started to arrive in the lowlands in the late 1980s after the privatization of the mines,<sup>809</sup> the drug trafficking linked to the production of coca leaves, the expansion of urban centres, the devastation created by timber extraction, hunting and cattle ranching, and the state's projects for extraction of hydrocarbons from the Amazon through foreign direct investment.<sup>810</sup>

In the 1990s, lowland indigenous organisations played an important role in pushing the Bolivian state to implement policies that would recognise them as citizens and humans and would implement an agrarian reform in lowland Bolivia.<sup>811</sup> According to Albó, lowland organisations were the first to appeal to the right to territory present in IHRL instruments (as opposed to only reclaiming private title) in order to counter the presence of highland settlers, oil and timber companies and the expansion of the agricultural frontiers.<sup>812</sup> The demands of lowland organisations are to be read also in the context of predominance in the Amazon and Chaco regions of large estates owned by white-mestizo elites, and the consequent encroachment of indigenous territories.<sup>813</sup> In this sense, reforms that were favourable to indigenous populations in the Social Constitutionalism period such as the agrarian reform did not reach the lowlands.<sup>814</sup> Amazon peoples continued to be treated as savages and displaced from their territories. Well into the 2000s, there continue to be cases in Eastern Bolivia of Guaraní captive communities living in *haciendas* under the serfdom by debt system.<sup>815</sup>

The six-hundred-kilometre walk from the Amazon to the Andean mountains in what was known as the March for Dignity and Territory of 1990 consolidated the alliances between lowland organisations.<sup>816</sup> This march may be considered the start of a new era in indigenous identity politics in Bolivia in which indigenous rights discourse took

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<sup>809</sup> 40 to 45% of the miners and factory workers were dismissed between 1985-1987 with the privatization ('capitalization') of state mining companies. Van Cott, *The Friendly Liquidation of the Past. The Politics of Diversity in Latin America* (n 542) 131.

<sup>810</sup> Postero, *Now we are Citizens: Indigenous Politics in Postmulticultural Bolivia* (n 559), 201; Verónica Barroso Mendizabal, 'TIPNIS ¿Un conflicto ambiental o de territorio?' (2012) 11 *Revista Letras Verdes* 112.

<sup>811</sup> María del Pilar Valencia García and Iván Égido Zurita, *Los pueblos indígenas de tierras bajas en el proceso constituyente boliviano* (CEJIS 2010) 22-23.

<sup>812</sup> Albó, 'Hacia el poder indígena en Ecuador, Perú y Bolivia' (n 394) 142; Pajuelo Teves (n 641) 70.

<sup>813</sup> Maybury-Lewis, 'Lowland Peoples on the Twentieth Century' (n 561), 877.

<sup>814</sup> *Ibid.*

<sup>815</sup> UNHRC (Sub-Commission) 'Informe del Relator Especial Rodolfo Stavenhagen sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas. Misión a Bolivia' A/HRC/11/11 (18 February 2009).

<sup>816</sup> Pajuelo Teves (n 641) 70.

prominence.<sup>817</sup> Under the emerging neoliberal multiculturalist model, the government was unwilling or unable to violently repress the lowland indigenous peoples' march for Life and Dignity of 1990, as it had done five years earlier with the miners' March for Life against structural adjustment reforms.<sup>818</sup> This was the first of eight marches in the 1990s and 2000s to demand recognition, territory and a change of political regime.<sup>819</sup>

In the 2000s, the proposal of lowland indigenous organizations had two dimensions. One aspect of the proposal was presented in the language of indigenous collective rights and appealed directly to their constituencies. It consisted of demands for territory and control over the natural resources found there, political autonomy, indigenous local governments, and increased political participation and representation in the central state democratic institutions.<sup>820</sup> These demands for indigenous autonomy would later become central to the agenda of the indigenous peasant coalition Pacto de Unidad and consequently the discussions in the Constituent Assembly.<sup>821</sup> The second dimension was a more universal proposition of reforming the political and economic system to face the crisis of legitimacy and representation of the state.<sup>822</sup> This second aspect of the lowland proposition responded to a need to go beyond the politics of difference and form alliances with other indigenous and non-indigenous sectors, rural and urban, in order to propose a unified agenda for structural change.<sup>823</sup> In this regard, lowland indigenous organisations were the first to present the idea of a Constituent Assembly in the March for Popular Sovereignty, Territory and Natural Resources of 2002.<sup>824</sup>

It should be emphasized that lowland organisations resorted to the language of indigenous rights and identity politics but never limited their demands to the ambit of the merely cultural. They had demands for recognition and redistribution, demands for

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<sup>817</sup> This affirmation is based on Anibal Quijano, 'The Challenge of the "Indigenous Movement" in Latin America' (2005) 19 *Socialism and Democracy* 55, 74-75.

<sup>818</sup> Pajuelo Teves (n 641) 67-68.

<sup>819</sup> As a result of this march, the Executive created seven indigenous territories. Postero, *Now we are Citizens: Indigenous Politics in Postmulticultural Bolivia* (n 559) 49-50. The last march was on 2011 when lowland peoples protested against the MAS Government over the construction of a motorway over the Indigenous Territory and National Park Isiboro Securé (TIPNIS) in the Amazon region. Barroso Mendizabal (n 810) 113-114.

<sup>820</sup> Postero, *Now we are Citizens: Indigenous Politics in Postmulticultural Bolivia* (n 559) 203.

<sup>821</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 26, 193.

<sup>822</sup> Postero, *Now we are Citizens: Indigenous Politics in Postmulticultural Bolivia* (n 559) 203; Valencia García and Égido Zurita (n 811) 35-37.

<sup>823</sup> Postero, *Now we are Citizens: Indigenous Politics in Postmulticultural Bolivia* (n 559) 203; Valencia García and Égido Zurita (n 811) 30, 35-37.

<sup>824</sup> Garcés (n 61) 21.

territorial and political autonomy and for a change of state model. Thus, even when resorting to noble savage representations, indigeneity was utilized as a racial resistance discourse. Amazon indigenous peoples were no longer to be considered invisible savages pushed by modernisation to the borders of civilized society. They demanded to be represented in the white nation, and they also demanded lands for their nations. They marched for dignity and territory. They had proposals for their own constituencies but they were not constrained by 'ethnic politics'. Rather, they also had solutions to the racial discrimination suffered by indigenous peoples more generally, as well as proposals for the crisis of legitimacy of the Bolivian state.

## ii. Highland Indigenous Peoples: The Emergence of Plurinationalism

*'A nation that oppresses another nation cannot be free'.*

Tiwanaku Manifesto, 1973.<sup>825</sup>

Identity politics in Bolivia are not limited to the language of rights and multiculturalism. Rather, in the highlands identity politics are influenced by anti-colonialist discourses such as Katarism. Katarism is a cultural, political and unionist movement initiated in the Bolivian highlands in the late 1960s by peasants, high-school students and university students of Aymara descent.<sup>826</sup> Katarism would eventually become a national movement, particularly among Aymara-speaking people. It was important in the dissolution of the Military-Peasant pact and also in the transition to democracy because Katarists contributed to shift the alliance of the peasants from the MNR government to the labour movement.<sup>827</sup> The Indianism of Fausto Reinaga heavily influenced Katarism.<sup>828</sup> This is a philosophy that has as a central concept the Indian revolution.<sup>829</sup> As advanced in Chapter 1, Reinaga re-established the term 'Indian' (as opposed to using

<sup>825</sup> *'Un pueblo que oprime a otro pueblo no puede ser libre'*. Tiwanaku Manifesto 1973 of the Katarist Movement of Bolivia. Rivera Cusicanqui explains that the Katarists took this quote from the Inka Yupanqui, who expressed it in the Spanish courts towards the end of the colonial period.

<sup>826</sup> The name of the movement is in honour of Julián Apaza (aka Tupa Katari) an Aymara who in the 18<sup>th</sup> century started a rebellion against the Spanish colonizers and is now a national symbol of the Plurinational State of Bolivia, along with his wife Bartolina Sisa. Van Cott, *The Friendly Liquidation of the Past. The Politics of Diversity in Latin America* (n 542) 128; Rivera Cusicanqui (n 58) 176-197.

<sup>827</sup> Rivera Cusicanqui (n 58) 194-195.

<sup>828</sup> Fausto Reinaga (1906-1994) was a prolific Bolivian thinker of Quechua descent. In the 1970s he developed what has now been denominated 'Indianism' in various works including *The Indian Revolution* (1971), *Manifest of the Indian Party of Bolivia* (1970) and *Indian Thesis* (1971). Gustavo R. Cruz, *Los senderos de Fausto Reinaga. Filosofía de un pensamiento indio* (CIDES-UMSA; Plural Editores 2013) 33-35, 49-50.

<sup>829</sup> Ibid, 50. It should be highlighted that 1960s there was an emergence of different Indianist organisations, some of which did not agree with Reinaga. Thus, as a movement, Indianism transcends Reinaga. Ibid, 50.

the term ‘indigenous’) to differentiate his ideology from the indigenism of the 1950s, which defined indigeneity as folklore, tourism, art and something that belongs to the pre-colonial past.<sup>830</sup> Reinaga thought that the ‘indigenous’ of indigenism was an empty political subject, something that did not exist, something created only for the subjugation of the Indian race.<sup>831</sup> Hence, in the 1970s, the salient contribution of Katarism was the ‘reinvention of *Indianness*, not as a stigma, but as the subject of emancipation’.<sup>832</sup>

The racial-consciousness developed by the Katarist movement is linked to a phase of indigenous historical collective memory that Rivera Cusicanqui denominates ‘distant memory’ (*memoria larga*). It is a memory that she believes was relived more acutely by the urban indigenous in the period of Social Constitutionalism. In their daily experiences of exclusion and discrimination by the white-mestizo society (*formas de discriminación señoriales*), urban indigenous individuals were able to perceive more clearly the contradictions in the ideological fantasy of a homogenous and equal society—a society in which they were supposed to be included, particularly since the revolution of 1952.<sup>833</sup> Paraphrasing Fanon, the first encounter with the white-mestizo in the cities oppressed the Aymara with all the weight of their Indianness.<sup>834</sup> This made the Aymara feel, as the Katarist would state, ‘like foreigners in their own country’.<sup>835</sup>

Katarism also pushed strongly for anti-colonialism and racial analysis<sup>836</sup> in a context in which Marxist class discourse was dominant among popular organisations.<sup>837</sup> In this regard, Marxism during the MNR state period functioned as a rationalist discourse of modernization. It was instrumental to the disarticulation of indigenous communitarian rural economies and projects of cultural homogenization for the strengthening of the state, and also to the formation of corporatist relations through unions in order to give the state control over the national economy and modes of production.<sup>838</sup> Hence, Marxist

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<sup>830</sup> Escárzaga (n 725) 193.

<sup>831</sup> Ibid, 193.

<sup>832</sup> García Linera, ‘El desencuentro de dos razones revolucionarias. Indianismo y Marxismo’ (n 635) 5. In this sense, also the Tiwanaku Manifesto presents the indigenous peasant as the ‘developer of his own destiny’ (*gestor de su propio destino*).

<sup>833</sup> Rivera Cusicanqui (n 58) 214, 216.

<sup>834</sup> Fanon, *Black Skin White Masks* (n 55) 116.

<sup>835</sup> Tiwanaku Manifesto of 1973.

<sup>836</sup> Although in their texts Katarists always speak of ‘ethnicity’ and not race.

<sup>837</sup> In a similar sense, Van Cott, *The Friendly Liquidation of the Past. The Politics of Diversity in Latin America* (n 542) 127-128.

<sup>838</sup> García Linera, ‘El desencuentro de dos razones revolucionarias. Indianismo y Marxismo’ (n 635) 2.

class discourse in Bolivia is related to the creation of class-consciousness and to the political organisation of peasant and urban workers in unions. However, it is also related to the continuation of racial prejudice among the white-mestizo left and the 'national popular' governments. As a result, the Katarist movement not only conceived itself as independent and different from the conservative white-mestizo Bolivian society, but also as distinct from the left parties and the MNR Party.<sup>839</sup>

This does not mean, however, that Katarists gave up class discourse. In Katarism, class and race as analytical categories are 'the two eyes with which to see the world', or 'the two legs with which to walk on it'.<sup>840</sup> Consequently, class-consciousness and race consciousness are not reducible to each other and they are both considered necessary. The CSTUCB states in its Political Thesis,

Our thought does not admit a unilateral reduction of the whole of our history to solely a class struggle or solely an ethnic struggle. In the practice of these two dimensions we recognise not only our unity as workers but also our distinctive and differentiated personality.<sup>841</sup>

Rivera Cusicanqui explains in this regard that there is a second dimension to Katarist struggle, one that has to do with the 'recent memory' (*memoria corta*): the unionist aspect of Katarist struggle and the formation of class-consciousness among indigenous communities.<sup>842</sup> Unionist Katarism (*katarismo sindical*) acknowledges in this sense other historical landmarks in the formation of new ways of exploitation of peasant labour that are juxtaposed to, but can be clearly differentiated from, the Spanish conquest and the continuation of colonialist forms of domination.<sup>843</sup>

In practice, the relation between class and race discourses is more dialectic, and it is expressed in the production of different currents within Katarism. Rivera Cusicanqui explains that in 1978, there was a rupture in Katarism between those who privileged

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<sup>839</sup> Ibid, 6.

<sup>840</sup> Albó attributes this metaphor to the Katarists. Xavier Albó, 'Larga memoria de lo étnico en Bolivia, con temporales oscilaciones' in John Crabtree, George Gray Molina and Lawrence Whitehead (eds), *Tensiones irresueltas Bolivia, pasado y presente* (UNDP; Plural Editores 2009) 36.

<sup>841</sup> CSUTCB Political Thesis of 1983 in Rivera Cusicanqui (n 58) 239. Own translation from Spanish.

<sup>842</sup> Ibid, 212-216. It should be noted, as indicated in the CSUTCB Political Thesis of 1983, that rural unions in Bolivia are a form of government of indigenous communities. CSUTCB Political Thesis 1983 in *ibid*, 240-241.

<sup>843</sup> Ibid, 215.

class discourse and those who privileged racial discourse.<sup>844</sup> The former, who organized as the Revolutionary Movement Tupaq Katari (MRTK), came from a rural union tradition, had more contact with the white-mestizo leftist organisations, and valued the contributions of the revolution of 1952 such as the universal vote and the agrarian reform.<sup>845</sup> The latter took the name of Indian Movement Tupaq Katari (MITKA), and saw in racial discrimination and colonialist oppression the main problems of the peasants and workers of Bolivia.<sup>846</sup> They rejected the white-mestizo or *q'ara*<sup>847</sup> left. At the same time, they became part of the indigenous transnational movement (and the international funding related to it),<sup>848</sup> which is characterized by the prominence of identity politics.

During the 1980s, there was a complex process of further division within the Katarist movement among ideological and personalist lines that translated into a multiplicity of political parties, unions and even a guerrilla movement.<sup>849</sup> The 1990s in particular saw a different phase of Katarism, one that was neither dominated by class nor race discourse, but by the 'pluri-multi' current,<sup>850</sup> or the multiculturalist approach.<sup>851</sup> It was adopted by the Katarist sector that was more willing to form alliances not only with popular organisations,<sup>852</sup> but also with white-mestizo intellectuals, the Church and NGOs.<sup>853</sup>

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<sup>844</sup> The evolution of Katarism and indigenous movements in Bolivia more generally constitute a good case study to analyse the discussion in the left in the United States on whether recognition struggles displace redistribution struggles. See for example the debate in the *New Left Review* between Fraser, Butler and Young. Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age' (n 664); Butler (n 332); Iris Marion Young, 'Unruly Categories: A Critique of Nancy Fraser's Dual Systems Theory' (1997) 1/222 *New Left Review* 147.

<sup>845</sup> Rivera Cusicanqui (n 58) 199-201.

<sup>846</sup> *Ibid.*, 201.

<sup>847</sup> *Q'ara* is a term utilized by Aymara and Quechua indigenous peoples to refer to whites. It means 'bare' or 'naked' (*pelado* in Spanish) and it refers to the Spanish conquerors that came with nothing to offer but their will to dispossess indigenous populations. Thus, it means the exploiter, the person who takes from others instead of doing their own effort to provide for themselves. Carlos M. Caravantes García, 'El katarismo en Bolivia, hoy' in *Conquista y resistencia en la historia de América* (Publicacions Universitat de Barcelona 1991) 416 citing Xavier Albó and others, *Para comprender las culturas rurales en Bolivia* (1st edn, La Paz MEC; CIPA; UNICEF 1989) 113-114.

<sup>848</sup> Rivera Cusicanqui (n 58) 201-202.

<sup>849</sup> *Ibid.*, 176-197; Máximo Quisbert, '¿Hay líderes indianistas o kataristas para futuras elecciones presidenciales?' (2011) 5 *Willka* 45, 59-69.

<sup>850</sup> This term, utilised by indigenous movements in Bolivia, refers to multiculturalism. It alludes to the declaration of Bolivia as a 'pluricultural and multi-ethnic nation' in the context of the multicultural constitutional reforms of 1994.

<sup>851</sup> García Linera denominates them 'integrationists' as opposed to Aymara nationalism and also "pachamamics". These currents he considers appeared in the 1980s, while Quisbert locates them in the late 1970s. Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 92; García Linera, 'El desencuentro de dos razones revolucionarias. Indianismo y Marxismo' (n 635) 7; Quisbert (n 849) 54-55, 67.

<sup>852</sup> García Linera, 'El desencuentro de dos razones revolucionarias. Indianismo y Marxismo' (n 635) 7.

The ‘pluri-multi’ Katarists sought recognition and equal political representation in state structures.<sup>854</sup> Their goal was an egalitarian society for both indigenous populations and the dominant white-mestizo society.<sup>855</sup> However, the Katarist leader Víctor Hugo Cárdenas took this too far and, without the consent of his constituency, accepted to run for Vice-President for the MNR Party (of neoliberal cut at that time) along with Sánchez de Lozada as president.<sup>856</sup> The 1990s were therefore considered the ‘dark age’ of Katarism, a period of co-optation of indigenous radical discourse by the neoliberal government.<sup>857</sup>

#### **4.2.2. The ‘Permitted Indian’: The Adoption of Multicultural Policies in Bolivia**

In Bolivia, following the ratification of the ILO Convention 169 in 1991, multiculturalist policies were incorporated through the constitutional reforms of 1994. Thus, the Constitution of Bolivia of 1967 recognised the ‘pluri-cultural’ and ‘multi-ethnic’ condition of the Bolivian nation.<sup>858</sup> It also recognised the cultural and socio-economic rights of indigenous peoples (which included rights to land, territory, the use of natural resources, and the ‘recognition’ of their ‘identity, values, languages, customs and institutions’).<sup>859</sup> Finally, the constitutional reforms of the 1990s also included the recognition of the legal status (*personalidad jurídica*) of peasant and indigenous communities, unions and associations,<sup>860</sup> and the use of their own law. Following the trend in IHRL, however, indigenous law would only be tolerated as an ‘alternative dispute resolution’ mechanism, and only as long as indigenous ‘norms, customs and procedures’ were not contrary to the Constitution or the legislation of Bolivia.<sup>861</sup> The constitutional reform was underpinned by further reforms: a decentralization law (Law 1551 of Popular Participation, 1994), an agrarian reform law that recognized indigenous

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<sup>853</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 91.

<sup>854</sup> García Linera, ‘El desencuentro de dos razones revolucionarias. Indianismo y Marxismo’ (n 635) 7.

<sup>855</sup> *Ibid.*, 7.

<sup>856</sup> Quisbert (n 849) 66-67.

<sup>857</sup> García Linera, ‘El desencuentro de dos razones revolucionarias. Indianismo y Marxismo’ (n 635) 7-8.

<sup>858</sup> Article 1 of the Constitution of Bolivia of 1967.

<sup>859</sup> *Ibid.*, Article 171.I

<sup>860</sup> *Ibid.*, Article 171.II

<sup>861</sup> *Ibid.*, Article 171.III.



communal property (Law 1715 of the Institute of Agrarian Reform, 1996), and a law that made education pluri-lingual (Law 1564 of Education Reform, 1994).<sup>862</sup>

Popular and indigenous organisations and intellectuals autonomously pushed for multiculturalist reforms.<sup>863</sup> Yet these reforms also responded to the elites' concern with the crisis of governability and the economic instability in Bolivia after the transition to democracy.<sup>864</sup> There was also a concern with the weakness of the state, whose authority and services were (and still are) unevenly present in the territory.<sup>865</sup> In addition, the Bolivian state was plagued with clientelism, weak institutions and low representativity.<sup>866</sup> Thus, as in the rest of the region, in Bolivia, multiculturalist reforms occurred in tandem with good governance reforms that were meant to strengthen the domestic market, state institutions, civil society associations and target poverty in order to facilitate the implementation of orthodox economic policies and the neoliberal cultural project. Gustafson locates the neoliberal multicultural turn in the period 1993-1998, following the first phase of structural adjustment (1985-1989).<sup>867</sup>

Despite the presence of Cárdenas and the alliance between the MNR party and the Tupaj Katari Revolutionary Liberation Movement (MRTKL), indigenous organizations had little or no participation in the design of multiculturalist reforms.<sup>868</sup> Instead, president Sánchez de Lozada made a number of reforms under a 'democracy by pact', or a system of negotiating in secret the multicultural bills and then pushing them through the legislature through a voting majority.<sup>869</sup> This was the case with the Law of Popular Participation (LPP), a municipal decentralization law prompted by international aid agencies (the World Bank, the UNDP and the International Development Bank<sup>870</sup>), which was crafted without the participation of civil society.<sup>871</sup> The LPP legally recognized indigenous authorities and communities as well as other forms of local

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<sup>862</sup> Garcés (n 61) 19.

<sup>863</sup> Van Cott, *The Friendly Liquidation of the Past. The Politics of Diversity in Latin America* (n 542) 135.

<sup>864</sup> Ibid 133.

<sup>865</sup> Ibid, 134.

<sup>866</sup> Ibid, 134.

<sup>867</sup> Gustafson (n 662) 275-276.

<sup>868</sup> Van Cott, *The Friendly Liquidation of the Past. The Politics of Diversity in Latin America* (n 542) 144-178. In contrast with Gustafson, Van Cott states that CIDOB (lowland organisation) did have some degree of participation in the making of the LPP and more so in its implementation, and it was more aligned with the making of this new law than the CSUTCB and leftist intellectuals, who saw it as an instrument of co-option. Ibid, 161, 194-195.

<sup>869</sup> Ibid, 146.

<sup>870</sup> Ibid, 202-203 also in relation to the funds channelled to the implementation of this law.

<sup>871</sup> Ibid, 151-152. Although indigenous organisations did not push for this specific law, they had pushed for mechanism for political participation. Gustafson (n 662) 280.

organisation such as neighbourhood associations and civic committees.<sup>872</sup> In addition, the LPP created over three hundred municipal governments that, in areas that were predominantly indigenous, were led by indigenous local authorities.<sup>873</sup> Thus, the LPP introduced party politics in communities previously dominated by other forms of political organisation and became a platform for indigenous individuals to participate in national politics.<sup>874</sup> For example, the strengthening of the rural ‘*municipios*’ by the LPP helped Evo Morales’s ascension to presidency by permitting the coca grower unions to take over the municipal governments of the Chapare.<sup>875</sup>

At the same time, in her anthropological work on the implementation of the LPP in Zona Cruz, Postero argues that the LPP confined demands by Guaraní communities to municipal procedural issues.<sup>876</sup> More than a law for the recognition of indigenous populations and their forms of organisation, it was a law for distributing resources and consequently to substitute patronage relations and corporate organisations.<sup>877</sup> This is in line with neo-institutionalist policies that see in decentralization a way of re-allocating state services closer to the users of those services.<sup>878</sup> Decentralization also sought to promote accountability and efficiency in the administration of public goods.<sup>879</sup> These goals are positive but they had the effect of also permitting the government and NGOs to impose specific forms of organization and participation as conditions for indigenous peoples to access citizenship.<sup>880</sup>

Furthermore, what was made available to indigenous communities was neoliberal citizenship, characterised by ‘efficient organization, rational participation and self-government’.<sup>881</sup> For instance, Postero explains that the law required Guaraní communities to codify their legal norms in certain areas and to present them for government approval in the form of a statute.<sup>882</sup> In sum, Postero argues that the LPP through ‘practices of the law’ reinforced the exclusion of indigenous peoples from political power. It did so by weakening existing corporate models and eroding the

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<sup>872</sup> Gustafson (n 662) 279; Articles 2, 3 and 9 of the Law of Popular Participation of 1994.

<sup>873</sup> Pajuelo Teves (n 641) 74.

<sup>874</sup> Ibid, 74.

<sup>875</sup> Albó, ‘Hacia el poder indígena en Ecuador, Perú y Bolivia’ (n 394) 143; Gustafson (n 609) 280-281.

<sup>876</sup> Postero, *Now we are Citizens: Indigenous Politics in Postmulticultural Bolivia* (n 559) 164-165.

<sup>877</sup> Ibid, 150.

<sup>878</sup> Gustafson (n 662) 279.

<sup>879</sup> Ibid, 279.

<sup>880</sup> Postero, *Now we are Citizens: Indigenous Politics in Postmulticultural Bolivia* (n 559) 184.

<sup>881</sup> Ibid, 184.

<sup>882</sup> Ibid, 180-184.

leaders' political and social authority.<sup>883</sup> At the same time, it strengthened the power of the hegemonic political parties (which penetrated local politics)<sup>884</sup> and expanded the rule of the law of the state over indigenous territories. Hence, Postero concludes that the Law of Popular participation reinforced the way state-indigenous relations is mediated by local elites, traditional political parties and clientelism. Thus, this law recontextualized existing racial hierarchies in the neoliberal multicultural context.<sup>885</sup>

A second example is the Law of the Institute of Agrarian Reform of 1996 (Law INRA). In 1995, the Bolivian government invited the main popular and indigenous organisations to discuss the bill.<sup>886</sup> However, after fourteen months of negotiations, the Congress approved the law making substantial modifications to the agreed bill, causing further mobilizations among indigenous organisations that were repressed by the government.<sup>887</sup> The approved law's objective was to permit the consolidation of private property, particularly in Eastern Bolivia (Amazon and Chaco regions), through the titling and registering of land owning, with the view of expanding market-led growth.<sup>888</sup> The 'land tenure question' in Bolivia is highly relevant because the country's economy is dependent on the extraction of minerals and timber and the production for the local and international market of primary agricultural products.<sup>889</sup> Transnational companies and powerful local elites own the mediums of production for agro-industry and mineral extraction.<sup>890</sup> Their profit-led activities operate as enclaves in a structurally

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<sup>883</sup> Ibid, 161.

<sup>884</sup> Ibid, 161.

<sup>885</sup> Ibid, 225.

<sup>886</sup> Pajuelo Teves (n 641) 74.

<sup>887</sup> Ibid, 74-75; Gustafson (n 662) 282

<sup>888</sup> Gustafson (n 662) 281; Bruno Fornillo, '¿Existe una reforma agraria en la Bolivia del Movimiento al Socialismo?' (2012) 42 Íconos (FLACSO Quito) 153, 157.

<sup>889</sup> Fornillo (n 888) 154.

<sup>890</sup> Ibid, 154-155.

heterogeneous economy<sup>891</sup> in which modern forms of production coexist with subsistence communitarian economies and urban family-based informal economies.<sup>892</sup>

However, the law also created the legal concept of ‘autochthonous communitarian land’ (*‘tierras comunitarias de origen’* or TCOs), as a result of the pressure of indigenous organisations (particularly of the lowlands) for an agrarian reform.<sup>893</sup> The idea was that private holdings over a certain acreage that did not fulfil a social objective or generate tax revenue for the state could be expropriated in order to create indigenous territories.<sup>894</sup> Despite these objectives of land redistribution, by 2006 (the deadline the law set for titling and redistribution), only 8.6% of the land had been titled (*saneadas*). Moreover, only a 100,000 hectares of this percentage were considered fiscal land and thus amenable for the creation of indigenous territories.<sup>895</sup> According to Fornillo, the governments of that period prioritized private land titling in order to attract investment, and the mercantilization of lands that were formerly ‘unproductive’ as well as of forests formerly given in concession.<sup>896</sup> Aymara peasants also opposed the law because they considered it a threat to the *ayllu* system of land governance with its emphasis on individual property rights and land titling over communal property.<sup>897</sup>

Thus, the neoliberal government adopted multicultural reforms because of the strong mobilization of highland and lowland indigenous peoples. It also adopted them in the context of good governance policies in the region and the consequent concern with the

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<sup>891</sup> The concept of ‘structural heterogeneity’ is from ECLAC’s (United Nations Economic Commission for Latin America and the Caribbean) structuralism theory (1950s-1970s). The expression is attributed to Anibal Pinto (1965, 1970). Ricardo Bielschowsky, ‘Sesenta años de la CEPAL: estructuralismo y neoestructuralismo’ (2009) 97 *Revista CEPAL* 173, 175. Structural heterogeneity can be understood as the ‘crystallization of forms of production, social relations and mechanisms of domination that correspond to different phases and modalities of peripheral development [periphery referring to former colonies, particularly Latin America and the Caribbean] that coexist in time and are interdependent’ within a nation-state territory. Armando Di Filippo and Santiago Jadue, ‘La heterogeneidad estructural: concepto y dimensiones’ (1976) 43 *El Trimestre Económico* 167, 167. Own translation from Spanish.

<sup>892</sup> In relation to the description of Bolivia’s economy see James Dunkerley, ‘Evo Morales, the ‘Two Bolivias’ and the Third World Bolivian Revolution’ (2007) 39 *Journal of Latin American Studies* 133, 158.

<sup>893</sup> Fornillo (n 888) 154-155. Fornillo explains that since the 1970s, governments promoted the large estate model in Eastern Bolivia owned by local white elites. This consolidated agro-industry in that region and also concentrated over 60% of the land in the hands of the local agro-industrial elites.

<sup>894</sup> Gustafson (n 662) 281; Law INRA of 1996, Articles 66 (1) (objectives of *saneamiento*) and 72 (*saneamiento* of TCOs)

<sup>895</sup> Fornillo (n 834) 157.

<sup>896</sup> *Ibid.*, 157.

<sup>897</sup> Jeffery Webber, *Red October. Left-Indigenous Struggles in Modern Bolivia* (Haymarket Books 2011) 169.

implementation of neoliberal policies in the context of a weak state.<sup>898</sup> The multicultural turn in IHRL and Latin American constitutions gave indigenous organisations visibility and access to international aid, and it forced the government to reconstitute the threshold of toleration of indigenous peoples.<sup>899</sup> The adoption of multiculturalism in IHRL and in the region also legitimized the language of identity politics and indigenous collective rights.

Under those flags, indigenous organisations were able to safely and effectively mobilize at a time when the Bolivian state was responding with violence to peasant and workers' movements that opposed neoliberal economic reforms. In the 2000s, this was the case with demands against the privatization of water (Water War in 2000), which were translated by various organisations into the language of cultural rights (water as sacred and part of Mother Earth, the commoditization of water runs against indigenous 'customary law').<sup>900</sup> As will be explained below, coca growers also appealed to cultural rights in order to fight policies against the eradication of the coca leaf. Finally, lowland organisations marched against an extractivist economy and the privileging of foreign direct investment by holding the banner of indigenous collective rights to land and territory.

However, at the same time, the Bolivian government did not permit the active participation of indigenous peoples in the process of making Bolivia a 'pluri-cultural' nation-state. Rather, the process was co-opted by the administration of Sánchez de Lozada and international creditors and donors. Multicultural reforms in Bolivia had the effect of silencing more radical demands for redistribution of land, as well as demands for the integration in the state's legal framework of alternative forms of representation and territorial and political organisation. The co-optation of demands was carried out

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<sup>898</sup> Van Cott, *The Friendly Liquidation of the Past. The Politics of Diversity in Latin America* (n 542) 145; Gustafson (n 662) 283.

<sup>899</sup> In a similar sense, Van Cott, *The Friendly Liquidation of the Past. The Politics of Diversity in Latin America* (n 542) 144; José Antonio Lucero, 'Decades Lost and Won: Indigenous Movements and Multicultural Neoliberalism in the Andes' in John Burdick, Phillip Oxhorn and Kenneth M. Roberts (eds), *Beyond Neoliberalism in Latin America? Societies and Politics at the Crossroads* (Palgrave MacMillan 2009) 67-68; 77-79.

<sup>900</sup> For example, Laurie, Andolina and Radcliffe (n 794) But while the cultural difference approach permitted the visibilization of some sectors, it also excluded those who could not mobilize using noble savage representations, such as the poor urban communities of migrants of Cochabamba. Ibid, 263-267.

both at the level of public policy design as well as of lack of implementation of the new collective rights incorporated to the Constitution and legislation.<sup>901</sup>

Finally, according to Rivera Cusicanqui, multiculturalism was also a way for the neoliberal governments to appropriate themselves of the power to define indigeneity as the ‘noble savage’.<sup>902</sup> In this regard, Rivera Cusicanqui explains that, following the indigeneity representations of transnational actors such as the World Bank, the National Secretariat for Ethnic, Gender and Generational Affairs of the Ministry of Human Development of Bolivia only considered as authentically indigenous the lowland indigenous peoples and isolated pockets of Andean communities such as the Uru-chipayas. Peasant communities were declared acculturated and therefore not entitled to collective rights.<sup>903</sup>

In this regard, Rivera Cusicanqui identifies the use of a regime of authenticity that enabled the government to dismiss peasants as subjects of cultural and economic demands because of not being sufficiently ‘pure’ and ‘autochthonous’. Instead, they were categorised as ‘shabby migrants, proletarianized rural labour and coca growers’.<sup>904</sup> Following Melamed, neoliberal multiculturalism precisely utilises economic, cultural and ideological distinctions in order to produce lesser personhoods. Thus new categories of stigma (i.e. migrants, coca growers and proletarianized rural labour) are juxtaposed to former racial categories producing differential status groups.<sup>905</sup>

### **4.3. The Rise of Indigenous Movements in the 21<sup>st</sup> Century**

The Bolivian trajectory parts from that of other Latin American countries in that the ‘rebel Indian’ was not tamed by multiculturalist governance but came back with full force in the 2000s. Bolivia is also exceptional in that indigenous and popular movements were actually successful in overthrowing the neoliberal government in 2003, and in shifting political elites in 2005 with the election as president of Bolivia of the coca grower leader Evo Morales. The mobilizations of the 21<sup>st</sup> century responded

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<sup>901</sup> In a similar sense, Van Cott, *The Friendly Liquidation of the Past. The Politics of Diversity in Latin America* (n 542) 240-242.

<sup>902</sup> Rivera Cusicanqui (n 58) 64.

<sup>903</sup> Ibid, 62-63.

<sup>904</sup> Ibid, 64.

<sup>905</sup> Melamed, ‘From Racial Liberalism to Neoliberal Multiculturalism’ (n 56) 14.

firstly to a feeling among some sectors that the ‘democracy by pact’ (*‘democracia pactada’*) had not increased political participation but instead had perpetuated the long-standing legitimacy and representation deficiencies of the state.<sup>906</sup> In this regard, the first period of democratic government seemed to comprise the worst of two worlds. On the one hand, the legacy of the MNR state of clientelist and prebendalist relations, the entrenched white-mestizo oligarchy, and state repression.<sup>907</sup> Hence, despite the economic crisis of the 1980s and the neoliberal measures, both of which significantly weakened the influence of the state over social sectors,<sup>908</sup> the ‘democracy by pact’ evidenced the continuation of the discretionary management of the public administration.<sup>909</sup> On the other hand, the reduction of the role of the state in the provision of basic services, the dismantling of the labour movement, and the deterioration of the peasant form of production were all legacies of the neoliberal government.<sup>910</sup>

In addition, the Water War (2000 against the privatization of water) and the Gas Wars (2003 against the privatization of hydrocarbons) channelled a concerned shared by several sectors about the fact that a political class tied to transnational capital was controlling public decision-making.<sup>911</sup> As a result, Bolivians were not able to access or benefit from ‘common goods’ such as water and gas.<sup>912</sup> Finally, protests such as the one against the *impuestazo*<sup>913</sup> evidenced also the ‘exhaustion of the neoliberal model’ and the escalations of contradictions in neoliberal fiscal policies for the Bolivian

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<sup>906</sup> Pajuelo Teves (n 641) 59, 83; in a similar sense, Postero, *Now we are Citizens: Indigenous Politics in Postmulticultural Bolivia* (n 559) 205.

<sup>907</sup> Garcés (n 61) 18; Pajuelo Teves (n 641) 67-68.

<sup>908</sup> Pajuelo Teves (n 641) 58.

<sup>909</sup> Postero, *Now we are Citizens: Indigenous Politics in Postmulticultural Bolivia* (n 559) 205; Pajuelo Teves (n 641) 59.

<sup>910</sup> For example, Postero, *Now we are Citizens: Indigenous Politics in Postmulticultural Bolivia* (n 559) 190-192; García Linera, ‘El desencuentro de dos razones revolucionarias. Indianismo y Marxismo’ (n 635).

<sup>911</sup> Postero, *Now we are Citizens: Indigenous Politics in Postmulticultural Bolivia* (n 559) 195.

<sup>912</sup> Garcés (n 61) 20.

<sup>913</sup> In February 2003, president Sánchez de Lozada’s administration proposed a direct income tax of up to 12.5% that was to be levied over employees who made more than two times the minimum wage (US\$110), a policy that targeted the public sector. With this tax increase, the Government intended to comply with the International Monetary Fund (IMF) delegation’s request to reduce fiscal deficit from 8% down to 5.5% in one year for Bolivia to continue to have access to credit from the institution. Ibid, 21-22; Webber (n 843) 178.

context.<sup>914</sup> It was in this setting that the proposal pushed by the lowland indigenous peoples in 2002 for a Constituent Assembly commenced gaining popularity.<sup>915</sup>

The key actors of these protests—which would later assume a central role in supporting and drafting the new Constitution—were the indigenous and peasant organisations. Particularly after the Water War, these organisations formed alliances and gradually assumed a unified agenda that was crystallized in the ‘Agenda of October’ of 2003. The main points in this agenda were the call for a Constituent Assembly, the nationalization of hydrocarbons, and the request for the resignation of president Sánchez de Lozada (1993-1997; 2002-2003).<sup>916</sup> The latter had been responding to the mobilizations with military repression and had lost almost all credibility after the Massacre of Warisata in 2003.<sup>917</sup> The indigenous and peasant organisations that lead these protests can be divided into three sectors: the highland indigenous organisations (which include, among others, the CSTUCB and the neighbourhood associations of El Alto), the lowland indigenous organizations, and the coca leaf producers’ (*cocaleros*) unions.<sup>918</sup>

This third political actor, the coca growers, would prove to become the most powerful of all. As mentioned previously, the *cocaleros* of the Chapare are settlers of Aymara and Quechua descent, many of whom could be counted among the thousands of miners who lost their jobs with the closing and privatization of the tin mines during the structural adjustment programmes of the late 1980s.<sup>919</sup> They had seen in the cultivation of coca in the lowlands a new form of livelihood.<sup>920</sup> However, the United States ‘war on drugs’ policies had made of the Chapare a low-intensity war zone, with a high presence of United States’ anti-narcotics agents and Bolivian military forces, which were allowed to detain and kill coca leaf producers.<sup>921</sup>

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<sup>914</sup> Webber (n 843) 179.

<sup>915</sup> Garcés (n 61) 22.

<sup>916</sup> Ibid, 23 citing Gretchen Gordon and Aaron Luoma, ‘Petróleo y gas: la riqueza ilusoria debajo de sus pies’ in Jim Shultz and Melissa Crane Draper (eds), *Desafiando la globalización Historias de la experiencia boliviana* (Plural Editores; Centro para La Democracia 2008); Pajuelo Teves (n 641) 83-84.

<sup>917</sup> Pajuelo Teves (n 641) 84; Albó, ‘Hacia el poder indígena en Ecuador, Perú y Bolivia’ (n 394) 144; Webber (n 843) 218-219.

<sup>918</sup> Albó, ‘Hacia el poder indígena en Ecuador, Perú y Bolivia’ (n 341) 142; Pajuelo Teves (n 641) 61.

<sup>919</sup> Albó, ‘Hacia el poder indígena en Ecuador, Perú y Bolivia’ (n 394) 142; Postero, *Now we are Citizens: Indigenous Politics in Postmulticultural Bolivia* (n 559) 197.

<sup>920</sup> Albó, ‘Hacia el poder indígena en Ecuador, Perú y Bolivia’ (n 394) 142; Postero, *Now we are Citizens: Indigenous Politics in Postmulticultural Bolivia* (n 559) 198.

<sup>921</sup> Postero, *Now we are Citizens: Indigenous Politics in Postmulticultural Bolivia* (n 559) 198.



*Cocaleros* would normally self-identify as peasants or settlers. However, since the Five-Hundred Years of Resistance celebration in 1992, they started to appeal to their indigenous origins. This enabled them to utilise cultural rights and cultural difference discourse against state repression and United States imperialism. Hence, in order to protect themselves and their livelihoods they assumed as one of their modes of struggle their human right to grow, sell and consume coca leaves because of the sacred and traditional uses of the coca leaf for indigenous peoples.<sup>922</sup> Indeed, coca leaves, in addition to being the raw material for the production of cocaine, are an important element of social and cultural daily life in the Andes since pre-colonial times. They are used for religious rituals, as an infusion against altitude sickness, and for chewing as a mild stimulant and hunger suppressor.<sup>923</sup>

The *cocaleros* became an increasingly powerful group, assuming a prominent role in the Katarist CSUTCB through their leader Evo Morales. Eventually, the *cocaleros* ran for Congress and presidential elections through the MAS (Movement Toward Socialism) Party. This political party was created in 1995 as the ‘political instrument’ of the Assembly of Indigenous Peoples. Thus, its function was to help highland indigenous organisations make the step from union politics and street mobilizations to national electoral politics.<sup>924</sup> Under the leadership of Evo Morales, in the 2000s the *cocaleros* would seek to expand their constituency by forming alliances with indigenous and non-indigenous sectors. They also broadened their discourse from one of indigenous cultural rights to a denunciation the neoliberal regime and the hegemonic political parties in Bolivia.<sup>925</sup> As mentioned previously, the United States, international donors and creditors and transnational companies had a significant amount of influence over Bolivia’s domestic policies, particularly since the economic crisis of the 1980s.<sup>926</sup> This prompted an anti-imperialist discourse among coca leaf producers that had a good

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<sup>922</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 121; Postero, *Now we are Citizens: Indigenous Politics in Postmulticultural Bolivia* (n 559) 198 citing Xavier Albó, ‘Bolivia: From Indian and Campesino Leaders to Councillors and Parliamentary Deputies’ in Rachel Sieder (ed), *Multiculturalism in Latin America, Indigenous Rights, Diversity, and Democracy* (Palgrave 2002); Webber also argues that the move towards an identity and cultural rights discourse was instrumental to acquiring the support of the Katarist CSUTCB. Webber (n 843) 127 citing Kevin Healy, ‘Political Ascent of of Bolivia’s Coca Leaf Producers’ (1991) 33 *Journal of Interamerican Studies and World Affairs* 87.

<sup>923</sup> Postero, *Now we are Citizens: Indigenous Politics in Postmulticultural Bolivia* (n 559) 197.

<sup>924</sup> Webber (n 843) 128-130; Albó, ‘Hacia el poder indígena en Ecuador, Perú y Bolivia’ (n 394) 143-144.

<sup>925</sup> Pajuelo Teves (n 641) 82.

<sup>926</sup> Jeffery R. Webber, *From Rebellion to Reform in Bolivia. Class Struggle, Indigenous Liberation and the Politics of Evo Morales* (1st edn, Haymarket Books 2011) 30-39.

reception among other sectors.<sup>927</sup> The MAS Party won the presidential elections in 2005 and, pressured by indigenous organisations, a year later called for the Constituent Assembly process.

In the case of lowland indigenous communities, they had become a target with the deepening of neoliberal reforms. Despite the multiculturalist discourse, Postero explains that the neoliberal governments of the 2000s privileged the recommendation of the World Bank of privatizing hydrocarbons and an extractivist economy that was to be funded by foreign direct investment (FDI).<sup>928</sup> Consequently, in situations of socio-environmental conflicts, the state would favour transnational companies over indigenous communities. This was the case, for example, with the Chiquitano protests and lawsuits in 2000 against the Enron and Shell oil pipeline project over their territories in the Chiquitano Dry Forest, which did not succeed in stopping the construction of the pipeline.<sup>929</sup> In this context, multiculturalist reforms were thought by various social sectors to be part of the problem rather than the solution, as they did not touch on political or economic structures. Instead they contributed to creating a land reform that favoured large estate owners and a political participation reform that did not permit deep restructuring.<sup>930</sup>

As for the highlands, García Linera considers that in the 2000s, under the leadership of Felipe Quispe ('the Mallku'),<sup>931</sup> there was a renaissance of Katarism. As a result, Indianism became the 'discursive nucleus' of the 'new left'.<sup>932</sup> García Linera further argues that Indianism was appealing because it located its explanation of racial discrimination and inequality in a neoliberal context. In addition, it was closer to the experiences of daily community life of indigenous peoples than a declining leftist discourse and the 'ideological void' of the state-promoted 'transnational modern spaces'

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<sup>927</sup> Postero, *Now we are Citizens: Indigenous Politics in Postmulticultural Bolivia* (n 559) 199-200.

<sup>928</sup> Ibid, 201-202.

<sup>929</sup> Ibid, 201-202.

<sup>930</sup> Ibid 203; Valencia García and Égido Zurita (n 811) 22-23.

<sup>931</sup> Quispe who was elected president of the CSUTCB in 1998. Previously Quispe was involved in the Katarist Guerrilla movement attempt in the 1980s and also participated in the presidential elections of 2002 with the party Pachakuti Indigenous Movement (MIP). Webber, *Red October. Left-Indigenous Struggles in Modern Bolivia* (n 897) 129-130; Pablo Mamani, 'Entrevistas a los luchadores Kataristas e Indianistas: Felipe Quispe Huanca' (2011) 5 Willka 175. The denomination 'Mallku' alludes to a political and administrative authority in *ayllu* system, constituting the most important figure within a grouping of *ayllus*. Webber, *Red October. Left-Indigenous Struggles in Modern Bolivia* (n 897) 167.

<sup>932</sup> García Linera, 'El desencuentro de dos razones revolucionarias. Indianismo y Marxismo' (n 635) 9.

created by a neoliberal economy.<sup>933</sup> In this regard, Quispe re-introduced to the CSUTCB a radical Indianist discourse of Aymara nationalism.

In contrast with the conciliatory ‘pluri-multi’ current of the 1990s, Aymara nationalism is based on Reinaga’s idea of the two Bolivias: the one of the European or white-mestizos and the one of the Indians, the one of the oppressors and the one of the oppressed.<sup>934</sup> This idea is highly similar to the division Fanon makes between the world of the colonizers and the world of the colonized, which are mutually excluding and irreconcilable. Belonging to one or the other world is based on race primarily and also on class (which Fanon explains is determined by race).<sup>935</sup> Aymara nationalism seeks the construction of an Indian nation with a communitarian regime in which white-mestizos are a minority.<sup>936</sup> Some currents (such as the ‘millenarian restorationist’ line) also propose the restoration of the Inca Empire, or the Qollasuyo, and the consequent re-definition of the territorial administration of Bolivia.<sup>937</sup> Hence, in addition to having an anti-neoliberal and an anti-imperialist dimension, the CSUTCB also incorporated into the ‘revolutionary epoch’<sup>938</sup> of the 2000s a racial resistance and anti-colonialist dimension.

It is worth mentioning a fourth political actor too: the Eastern Bolivia elites, who stood in opposition to the indigenous movements. As will be explored in the following chapter, this fourth actor had a decisive role in the making of the Constitution of Bolivia of 2009 and the marginalization of plurinationalism. Since the 1980s, Eastern Bolivia (popularly known as the Media Luna<sup>939</sup>) has been the most economically prosperous

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<sup>933</sup> Ibid, 9.

<sup>934</sup> In relation to the presence of the two Bolivia’s theory in Felipe Quispe’s and Aymara nationalism discourse, ibid, 8; Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 55; in relation to the idea of the two Bolivias in Fausto Reinaga’s Indianism see Escárzaga (n 725) 194-195. Escarzaga explains that Reinaga takes this idea from Carnero Hoke, who speaks about two Peru: the one of the coast (the white) and the one of the mountains or *sierras* (the Indians).

<sup>935</sup> Frantz Fanon, *The Wretched of the Earth* (Richard Philcox tr, Kindle edn, Grove Press 2004 [1961]) 3-5.

<sup>936</sup> García Linera, ‘El desencuentro de dos razones revolucionarias. Indianismo y Marxismo’ (n 635) 7. Aymara nationalism has also a transnational dimension as Aymara and Quechua peoples also live in other South American countries.

<sup>937</sup> Pablo Mamani, ‘Entrevistas a los luchadores Kataristas e Indianistas: Inka Wascar Chiquiwanca’ (2011) 5 Willka 191.

<sup>938</sup> Webber, *From Rebellion to Reform in Bolivia. Class Struggle, Indigenous Liberation and the Politics of Evo Morales* (n 926) 43-47 based on Adolfo Gilly, ‘Bolivia: a 21<sup>st</sup>-Century Revolution’ (2005) 19 Socialism and Democracy 41.

<sup>939</sup> Eastern Bolivia is denominated ‘the Half-Moon’ or the Media Luna because of its location in the administrative map of Bolivia resembles a crescent moon. Eastern Bolivia is constituted by the

region in Bolivia,<sup>940</sup> and currently the elites in those areas are dedicated to finance, agro-industry and oil extraction.<sup>941</sup> In the 2000s, the Federation of Private Entrepreneurs of Bolivia represented them. This federation was comprised of the Eastern Agricultural Chamber, the Cattle-Ranchers Federation, the Chamber of Industry and Commerce and the Hydrocarbons Chamber.<sup>942</sup>

The Media Luna elites (as well as the rural and urban middle classes that supported them) responded to the challenge of the rising indigenous movements by adopting a discourse of self-determination and claiming to be a separate nation that deserved at least departmental autonomy, if not full secession.<sup>943</sup> Hence, seeing that they were losing control of the state apparatus with the rise of the MAS party and the exit of Sánchez de Lozada, the Eastern elites sought to protect their hegemony in their own region with the 'January Agenda' of 2005. In this document, they requested control over the natural resources of Eastern Bolivia (land, timber, gas, oil), the right to retain two thirds of the tax revenues generated in the department, and authority to set policies concerning security, tariffs, foreign relations, among others.<sup>944</sup> The nationalist discourse of the Media Luna also had a racist aspect to it, evidence that the nationalist fantasy of white supremacy was alive and well in that region, despite the 'recognition' of indigenous peoples in the Constitution.

According to this racist discourse, Eastern Bolivia is modern, wealthy, productive and white<sup>945</sup> (there are about thirty-four ethnic groups in the Amazon and Chaco region that nevertheless constitute numerical minorities in relation to the white-mestizos<sup>946</sup>). Moreover, Eastern Bolivia (the 'Camba Nation') sets itself apart from Andean Bolivia

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departments of Santa Cruz, Tarija, Beni and Pando and it is situated it covers the Amazon and Chaco regions.

<sup>940</sup> Pajuelo Teves (n 641) 233.

<sup>941</sup> Webber, *Red October. Left-Indigenous Struggles in Modern Bolivia* (n 897) 234.

<sup>942</sup> Ibid, 234.

<sup>943</sup> Postero, *Now we are Citizens: Indigenous Politics in Postmulticultural Bolivia* (n 559) 211; Webber, *Red October. Left-Indigenous Struggles in Modern Bolivia* (n 897) 232.

<sup>944</sup> Webber, *Red October. Left-Indigenous Struggles in Modern Bolivia* (n 897) 232. It was since the multiculturalist reforms however, particularly the Law of the Institute of Agrarian Reform of 1996, that the Eastern elites started to see their status quo threatened and began speaking about autonomy and even secession. Federico Fuentes, 'The Struggle for Bolivia's Future' (2007) 59 Monthly Review An Independent Socialist Magazine 95.

<sup>945</sup> Pajuelo Teves (n 641) 62.

<sup>946</sup> Xavier Albó and Franz Barrios Suvelza, *Por una Bolivia Plurinacional e Intercultural con Autonomías* (Programa de las Naciones Unidas para el Desarrollo (PNUD) en Bolivia 2006) 23; Molina Barrios, Figueroa and Quisbert (n 488) 43.

(the ‘Colla Nation’), which is depicted as backward, unproductive, poor and Indian<sup>947</sup> (Aymara and Quechua indigenous peoples constitute a numerical majority in six of the ten departments of Bolivia<sup>948</sup>). In addition, the Media Luna elites were in favour of neoliberal policies that benefited them, such as a market economy and foreign direct investment attraction.<sup>949</sup> Thus, in their speech they combined a civilization versus barbarism racist discourse with one that linked progress and productivity with a neoliberal economy. In this regard, indigenous proposals were viewed as backward on account of race but also because of their opposition to the neoliberal project.

## 4.4. Plurinational Constitutionalism

### 4.4.1. Plurinationalism in the CSUTCB’s Political Thesis of 1983

This section will begin by referring to plurinationalism as it was originally coined in the CSUTCB’s Political Thesis of 1983. This is pertinent to the discussion because I argue that many aspects of the Katarists’ idea of plurinationalism are present in the Constitution of Bolivia of 2009. In his ethnographical work on the Constituent Assembly process of Bolivia, Schavelzon mentions that the Katarist-Indianist current was to be found in the definition of the political subject and the emphasis on legal pluralism, self-determination and plurinationalism.<sup>950</sup> Moreover, as will be further discussed below, I consider that the Katarist-Indianist view is present in concepts such as the ‘Unitary State’<sup>951</sup> and ‘communitarian democracy’<sup>952</sup> and the inclusion of the Aymara principles ‘*ama qhilla, ama llulla, ama suwa*’ (do not be lazy, do not be a liar, do not be a thief) in the Constitution.<sup>953</sup>

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<sup>947</sup> Pajuelo Teves (n 641) 62.

<sup>948</sup> Albó and Barrios Suvelza, *Por una Bolivia Plurinacional e Intercultural con Autonomías* (n 946) 22. Based on National Census of Bolivia of 2001; Molina Barrios, Figueroa and Quisbert (n 488) 43.

<sup>949</sup> Webber, *Red October. Left-Indigenous Struggles in Modern Bolivia* (n 897) 234.

<sup>950</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 90.

<sup>951</sup> Constitution of Bolivia of 2009, Article 1.

<sup>952</sup> Ibid, Article 8. These are stated to be the ‘moral-ethical principles of the plural society’ (own translation).

<sup>953</sup> Ibid, Articles 11 (3), 26 (3) and 210 (III). A similar argument is in Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 90, 91.

## **i. Plurinationalism as a Nation-Building Paradigm**

The Political Thesis seems to refer to the plurinational state as a national version of the internal political organisation that was proposed for the CSUTCB itself. This is, a single organisation that nevertheless respects the ‘the diversity of struggles traditions’<sup>954</sup> as well as ‘the diversity of languages, cultures, histories and forms organization and work’ of the affiliated unions and ethnic groups.<sup>955</sup> In this sense, the references to the plurinational state in the Political Thesis point towards the construction of a ‘unitary state’ with centralized power (as opposed to a federal state) that will empower indigenous cultures and forms of self-government.<sup>956</sup> The idea of the unitary state is replicated in the Constitution of Bolivia of 2009, where it is said that Bolivia is a Unitary Social Plurinational Communitarian State with rule of law (*estado de derecho*).<sup>957</sup>

The forms of self-government the Political Thesis refers to include the ‘communitarian democracy’, which is defined in both the Political Thesis and in the Constitution of Bolivia of 2009 as the democracy of indigenous and peasant communities. A democracy in which the authorities and representatives are selected according to their own norms and procedures<sup>958</sup>—as opposed to a democracy in which the authorities are selected from ‘above’.<sup>959</sup> This last statement seems to be both a call for the recognition of legal pluralism, as well as a rejection of what the CSUTCB denominates ‘*pongueaje político*’, or political serfdom.<sup>960</sup> They allude to the control and manipulation of the peasant unions by the corporatist state<sup>961</sup> and the feelings of being used in electoral politics as ‘political ladders’ by left-wing and right-wing political parties.<sup>962</sup>

This idea in plurinationalism of respect for diversity and autonomy in a unitary political regime has to do also with the Katarist utopia set in the past of an ideal Inca cohesive empire in which diversity and autonomy were respected<sup>963</sup>—as opposed to a current

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<sup>954</sup> CSUTCB Political Thesis of 1983 in Rivera Cusicanqui (n 58) 236. Own translation from Spanish.

<sup>955</sup> Ibid, 241, 243. Own translation.

<sup>956</sup> Ibid, 241, 243.

<sup>957</sup> Constitution of Bolivia of 2009, Article 1. Rule of law is not a precise translation of *estado de derecho* though, which is closer in meaning to the French *état de droit*.

<sup>958</sup> Constitution of Bolivia of 2009, Article 11(3).

<sup>959</sup> Rivera Cusicanqui (n 58) 243.

<sup>960</sup> CSUTCB Political Thesis of 1983 in ibid, 238.

<sup>961</sup> Political Thesis, ibid, 238.

<sup>962</sup> Ibid, 200.

<sup>963</sup> For example, ibid, 231.

situation of ‘false integration and cultural homogenization’,<sup>964</sup> in which indigenous peoples are ‘second class citizens’.<sup>965</sup> In this regard, as Rivera Cusicanqui affirms that Katarism, as a movement inspired by autochthonous ideologies and forms of struggle, should be understood as an expression of a desire of its constituencies ‘to form part of a national-popular project of truly democratic and pluralist roots, and of the will to maintain their own identity and a capacity of influence, anchored in Indian cultural autonomy’.<sup>966</sup> Plurinationalism would therefore be the crystallization of that desire in a proposal of a state model and an alternative nation-building paradigm.

## ii. Plurinationalism as a Decolonisation Project

One of the main features of Pacto de Unidad’s proposal for a new constitution was its decolonization project,<sup>967</sup> which was a contribution of the Indianist-Katarist organisations.<sup>968</sup> The meaning of decolonization in Katarism becomes patent when understanding what Rivera Cusicanqui denominates the ‘discursive nucleus of the Katarist ideology’.<sup>969</sup> The first aspect of this nucleus is the view of Katarism as the anti-colonial struggle to restore the aforementioned utopian pre-colonial past in which ‘there was no experience of hunger, theft or lies’<sup>970</sup> (which is reflected in the constitutional precept ‘do not be lazy, do not be a liar, do not be a thief’).<sup>971</sup> In this regard, Rivera Cusicanqui also emphasizes the importance in Katarism of acknowledging both the continuity of the colonialist situation that is imposed over societies that ‘are originally free and autonomous’, and the indigenous struggle against this colonial domination.<sup>972</sup> Hence, the revision of history from the perspective of indigenous peoples is an important feature of the Political Thesis of 1983 and of the first years of the Katarist movement in general.<sup>973</sup>

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<sup>964</sup> Ibid, 241.

<sup>965</sup> Ibid, 230; Tiwanaku Manifesto of 1973.

<sup>966</sup> Ibid, 217 (own translation from Spanish).

<sup>967</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) xii, 8, 10, 53.

<sup>968</sup> Ibid, 85, 218.

<sup>969</sup> Rivera Cusicanqui (n 58) 210.

<sup>970</sup> CSUTCB Political Thesis of 1983 in *ibid*, 231. The Tiwanaku Manifesto also states that in the pre-colonial period there was no private property, individualism, class divisions or political sectarianism. Instead, there was a communitarian economy and a harmonious social system based on solidarity.

<sup>971</sup> Ibid, 211.

<sup>972</sup> Ibid, 211, 212.

<sup>973</sup> García Linera, ‘El desencuentro de dos razones revolucionarias. Indianismo y Marxismo’ (n 635) 4-5.

As advanced in Chapter 3, the continuity of indigenous cultures, the oppression of indigenous peoples by the state and white elites, and the indigenous struggle against these oppressions ('the silent revolution'<sup>974</sup>) were denied in the period of Social Constitutionalism, in which the ideologies *mestizaje* and *indigenismo* dominated official discourse and the education system.<sup>975</sup> In the first section of the Political Thesis, entitled 'Who are We?', the CSUTCB rebels against the primitivism of the liberals and the indigenism of the 'populist' period, and the consequent positioning of the Indian in a remote past by stating the following,

Our history is not only a thing of the past; it is also the present and the future. It can be summarised in a permanent struggle to re-affirm our own historical identity, for the development of our culture and, with our own personhood, be subjects and not objects of history.<sup>976</sup>

Indigenous and peasants are not to be seen as passive subjects that are only valuable as cannon fodder during the wars but as political and moral agents.<sup>977</sup> Moreover, for Katarists, the 'national frustration' (or the impossibility to form a nation) finds its reason in the 'systematic attempts of destruction' of the Aymara and Quechua cultures (Katarism is an Andean movement).<sup>978</sup> It is worth emphasizing here the difference between the idea of cultural diversity in plurinationalism and in IHRL. As discussed in Chapter 1, the latter is based on the ideologies of cultural survival and cultural enrichment that exoticise and subordinate indigenous peoples. Rather, the appeal to cultural diversity in Katarism is a response to Social Constitutionalism that requested indigenous peoples to forsake their cultures in exchange for equal citizenship (and humanity).<sup>979</sup>

The second statement of Katarist ideology is the awareness that indigenous peoples are not numerical or political minorities. Rather, Katarism emphasizes that indigenous peoples constitute a majority that, when united by their common condition of capitalist

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<sup>974</sup> Pérez Sáinz (544) 356.

<sup>975</sup> In relation to the education system see Tiwanaku Manifesto 1973.

<sup>976</sup> CSUTCB Political Thesis of 1983 in Rivera Cusicanqui (n 58) 230. Own translation from Spanish. The idea of not being objects of history reminds me of Fanon's words about his feelings of reification because of the colour of his skin: 'I came into the world imbued with the will to find a meaning in things, my spirit filled with the desire to attain to the source of the world, and then I found that I was an object in the midst of other objects.' Fanon, *Black Skin White Masks* (n 55) 82.

<sup>977</sup> Tiwanaku Manifesto, 1973.

<sup>978</sup> Tiwanaku Manifesto, 1973.

<sup>979</sup> In a similar sense, Rivera Cusicanqui (n 58) 211.



exploitation and colonial oppression, can bring down the system of domination that subjugates them. This awareness of their numerical power is referred to as the ‘awakening of the sleeping giant’.<sup>980</sup> It is also referred to as the return of the hero, Tupac Katari who before being dismembered by the Spanish colonizers in the late 1700s by being tied to four horses, allegedly said that he would come back ‘multiplied by millions’.<sup>981</sup> The emphasis on numerical strength works as a rhetorical device against the victimization of indigenous populations that turns them into minorities and ‘helpless objects’.<sup>982</sup>

It may also be a reaction to the phenomenon of ‘statistical ethnocide’ (*etnocidio estadístico*), or the reluctance of Latin American governments to include categories in censuses that would count the number of indigenous individuals in their territories and that would provide information about their location and living conditions.<sup>983</sup> The reasons for this were both assimilationist policies and policies that sought to conceal the fact that in certain countries like Bolivia, Peru, Guatemala and Mexico, indigenous peoples represent a highly significant percentage of the total population.<sup>984</sup> In the multiculturalist period, the invisibilization of indigenous peoples and their impoverished living conditions also prevent the enforcement of constitutional rights including collective rights.<sup>985</sup>

#### **4.4.2. Plurinationalism in the Constituent Assembly Process**

In the context of the Constituent Assembly process, the Plurinational State was a proposal advanced by Pacto de Unidad (‘Unity Pact’), an indigenous-peasant coalition formed in Santa Cruz in 2004. It was composed by the main national indigenous organisations: the CSUTCB, the coca leaf producers’ ‘National Confederation of Inter-Cultural Communities of Bolivia’, the Confederation of Indigenous Peasant Women of Bolivia ‘Bartolina Sisa’, CIDOB and CONAMAQ. Pacto de Unidad was also supported by a number of national NGOs such as CEJIS (Centre for Legal and Social Research), CIPCA (Centre for the Promotion and Research of the Peasant), CESA (Centre for

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<sup>980</sup> Ibid, 66.

<sup>981</sup> Ibid, 211-212.

<sup>982</sup> Hage (n 52) 95.

<sup>983</sup> Albó, ‘Etnicidad y movimientos indígenas en América Latina’ (n 568) 3-4 citing Bonfil Batalla.

<sup>984</sup> Ibid, 4; Bello and Rangel (n 573) 15.

<sup>985</sup> Bello and Rangel (n 573) 15-16.

Agricultural, Social and Community Services), NINA Programme, and international NGOs such as IBIS Denmark.<sup>986</sup>

In 2006 and then in 2007,<sup>987</sup> Pacto de Unidad presented a complete text of a Constitution that was used by the MAS party as the basis of their proposal during the Constituent Assembly.<sup>988</sup> This Constitution proposal was the result of a complex process of political participation begun in 2004 in which hundreds of participants that belonged to the constituencies of these organisations provided their input.<sup>989</sup> Pacto de Unidad referred to the following areas: state model, territorial administration and indigenous autonomies, natural resources, land and territory, political representation and collective rights.<sup>990</sup> Within Pacto de Unidad, the idea of a Plurinational State was proposed by the CSUTCB and then developed in different conferences and meetings. The CSUTCB emphasized that plurinationalism was not only about declaring the pluri-ethnic and multicultural character of the country, as multiculturalism had done. It had to go beyond the rhetoric and involve a re-structuring of the state's institutions and territory in a way that reflected the existence of a multiplicity of nations (and legal orders) in Bolivia.<sup>991</sup> In this regard, plurinationalism refers firstly to the dismantling of the colonial state (which is controlled by an oligarchy) and the participation of indigenous peoples in all government levels.<sup>992</sup> Second, it is the idea of a plural political system that acknowledges indigenous forms of organisation and that modifies the structure of the modern state in order to incorporate them.<sup>993</sup> Plurinationalism would therefore alleviate the 'crisis of correspondence'<sup>994</sup> between the state and civil society.

In this sense, Tapia explains how in Bolivia there has been little relation between the state and civil society during the colony and after independence. Before the

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<sup>986</sup> Garcés (n 61) 14.

<sup>987</sup> Pacto de Unidad presented a first draft of their Constitution Project on 5 August 2006 and the 23 May 2007 they presented a revised version. Gobernabilidad Democrática en Bolivia, 'Propuesta de Constitución presentada por el Pacto de Unidad (2006-2007)' United Nations Development Programme (UNDP) for Bolivia web page <<http://www.gobernabilidad.org.bo/piocs/asamblea-constituyente/propuesta-de-constitucion>> accessed 31 December 2014. In this thesis, I refer to the text of 2007.

<sup>988</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 125-126.

<sup>989</sup> Garcés (n 61) 43-64.

<sup>990</sup> Ibid, 67-79.

<sup>991</sup> Ibid, 49.

<sup>992</sup> Ibid, 49.

<sup>993</sup> Tapia Mealla (n 568) 135-137.

<sup>994</sup> Luis Tapia Mealla, 'Una reflexión sobre la idea de Estado plurinacional' (2007) 22 Observatorio Social de America Latina (OSAL) 47, 48-49.

multicultural reforms that enabled indigenous peoples to have access to national politics, only the oligarchy had access to state politics through the political party system. However, parallel to this official realm, indigenous peoples have their own forms of organisation and representation, such as peasant unions and indigenous assemblies, which found no correspondence with institutions of a liberal representative democracy.<sup>995</sup> Plurinationalism would therefore seek to acknowledge these parallel structures and have them represented in (if not incorporated into) the state.

One of the few key terms of plurinationalism that could be partially developed in the Constitution of 2009 is 'people'. The idea was to create a political subject that would distinguish herself from the elites that had until now controlled the state apparatus. In addition, the constituent delegates wished to differentiate the new Constitution from liberal republicanism and the idea of a nation understood as a homogenous population, both of which were associated by indigenous organisations to colonialism and racial discrimination.<sup>996</sup> The explicit mention of different sectors was also a result of the idea that in a plurinational state, sovereignty is not transferred to the state but always belongs to the people, or to the peoples in the Bolivian case. And if sovereignty belongs to the people, so do natural resources and territories and lands.<sup>997</sup> Finally, this definition of people was an attempt to include the identities of the colonised, those who throughout the republican period had been excluded from the national project by completely ignoring their existence (as it is the case of indigenous peoples of the lowlands or the Afro-Bolivians) or considering them an obstacle to modernisation.

During the Constituent Assembly process, the constitutional article referring to the composition of the Bolivian nation only highlighted the distinctiveness of indigenous peoples. Later, however, Afro-Bolivians (who acquired this denomination in the Constitution of 2009) were also explicitly included as an ethnic group that was part of the Bolivian state. This occurred after Afro-Bolivian organisations intensely lobbied during the Constituent Assembly meetings in Sucre so they would not be left out of the Constitution, as they were left out the National Census of 2001.<sup>998</sup> The coca growers,

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<sup>995</sup> Ibid, 49.

<sup>996</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48 ) 27.

<sup>997</sup> Ibid, 71; Álvaro García Linera, *Los tres pilares de la nueva Constitución Política del Estado. Estado Plurinacional, Economía Estatal y Estado Autónomo* (2008).

<sup>998</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 128.

who had great political power at that time because of having direct access to the Government of Morales, also wished to be explicitly mentioned with the name of inter-cultural communities.<sup>999</sup> The Constitution, however, does not refer to *mestizos* in order to avoid allusions to the former *mestizaje* model of Social Constitutionalism. For the opposition, to exclude the category *mestizo* left those who were not indigenous in a ‘limbo’.<sup>1000</sup>

During the Constituent Assembly there were also concerns about the creation of an ‘ethnic state’ and a nation that would only be defined in racial terms. Therefore, the constituent delegates of the MAS party proposed that the constitutional norm defining the Bolivian people also defined Bolivian citizens in terms of gender and class (‘male and female Bolivians of urban areas and various social classes’<sup>1001</sup>). However, while racial and gender differentiation survived the revision of the text by the legislature, this was not the case of class differentiation. The final version of this norm reads as follows

The Bolivian nation is composed of the totality of male and female Bolivians, the indigenous autochthonous peasant peoples and nations, and the inter-cultural and Afro-Bolivian communities that together form the Bolivian people.<sup>1002</sup>

According to Schavelzon, there was much discussion during the Constituent Assembly about what it means to be indigenous.<sup>1003</sup> The result was the denomination of the indigenous subject as ‘indigenous autochthonous peasant’ (*indígena originario campesino*).<sup>1004</sup> ‘Autochthonous’ (*originario*) refers to indigenous from the highlands. It is similar to the denomination ‘first nations’ of the indigenous peoples that inhabit the United States, and it seems to emphasise the claim to self-determination of indigenous populations. ‘Indigenous’ refers to lowland peoples, who took the term from IHRL discourse. Finally, ‘peasant’ was added because some sectors such as the CSUTCB members and the settlers wished to be recognised as indigenous but not reduced to such a category, or they rejected the category ‘indigenous’ altogether.<sup>1005</sup> As discussed in

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<sup>999</sup> Ibid, 127.

<sup>1000</sup> Ibid, 97,139 referring to the critique of plurinationalism by Julio Aliaga.

<sup>1001</sup> Ibid, 129.

<sup>1002</sup> Constitution of Bolivia of 2009, Article 3. Own translation.

<sup>1003</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 98.

<sup>1004</sup> Constitution of Bolivia of 2009, Article 2. All references to indigenous peoples in the Constitution utilise this term.

<sup>1005</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 93-94, 97.

Chapter 5, this wide definition of indigeneity would prove problematic in the implementation of a human rights approach to indigenous peoples, and would clash with more restrictive definition of indigeneity present in IHRL and in the Constitution. In addition, the discussion on the definition of indigeneity evidenced important ideological and political differences between indigenous organisations (CIDOB, CONAMAQ) and peasant organisations (CSUTCB, Bartolina Sisa, coca growers) in Pacto de Unidad.<sup>1006</sup>

#### **4.4.3. Plurinational Constitutionalism in relation to Multicultural Constitutionalism**

Plurinationalism may be considered a form of constitutionalism that started with the Constituent Assembly processes of Ecuador (2008) and Bolivia (2006-2009) and that can be distinguished from Multicultural Constitutionalism.<sup>1007</sup> Plurinationalism is an ongoing political project<sup>1008</sup> that, as will be argued in Chapter 5, ultimately did not occupy a prominent place in the Constitution of Bolivia of 2009, partly because of the internal tensions inside the indigenous movement that were transferred to the proposal itself. Notwithstanding these facts, as mentioned in the introduction to this chapter, I consider plurinationalism a valid proposal and an alternative to existing constitutional forms. Its value lies also in the way it was formulated. It is a bottom-down proposal that started being collectively constructed by the grassroots associations, assemblies and unions that compose the main indigenous and peasant organisations in Bolivia. It was then further discussed in the context of a democratic process during the Constituent Assembly with the participation of Bolivian intellectuals and in interaction with opposition sectors.

‘Plurinational Constitutionalism’ is characterised by emphasizing the right to self-determination of indigenous peoples as an interpretation framework for indigenous collective rights and state-indigenous relations more generally.<sup>1009</sup> In this regard, for Yrigoyen Fajardo, the difference between Multicultural Constitutionalism and

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<sup>1006</sup> Ibid, 98.

<sup>1007</sup> Yrigoyen Fajardo, ‘Hitos del reconocimiento del pluralismo jurídico y el derecho indígena en las políticas indigenistas del constitucionalismo andino’ (n 2). Introduction to the thesis (n 2)

<sup>1008</sup> Salvador Schavelzon, ‘Cosmopolitique constituante en Bolivie. La Constitution "ouverte" et le surgissement de l'État Plurinational’ (2012) XLII Recherches Amérindiennes au Québec 79, 86.

<sup>1009</sup> Garcés (n 61) 145-146; in a similar sense, Yrigoyen Fajardo, *El Pluralismo Jurídico en la Historia Constitucional Latinoamericana: de la Sujeción a la Descolonización* (n 543) 10; Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 65, 454.

Plurinational Constitutionalism is precisely that the latter goes further in the advancement of indigenous rights by referring to indigenous populations as nations with self-determination, in the way the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP, 2007) does.<sup>1010</sup>

However, I consider that the Constitution of Bolivia of 2009 goes much further in its inclusion of the right to self-determination than the UNDRIP. As mentioned in Chapter 1, the UNDRIP limits the definition of self-determination to the right to internal self-government. In addition, as explained in Chapter 2, despite its (non-binding) declaration of self-determination of indigenous peoples, currently the predominant approach to indigenous collective rights in IHRL is cultural difference. As a result, currently IHRL establishes individual rights and autonomy endorsement as the limits to toleration of difference. Hence, when a reified view of culture is deemed to oppose individual autonomy, it cannot be tolerated by the state. In contrast, plurinationalism justifies differentiated rights on the basis of self-determination and consequently as a form of restoration for the colonial past. Collective rights in this sense are a way of enhancing the political autonomy of indigenous nations, instead of being conceptualised as ways of protecting minorities against the intolerance of the dominant group.<sup>1011</sup>

Where multiculturalism and plurinationalism coincide (when defining plurinationalism as Pacto de Unidad's constitution project) is in including differentiated rights for indigenous peoples and therefore utilising racial categories in order to assign rights. However, it cannot be said that the presence of indigenous rights discourse in Pacto de Unidad's proposal is necessarily an indication of the presence of a multiculturalist approach to indigenous peoples in plurinationalism. As mentioned earlier, plurinationalism was proposed as an alternative to the 'pluri-multi' approach officially assumed by the Bolivian state between 1994-2005.<sup>1012</sup> Second, as argued in Chapter 3, the meaning and effects of the discourses of indigenous rights and multiculturalism vary depending on the enunciator. In the Bolivian context, the use of indigenous rights by highland and lowland organisations in the 1990s was tied to a discourse of anti-colonialism, recognition and land. Nevertheless, the multicultural reforms carried out by

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<sup>1010</sup> UNDRIP, Articles 3,4 and 46.

<sup>1011</sup> As it is the case of the 'external protections' idea in Kymlicka's minority rights theory. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 47) 36.

<sup>1012</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 11.

the state significantly limited indigenous demands for political participation, autonomy and territory. The state did so through practices of inclusion<sup>1013</sup> that circumscribed indigenous peoples' presence and participation in the national space in a way that avoided touching the centrality of the white subject and the existing political and economic regime.

It seems in this regard that while indigenous rights discourse enabled indigenous peoples to gain symbolic and material power, it also carried with it inherent limitations—as if indigenous rights discourse were a Trojan horse that when brought into the heart of the movement would constrain it from within, forcing it to represent itself and express its demands within the borders of what is knowable and acceptable to the dominant group. In other words, indigenous movements can resort to indigenous rights discourse, but the price is to perform as noble savages and limit demands to claims for collective rights that will not threaten state sovereignty, will not question liberal representative democracy or capitalism, and will not touch on the issue of colonialism.

Precisely one of the biggest limitations that human rights discourse entails for an anti-colonial movement is that indigenous rights *can be* tied to a system that requires the participation of the state recognising the racialised other, acting to protect her against intolerance and permitting her to exercise collective rights. As discussed in Chapter 2, for Fanon that is exactly the problem of the Hegelian notion of recognition in a colonial context: the fact that liberation and dignity depend upon the will and the actions of the oppressor. I say that human rights 'can be' tied to the state because the use of indigenous autonomy and rights discourse by the Zapatistas in Chiapas is an example of a movement that explicitly says that it does not need state recognition in order to exercise rights or claim autonomy.<sup>1014</sup>

However, when absorbed by the state's legal system and utilised to mediate state-indigenous relations, indigenous rights discourse will privilege IHRL official interpretations over non-official interpretations of rights coming from social movements. The reason for this is the international obligations the state had previously acquired by ratifying IHRL instruments—not to mention the reluctance of law operators

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<sup>1013</sup> Hage (n 52) See Chapter 3.

<sup>1014</sup> Shanon Speed and Alvaro Reyes, "In Our Defense": Rights and Resistance in Chiapas' (2002) 25 Political and Legal Anthropology Review 69, 74-75.

to move away from established meanings of the law and a legal positivist framework.<sup>1015</sup> As analysed in Chapter 5, indeed the inclusion of a regime of collective rights in the Constitution of Bolivia of 2009 entails clashes between the human rights approach and plurinationalism. I make the case that there will necessarily be tensions and conflicts between a human rights system that draws on primitivist representations of indigeneity, privileges a cultural difference approach and protects state territorial integrity and sovereignty, and plurinationalism, with its expanded concept of indigenous subject, the privileging of self-determination and the emphasis on political and territorial autonomy of indigenous peoples.

Looking beyond the scope of protection of indigenous collective rights, plurinationalism is a fundamentally different nation-building paradigm in relation to the *mestizaje* of Social Constitutionalism (1952-1994 in Bolivia),<sup>1016</sup> and the ‘cultural enrichment’<sup>1017</sup> of Multicultural Constitutionalism. For Kymlicka, multiculturalism responds to a central concern in liberal thinking with the idea of citizenship, social unity and social cohesion in relation to the quest for the stability and harmony of liberal democratic governments.<sup>1018</sup> In contrast, plurinationalism does not assume liberalism as the ideal paradigm in the first place. To the contrary, it is deeply critical of the liberal republican state, as it is associated among Bolivian indigenous sectors with their experience of authoritarian liberalism and the continuation of colonial forms of domination.<sup>1019</sup> In the context of plurinationalism, there is also the question of whether or not liberal forms of government could (and should) coexist with non-liberal proposals of self-management, co-government and communitarian democracy.<sup>1020</sup>

Second, as argued in Chapter 2, in multiculturalism (and in the IHRL system) the state adopts the function of an impartial arbiter.<sup>1021</sup> In comparison, plurinationalism, being a decolonization project, emphasizes the violence that the elites have exercised towards

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<sup>1015</sup> For this assertion I draw on interviews conducted in 2011 that I am not entitled to explicitly mention in this thesis.

<sup>1016</sup> See for example, Schilling-Vacaflor and Kuppe (n 2) loc 7936-7948; Albó, ‘Hacia el poder indígena en Ecuador, Perú y Bolivia’ (n 394) 146-147.

<sup>1017</sup> The expression Hage’s (n 52) 23, 117.

<sup>1018</sup> Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 47) 177.

<sup>1019</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 218.

<sup>1020</sup> Ibid 44-45; Teófilo Choque Mamani, *Estado plurinacional aparente* (Editorial Autodeterminación 2014); Schavelzon, ‘Cosmopolitique constituante en Bolivie. La Constitution "ouverte" et le surgissement de l’État Plurinational’ (n 1008) 83.

<sup>1021</sup> Hale, ‘Does Multiculturalism Menace? Governance, Cultural Rights and the Politics of Identity in Guatemala’ (n 35) 493.



indigenous peoples through the state apparatus and its legal system. While multiculturalism addresses the fact that the state is not neutral but instead represents the dominant group,<sup>1022</sup> plurinationalism goes much further in emphasizing that the state does not have the same relation with all the inhabitants of the nation. Instead, based on colonial racial hierarchies, it establishes gradations of personhood and citizenship. It exercises violence towards those who are seen as unable to self-govern, while protecting the liberties of the self-determined individuals. Furthermore, the emphasis on self-determination in plurinationalism also implies a conceptualisation of state sovereignty as based on the dispossession and subjugation of indigenous populations for the advancement of capitalist and neoliberal projects that benefit a reduced elite.<sup>1023</sup>

Third, liberal multiculturalism and its regime of toleration constitute a proposal for the management of difference, for the accommodation of minorities in liberal polities. As discussed in previous chapters, differentiated rights and multiculturalist citizenship are conceived as a way for cultural and racial minorities to integrate into the dominant society without losing their distinctiveness. However, multiculturalism does not address white supremacy, and it does not question the qualification as minorities of racialized groups, which keeps them in a liminal position in relation to the idea of the nation. In plurinationalism, indigenous peoples are not minorities. They are the ‘sleeping giant’ of Katarist ideology, a numerical majority that in the 2000s became an important political force able to overthrow the neoliberal government of Sánchez de Lozada. In addition, as mentioned earlier, in plurinationalism indigenous collectivities and individuals are the agents of their own liberation, instead of the victimized groups of the multiculturalist approach.

Finally, in plurinationalism and in Bolivia’s current political context, the definition of indigenous subject is much more flexible than in IHRL. Moreover, as examined in relation to the definition of the Bolivian people in the Constitution of Bolivia of 2009 and also the definition of the indigenous subject, categories of class, region and gender are also important in the definition of indigenous subject. For example, in the National Census of 2001, over 60% of the population in Bolivia self-identified as being part of a

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<sup>1022</sup> Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 47) 36-37, 108-110.

<sup>1023</sup> In a similar sense, Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 39-40.

specific indigenous ethnic group.<sup>1024</sup> In the census of 2012, this percentage dropped to 41%.<sup>1025</sup>

While there might have been issues with the way these censuses were carried out, authors such as Schavelzon also attribute this change to the political context. During the revolutionary period, indigeneity was ‘generic, wide and non-particularist’ and it coincided with the consolidation of the MAS party as a political force.<sup>1026</sup> In addition, as argued before, it was relevant to self-identify as indigenous in that period. There was a repressive neoliberal multicultural state and a domestic and international context in which class discourse had little purchase in contrast with indigenous rights discourse. In contrast, in 2012, the MAS party was hegemonic and the ideological differences between peasant and indigenous sectors started to become more evident, particularly with the TIPNIS conflict. In that context, the definition of indigeneity was split between a strict definition that refers to minority groups outside of the government, and a more generic state-led view: the indigenous political subject.<sup>1027</sup> As discussed in Chapter 5, this tension between different conceptions of the indigenous subject in the Constitution is affecting the implementation by the Constitutional Tribunal of the human rights approach to legal pluralism.

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<sup>1024</sup> Molina Barrios, Figueroa and Quisbert (n 488) 42.

<sup>1025</sup> Schavelzon, ‘Mutaciones de la identificación indígena durante el debate del censo 2012 en Bolivia: mestizaje abandonado, indigeneidad estatal y proliferación minoritaria ’ (n 4) 331 based on Instituto Nacional de Estadística de Bolivia, *Características de Población y Vivienda. Censo Nacional de Población y Vivienda 2012* (2012).

<sup>1026</sup> Schavelzon, ‘Mutaciones de la identificación indígena durante el debate del censo 2012 en Bolivia: mestizaje abandonado, indigeneidad estatal y proliferación minoritaria ’ (n 4) 333.

<sup>1027</sup> Ibid, 333, 344-345.

## **Chapter 5. Legal Pluralism in the Constitution of Bolivia of 2009**

### **5.1. Introduction**

In this last chapter I argue that despite the integration of a number of plurinationalist norms to the Constitution of Bolivia of 2009, the Constitution takes a human rights approach to legal pluralism. Therefore, plurinationalist norms related to legal pluralism are overridden by toleration clauses of a liberal multiculturalist cut that position individual rights as limits to indigenous legal orders. In addition, the current constitutional and legal framework of Bolivia reveals the absorption of indigenous legal orders by state law and the limitation of the scope of indigenous jurisdictions to minor issues—a framework that conflicts with the plurinationalist norm of equal hierarchy between state jurisdiction and indigenous jurisdictions. Finally, the Constitution creates a concentrated system of constitutional control that gives wide attributions to the Constitutional Tribunal in relation to indigenous legal orders—an opportunity that the Tribunal has utilised to place further limits on indigenous legal orders through the creation of an authenticity test.

This chapter is divided into three parts. Section 5.2 explains legal pluralism from a state-formation perspective in order to argue that the multiplicity of non-state institutions, authorities and legal systems in Bolivia is not a recent situation but a constitutive aspect of the Bolivian state. This section also argues that legal pluralism is a central feature of plurinationalism and one of the most important aspects of Pacto de Unidad's proposal. Section 5.3 analyses the Constituent Assembly process in order to explain explains why plurinationalism has a marginal role in the Constitution of 2009.

Finally, Section 5.4 examines in detail the regulation of legal pluralism in the new Constitution and the legislation that followed, particularly the Law of Jurisdictional Delimitation, in order to develop the arguments laid out in the first paragraph above. The last sub-section analyses the role of the Constitutional Tribunal and its Resolution 1422-2012, which sets a jurisprudential line in relation to allegations of human rights violations in indigenous communities. In this regard, the resolution itself indicates in the final judgment (*'por tanto'*) that the decision shall be published and diffused

because it is setting a precedent (*‘entendimiento fundante’*) on ‘plural constitutional control’ of decisions by indigenous jurisdictions.<sup>1028</sup>

## 5.2. Legal Pluralism in Bolivia

### 5.2.1. The Situation of Legal Pluralism in Bolivia

In Bolivia, legal pluralism, or the existence of more than one legal order within the state territory,<sup>1029</sup> can be explained partly as being the result of the uneven presence of the Bolivian state throughout its territory. As explained in Chapter 3, liberal reforms in Bolivia in the 19<sup>th</sup> century sought to dismantle the colonial institutions of the indigenous communities and the Republic of Indians under which a system of ‘weak legal pluralism’ was considered. Weak legal pluralism refers to a situation in which parallel legal regimes are ‘dependent from the ‘overarching and controlling state legal system’ and are tolerated for pragmatic reasons.<sup>1030</sup> As Griffiths states, these parallel systems result from ‘the “recognition” by the state of a supposedly pre-existing “customary law”’ of groups defined by their ethnicity, religion, nationality or geography.<sup>1031</sup> The purposes of eliminating these institutions during the republican period were to establish the state as the main form of social control over the territory, to institute legal centralism, and to guarantee private property for the advancement of market relations.

However, liberal elites and the subsequent governments did not accomplish their mission fully, and the Bolivian state has been described as a ‘state with holes’<sup>1032</sup>—that is, a state that was not built in a linear process of territorial extension. Instead, it is the product of an ongoing negotiation on its legitimacy, limits, and scope of action.<sup>1033</sup> The ‘discontinuous’ nature of the Bolivian state partly accounts for the dominant presence of other forms of government in certain parts of the territory. This is the case of *ayllus*,

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<sup>1028</sup> Constitutional Tribunal of the Plurinational State of Bolivia, Resolution 1422-2012, point 4 of the *‘por tanto’* p. 29. The resolution is also mentioned in the manual for training of judiciary officers. Vice-Ministerio de Justicia Indígena Originario Campesina, *Manual de Capacitación para Autoridades Judiciales* (Ministerio de Justicia de Bolivia 2013). Since Criminal Courts also process *habeas corpus*, it may be understood that they should also apply the criteria established in this resolution

<sup>1029</sup> Based on Griffiths’ definition of legal pluralism. Griffiths (n 499) 1.

<sup>1030</sup> Ibid, 5.

<sup>1031</sup> Ibid, 5.

<sup>1032</sup> UNDP, *El Estado del Estado en Bolivia: Informe Nacional sobre Desarrollo Humano 2007* (United Nations Development Programme, 2007) 99-101.

<sup>1033</sup> Ibid, 99-127; George Gray Molina, ‘Relaciones Estado/Sociedad en Bolivia: la Fuerza de la Debilidad’ in John Crabtree, George Gray Molina and Laurence Whithead (eds), *Tensiones Irresueltas Bolivia, Pasado y Presente* (1st edn, Plural Editores; PNUD 2009) 127.

unions, neighbourhood associations and *capitanías*<sup>1034</sup>. It also contributes to explain the dominant role of churches, international donors and NGOs in certain areas.<sup>1035</sup>

Gray Molina attributes this ‘weakness’ (or rather, as he clarifies, this specific state-society balance of relations) and the consequent proliferation of parallel institutions (‘institutional pluralism’) to a combination of a weakness of Bolivian elites in different periods,<sup>1036</sup> the strength of civil society organisations (that exercise functions of justice administration, natural resources management, and political self-determination), and different historical junctures that have marked the dynamics of the relations between elites, the state and indigenous and popular organisations.<sup>1037</sup> Examples of those historical junctures are the aforementioned regime of colonial legal pluralism during the Spanish colony, the pact between the state and the *ayllus* in the 19<sup>th</sup> century (so that the new republican state would collect tribute in exchange for allowing highland indigenous peoples to maintain their territories), and the dual power system between the MNR state and the labour movement in the 1950s.<sup>1038</sup>

The uneven presence of the state is reflected in Bolivia’s judicial system. According to the United Nations High Commissioner of Human Rights report on Bolivia of 2012, judicial tribunals and judges cover only 47.6% of the Bolivian local governments or *municipios*.<sup>1039</sup> Thus, justice is administered by non-state legal systems including the aforementioned *ayllu* system, neighbourhood associations and unions. These systems are not to be considered as isolated wholes but in a continuous relation of coordination and/or conflict with each other and with the state.<sup>1040</sup> In Latin America more generally,

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<sup>1034</sup> The ‘*capitanía*’ is a form of political and territorial organisation utilised by some lowland indigenous groups, such as the Guaraní. *Ayllu* as mentioned previously is a political and territorial form of organisation among Quechuas and Aymaras.

<sup>1035</sup> Gray Molina (n 1033) 130; UNDP (n 1032) 100. I would also add to this list of competing actors drug cartels and Eastern Bolivia large estate owners.

<sup>1036</sup> Gray Molina mentions the silver elites of the 19<sup>th</sup> century, the tin elites of the 20<sup>th</sup> century, the MNR State political elites in the 1950s and the owners of agro-industrial means since the 1980s. Gray Molina (n 1033) 128.

<sup>1037</sup> Ibid, 126-129.

<sup>1038</sup> Ibid, 127.

<sup>1039</sup> UNHRC ‘Informe Annual de la Alta Comisionada de las Naciones Unidas para los Derechos Humanos sobre las Actividades de su Oficina en el Estado Plurinacional de Bolivia’ A/HRC/19/21/Add.2 (2 February 2012) para 52 utilising data from the Bolivian Judicial Council (Consejo de la Judicatura)

<sup>1040</sup> For example, in some indigenous communities, the local authorities send complex cases such as murder to state judicial institutions, or they can also send them to a higher instance within the union system. Martín Bazarco Osorio and José Luis Exeni Rodríguez, ‘Bolivia: justicia indígena en tiempos de plurinacionalidad’ in Boaventura de Sousa Santos and José Luis Exeni Rodríguez (eds), *Justicia indígena, plurinacionalidad e interculturalidad en Bolivia* (Abya Yala; Fundación Rosa Luxemburg 2012) 111,112, 120-122. For an ethnographical study of the relations between the state legal system and

unevenness and variation in the state judicial system is also expressed in the way racialized groups experience state justice. For instance, in 2007, the Inter-American Commission of Human Rights reported that indigenous individuals' complaints in state courts are not properly addressed because of corruption and racial discrimination. This is the case in judicial cases relating to the environmental destruction of indigenous lands and territories by companies and state institutions, to disputes over possession and ownership of land for farming, to the non-recognition of indigenous communities as legal entities, to complaints by indigenous individuals related to access to basic state services, and to economic and social rights of indigenous individuals who are victims of forced labour.<sup>1041</sup> In addition, indigenous individuals who do not speak Spanish are not provided with translators. More generally, judges and prosecutors fail to take into account legal pluralism (and therefore different understandings of what constitutes an offence) when prosecuting indigenous individuals, despite the multicultural reforms that establish that cultural differences need to be taken into account.<sup>1042</sup>

One question that emerges is whether the weaknesses of the Bolivian state because of its heterogeneous presence in the territory and the presence of other legal orders could be considered symptomatic of the absence of a democratic system. In this regard, O'Donnell defines the 'state with holes'<sup>1043</sup> (or a state with 'brown areas' or 'privatized areas', to use O'Donnell's own terminology<sup>1044</sup>) as a situation in which the state

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the legal systems of different Quechua communities see René Orellana Halkyer, *Interlegalidad y Campos Jurídicos. Discurso y Derecho en la Configuración de Órdenes Semiautónomos en Comunidades Quechuas de Bolivia* (Huella Editores 2004); also Ramiro Molina Rivero and Ana Arteaga Bohrt, *Dos racionalidades ¿una lógica jurídica? La justicia comunitaria en el altiplano boliviano* (Universidad Mayor de San Andrés 2008)..

<sup>1041</sup> IACHR. 'Acceso a la justicia e inclusión social: el camino hacia el fortalecimiento de la democracia en Bolivia. Capítulo IV. Derechos de los Pueblos Indígenas y Comunidades Campesinas' OEA/Ser.L/V/II. Doc 34 (28 June 2007) para 279; For similar reports, ECOSOC 'Report of the Special Rapporteur Rodolfo Stavenhagen on the Situation of Human Rights and Fundamental Freedoms of Indigenous People. Addendum. Conclusions and Recommendations of the Expert Seminar on Indigenous Peoples and the Administration of Justice' E/CN.4/2004/80/Add.4 (27 January 2004); UNHRC 'Access to justice in the promotion and protection of the rights of indigenous peoples. Study by the Expert Mechanism on the Rights of Indigenous Peoples' A/HRC/24/50 (30 July 2013).

<sup>1042</sup> IACHR. 'Acceso a la justicia e inclusión social: el camino hacia el fortalecimiento de la democracia en Bolivia. Capítulo IV. Derechos de los Pueblos Indígenas y Comunidades Campesinas' (n 986) para 284; ECOSOC 'Report of the Special Rapporteur Rodolfo Stavenhagen on the Situation of Human Rights and Fundamental Freedoms of Indigenous People. Addendum. Conclusions and Recommendations of the Expert Seminar on Indigenous Peoples and the Administration of Justice' (n 986) para 38.

<sup>1043</sup> UNDP (n 1032) 99-100.

<sup>1044</sup> Guillermo O'Donnell, 'On the State, Democratization, and Some Conceptual Problems: a Latin American View with Glances at Some Post-Communist Countries' (1993) 21 World Development 1355, 11; Guillermo O'Donnell, *Dissonances: Democratic Critiques of Democracy* (Notre Dame University Press 2007) 121.

apparatus is unable to establish its legality throughout the territory.<sup>1045</sup> The ‘brown areas’ are characterised by a low presence of the state functionally and territorially.<sup>1046</sup> This has three consequences. First, as touched upon earlier, the ineffective state will coexist with ‘autonomous, territorially based spheres of power’.<sup>1047</sup> Second, as a result of the presence of these powers, there is a deterioration of the public dimension of the state and an absence of the rule of law, O’Donnell holds.<sup>1048</sup> Moreover, state organs in those ‘brown areas’ are penetrated by these alternative orders and mutate into personalistic circuits of power.<sup>1049</sup> In other words, the state present here is not the ‘legal state’, O’Donnell argues, but an ‘official state’ that has been ‘punctuated’ by an ‘informal legal system’ that manages to coexist with a central democratic regime.<sup>1050</sup> In addition, in these areas, party politics are distorted into a clientelistic and personalistic machine in which parties seek to extract resources from the state to feed and reproduce their own circuits of regional power.<sup>1051</sup> Finally, as mentioned earlier in relation to the IAHCRC report, this irregular presence of the state can also be detected by discrimination against and differentiated treatment of specific groups such as women, indigenous individuals, peasants or low income communities.<sup>1052</sup>

For these reasons, argues O’Donnell, a state that cannot extend its legality throughout the territory and enforce the ‘rights and guarantees of Western Constitutionalism’<sup>1053</sup> is only supporting a democracy of ‘low intensity citizenship’.<sup>1054</sup> This is, the state as part of its legal order positivises rights and freedoms but is unable to uphold or enforce them because of the absence of rule of law in certain territories, or because of the uneven enforcement in relation to specific groups that do not have equal access or are discriminated against. The presence of these ‘brown areas’ entails the ‘introjection of

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<sup>1045</sup> O’Donnell, ‘On the State, Democratization, and Some Conceptual Problems: a Latin American View with Glances at Some Post-Communist Countries’ (n 1044) 11. For O’Donnell, legality is a constitutive dimension of stateness as it gives stability and predictability to social relations. Ibid, 6.

<sup>1046</sup> Ibid, 11.

<sup>1047</sup> Ibid, 11.

<sup>1048</sup> Ibid, 11.

<sup>1049</sup> Ibid, 11.

<sup>1050</sup> O’Donnell, *Dissonances: Democratic Critiques of Democracy* (n 1044) 120-121. In this regard he points out how in some Latin American countries national elections are fair and clean but the local government elections are tainted by fraud and threat. Ibid, 122-123.

<sup>1051</sup> O’Donnell, ‘On the State, Democratization, and Some Conceptual Problems: a Latin American View with Glances at Some Post-Communist Countries’ (n 1044) 11-12; O’Donnell, *Dissonances: Democratic Critiques of Democracy* (n 1044) 121.

<sup>1052</sup> O’Donnell, ‘On the State, Democratization, and Some Conceptual Problems: a Latin American View with Glances at Some Post-Communist Countries’ (n 1044) 13.

<sup>1053</sup> Ibid, 13.

<sup>1054</sup> Ibid, 14.

authoritarianism' and a denial of the public and universal citizenship.<sup>1055</sup> In this sense, for O'Donnell the rule of law is a basic requirement of a democratic state and it entails a human rights system of respect of freedoms, universal civil rights (both of which will presuppose viewing all citizens or 'legal persons' as agents<sup>1056</sup>) and 'networks of accountability and responsibility'.<sup>1057</sup>

The United Nations Development Programme (UNDP) report of 2007 on the state of Bolivia, while agreeing with O'Donnell's definition of the state and his diagnosis of its weaknesses, takes issue with this negative portrayal of the autonomous 'spheres of power' and emphasises that they are not always arbitrary, as O'Donnell suggests.<sup>1058</sup> Rather, the report explains that, in the specific case of Bolivia, several communities are ruled by non-state legalities that possess legitimate public orders different from that of the colonial state.<sup>1059</sup> These orders, as the UNDP report explains, have been constructed 'through long processes of accommodation, domination, resistance or collaboration with predatory, rent-seeking and highly particularistic States'.<sup>1060</sup> In this regard, these legal orders exist partly because the Bolivian state has been unable to construct a 'common public space of authority, legitimacy and state sovereignty'.<sup>1061</sup> Thus, unlike O'Donnell, the UNDP report does not propose only an extension of the rule of law and the resulting increase in the functional and territorial presence of the state in the Bolivian territory. Rather, in line with Bolivian plurinationalism, it proposes the recognition of legal and institutional pluralism in Bolivia as well as an acknowledgement that there has been a history of daily discriminatory practices on the part of the Bolivian state that have contributed to the increase of the social and cultural stratification of Bolivian society.<sup>1062</sup> In addition, the UNDP report breaks with O'Donnell's assumption that it is only possible for a civil society to be strong if the

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<sup>1055</sup> Ibid, 12.

<sup>1056</sup> Guillermo O'Donnell, 'Why the Rule of Law Matters' (2004) 15 *Journal of Democracy* 32, 34; O'Donnell, *Dissonances: Democratic Critiques of Democracy* (n 1044) 126.

<sup>1057</sup> O'Donnell, *Dissonances: Democratic Critiques of Democracy* (n 1044) 126-127. It should be highlighted that O'Donnell is considering that a state can be democratic and authoritarian, and not only that a regime can be democratic or authoritarian. He elaborates on this point in O'Donnell, 'On the State, Democratization, and Some Conceptual Problems: a Latin American View with Glances at Some Post-Communist Countries' (n 1044).

<sup>1058</sup> O'Donnell, 'On the State, Democratization, and Some Conceptual Problems: a Latin American View with Glances at Some Post-Communist Countries' (n 1044) 9 referring to the systems of local power in these brown areas.

<sup>1059</sup> UNDP (n 1032) 100.

<sup>1060</sup> Ibid, 100. Own translation from Spanish.

<sup>1061</sup> Ibid, 10.

<sup>1062</sup> Ibid, 10-13.



state is evenly present throughout the territory guaranteeing civil and political rights for everyone.<sup>1063</sup> Conversely, Bolivian civil society organisations in this report are presented as strong, diverse and autonomous.<sup>1064</sup>

In other words, when considering state formation in Latin America in relation to indigenous peoples, the expansion of the state and its legality has historically been synonymous with indigenous peoples' dispossession, subjugation and even extermination. On the other hand, the presence of non-official legal systems is not necessarily a symptom of arbitrariness. Of course, as in the case of the neo-feudalist system present in some Eastern Bolivia haciendas or areas dominated by drug trafficking, the so-called brown areas can also be just as O'Donnell describes them. But what the defenders of legal pluralism in Bolivia argue is that (at least) some of these indigenous legal orders do not constitute a privatised order where there is a dominance of particularism (and thus power relations are shaped by patrimonialism, caudillism and clientelism).<sup>1065</sup> There can also be legalities that are constitutive of a different type of democracy, a 'communitarian democracy', as the Constitution of Bolivia of 2009 refers to it<sup>1066</sup>—one in which there can also be public deliberation of the political among individuals and groups with opposing views,<sup>1067</sup> and even coordination with state organs without there being mutual co-optation. Thus, the question that the Constitution of Bolivia poses is, as Gray Molina explains, not only a 'technical' matter concerning the strengthening of the state and its expansion within a territory. Rather, it is a political matter of what it entails to extend the sovereignty, authority and legitimacy of a traditionally weak (and colonial) state.<sup>1068</sup>

I concur with Gray Molina's balance of this debate when he expresses that empirical research should determine whether these 'holes' of the state are ruled by particularistic or public orders. In this regard, Gray Molina is of the view that a state with an uneven presence (or a 'truncated' or 'incomplete' state, as O'Donnell describes it<sup>1069</sup>) is not

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<sup>1063</sup> O'Donnell, *Dissonances: Democratic Critiques of Democracy* (n 1044) 131.

<sup>1064</sup> UNDP (n 1032) 11.

<sup>1065</sup> Gray Molina (n) 130; Guillermo O'Donnell, 'Illusions About Consolidation' (1996) 7 *Journal of Democracy* 34, 40 for a definition of particularism. For O'Donnell, the division between the public and the private spheres is a necessary element of a democratic regime. *Ibid.*

<sup>1066</sup> Constitution of Bolivia of 2009, Article 210.III

<sup>1067</sup> This definition of the public is by Gray Molina (n 1033) 130.

<sup>1068</sup> George Gray Molina, *Nuevas Constituciones Andinas, Nuevas Tensiones Estatales* (United Nations Development Programme. Regional Office for Latin America 2010) 6.

<sup>1069</sup> O'Donnell, *Dissonances: Democratic Critiques of Democracy* (n 1044) 121.

necessarily a failure that ‘must be filled with liberal democratic institutions’.<sup>1070</sup> At the same time, neither should the holes of the state be understood automatically as being governed by romanticised ‘harmonious’ and isolated indigenous legal orders. More interestingly, the idea of constructing a plural state leads to the question of whether or not it is even possible to have a human rights system and a democracy while at the same time having a non-liberal and non-republican state.<sup>1071</sup> In this regard, Gray Molina considers that the complexity of the new Andean constitutions (the Constitution of Ecuador of 2008 and the Constitution of Bolivia of 2009) lies mainly in their hybrid nature and their attempt to combine liberal and republican forms of former constitutions (and, I would add, a human rights system based on IHRL) with non-liberal and non-republican institutions of indigenous autonomy and indigenous justice.<sup>1072</sup> And this is precisely the matter that is being examined in this thesis focusing on the dual regulation of legal pluralism by plurinationalism (which is to some extent non-liberal and non-republican) and by a human rights system that presupposes a liberal democratic regime and a democratic state (as defined by O’Donnell).

### **5.2.2. Legal Pluralism in Plurinationalism**

Legal pluralism is the most controversial and salient aspect of plurinationalism. As de Sousa Santos expresses it, the constitutional recognition of indigenous justice in this instance was not meant to be an expression of multiculturalist policies, a conflict-resolution mechanism for small issues in remote communities that have no access to state justice, or a small eccentricity or political concession of the elites to indigenous organisations. Rather, it is part of a political project ‘...with a decolonizing and anti-capitalist calling, a second independence that finally breaks with the Eurocentric bonds that have conditioned the development processes [in Bolivia and Ecuador] in the last two hundred years.’<sup>1073</sup> de Sousa Santos considers legal pluralism as the proverbial tip of the spear of the plurinationalist project, because it is not just a proposal but something that is already present in the daily life of indigenous communities.<sup>1074</sup> Or, as explained by Gray Molina, legal pluralism and institutional pluralism are structural

<sup>1070</sup> Gray Molina, ‘Relaciones Estado/Sociedad en Bolivia: la Fuerza de la Debilidad’ (n 1033) 130.

<sup>1071</sup> Gray Molina, *Nuevas Constituciones Andinas, Nuevas Tensiones Estatales* (n 1068) 4.

<sup>1072</sup> Ibid, 5.

<sup>1073</sup> Boaventura de Sousa Santos, ‘Cuando los excluidos tienen Derecho: justicia indígena, plurinacionalidad e interculturalidad’ in Boaventura de Sousa Santos and José Luis Exeni Rodríguez (eds), *Justicia indígena, plurinacionalidad e interculturalidad en Bolivia* (Abya Yala; Fundación Rosa Luxemburg 2012) 13. Own translation.

<sup>1074</sup> Ibid, 14-15.

features of state formation in Bolivia.<sup>1075</sup> As the tip of the spear, de Sousa Santos considers the degree of implementation of the constitutional recognition of legal pluralism as a way to diagnose the contradictions and conflicts of the ‘transition processes’ in Ecuador and Bolivia.<sup>1076</sup> As will be discussed below, this would mean that despite the rhetoric of the MAS government, plurinationalism has until recently not been seriously implemented in Bolivia.

Legal pluralism was indeed one of the most important projects of Indianist groups in the Constituent Assembly.<sup>1077</sup> This was reflected in Pacto de Unidad’s systematization report, in which legal pluralism is presented as a principle of plurinationalism.<sup>1078</sup> As advanced in Chapter 4, Pacto de Unidad sought to transcend what they considered a rhetorical ‘pluri-multi’ recognition and incorporate into the state ‘various forms of organizing political action, of conceiving property, organising the territory and organizing economic activities’.<sup>1079</sup> Therefore, the plurinationalist project envisions a legal system and a state model in which there are multiple sources of law, and in which indigenous legal orders stand in equal hierarchy in relation to state law.<sup>1080</sup> In the context of the Constituent Assembly, constituent delegates such as Jimena Leonardo fought for indigenous forms of justice to be regarded as real legal orders—as opposed to the dominant view that considered the state legal system as the only true juridical system.<sup>1081</sup>

The constitutional recognition of legal pluralism in plurinationalism had two functions: the strengthening of indigenous territorial autonomies<sup>1082</sup> and the decolonization of state law. In relation to indigenous autonomy, the recognition of legal pluralism should be understood not as deriving from cultural difference, as in multiculturalism, but as justified by indigenous self-determination. Thus, indigenous justice in plurinationalism

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<sup>1075</sup> Gray Molina, ‘Relaciones Estado/Sociedad en Bolivia: la Fuerza de la Debilidad’ (n 1033) 128.

<sup>1076</sup> de Sousa Santos, ‘Cuando los excluidos tienen Derecho: justicia indígena, plurinacionalidad e interculturalidad’ (n 1073)

<sup>1077</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 481-482; Garcés (n 61) 71.

<sup>1078</sup> Garcés (n 61) 28, 49, 71.

<sup>1079</sup> de Sousa Santos, ‘Cuando los excluidos tienen Derecho: justicia indígena, plurinacionalidad e interculturalidad’ (n 1073) 27.

<sup>1080</sup> Constitution project of Pacto de Unidad of 2007, Article 102.

<sup>1081</sup> Red Latinoamericana de Antropología Jurídica, ‘Interview Jimena Leonardo’ VII International Congress of the Latin American Network of Legal Anthropology, Lima, August 2010 accessed 29 December 2014.

<sup>1082</sup> In a similar sense, Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 481-482.

is not a cultural expression, but an expression of indigenous peoples' right to self-government. In relation to the decolonisation of the law, the incorporation of indigenous legal orders and indigenous principles into the constitutional text was seen as a way to decolonize the judiciary, under the premise that it was in this organ that colonial forms of domination and their visible expression as racism are most patent.<sup>1083</sup> Thus, indigenous law would serve to strengthen and legitimize the judiciary as a whole. Finally, to decolonize the law also entailed the inclusion of indigenous peoples to politics, allowing them to do so through their own identity and political structures.<sup>1084</sup>

When looking at these two functions of legal pluralism it is possible to identify once again two aspects of plurinationalism that are in tension with each other: the aim of increasing indigenous autonomy and thereby weakening the state, and the aim of strengthening the state while also modifying it so as to render it more inclusive of indigenous peoples and their institutions. In relation to legal pluralism, indigenous autonomy would entail less intervention of the state in the affairs of indigenous communities and privileging mechanisms of coordination between jurisdictions, particularly for matters related to human rights violations and conflicts between jurisdictions.<sup>1085</sup> The second facet of plurinationalism entails the creation of a hybrid constitution, one that incorporates indigenous epistemologies and normative principles, and a unitary state in which indigenous justice is one of various jurisdictions pertaining to a single judicial function.<sup>1086</sup> As will be discussed in Section 5.3.2, the project of a strong unitary state was favoured in the end, since the liberal and conservative opposition and the MAS Party constituency supported it.

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<sup>1083</sup> Interview Head the Unit of Communication Projects and Foreign Affairs, Ministry of Communication of Bolivia (also academic specialised in legal pluralism). La Paz, 2 May 2014; in relation to delayed justice, corruption and lack of independence of the Bolivian judiciary, UNHRC 'Informe Annual de la Alta Comisionada de las Naciones Unidas para los Derechos Humanos sobre las Actividades de su Oficina en el Estado Plurinacional de Bolivia' A/HRC/19/21/Add.2 (2 February 2012) para 50-54.

<sup>1084</sup> Interview Head the Unit of Communication Projects and Foreign Affairs, Ministry of Communication of Bolivia. La Paz, 2 May 2014.

<sup>1085</sup> Article 102 of the Constitution project of Pacto de Unidad of 2007.

<sup>1086</sup> Ibid, Article 101. This constitution proposal does not mention a single judicial function explicitly (although the system seems to operate with this model). In contrast, the Constitution of Bolivia of 2009 explicitly mentions a single judicial function.

### 5.3. The Marginal Position of Plurinationalism in the Constitution of 2009

#### 5.3.1. The Constituent Assembly Process

Following the period of social mobilizations in the early 2000s that led to the resignation of presidents Sánchez de Lozada and his substitute Mesa Gisbert, Bolivia held elections in December 2005. With an 85.5% electoral turnout, Evo Morales, a unionist and coca grower leader of Aymara descent, was elected president with 53.74% of the vote<sup>1087</sup>—the highest electoral percentage since the transition to democracy in Bolivia.<sup>1088</sup> The MAS Party won in the Western departments (Chuquisaca, Oruro, La Paz, Potosí and Cochabamba), while PODEMOS (Democratic and Social Power Party, of neoliberal cut and constituted by members of the former hegemonic parties) won in Eastern Bolivia.<sup>1089</sup> The election results themselves evidenced a continuation of the conflict of the early 2000s between the Eastern elites and the indigenous and popular movements. In March 2006, a few months after Morales began his administration, two bills were approved. The first was the Law of Convocation of the Constituent Assembly, which was a central demand of the Agenda of October of 2003 of indigenous and popular organisations. The second bill was the Referendum Law for Departmental Autonomies, one of the demands of the Agenda of January of 2005 of the Eastern bourgeoisie bloc.<sup>1090</sup>

The three years of the Constituent Assembly were highly unstable because the process was threatened by autonomy demands of the Eastern Bolivia elites. As developed in Chapter 4, this sector saw their hegemony over the Eastern region and over the state apparatus threatened with the fall of the neoliberal state and the advancement of the indigenous-popular agenda. They also took issue with the prominent position acquired

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<sup>1087</sup> Corte Nacional Electoral de Bolivia, *Resultados de la Elección Presidencial realizada el 18 de diciembre de 2005*

(University of Georgetown 2005).

<sup>1088</sup> Webber, *From Rebellion to Reform in Bolivia. Class Struggle, Indigenous Liberation and the Politics of Evo Morales* (n 926) 50.

<sup>1089</sup> Webber explains that although the MAS party was stronger in the countryside (even in Eastern Bolivia) and among the informal urban proletariat, it was also able to win the support of the middle and upper classes of urban areas except for Santa Cruz. He attributes this to the addition of García Linera as vice-president and the moderation of the MAS discourse. Ibid, 52-53. The MAS Party also won 72 of a 130 seats in Congress, 12 of the 27 seats in the Senate and 3 of the 9 departmental prefectures. Ibid, 54-55.

<sup>1090</sup> Garcés (n 61) 26; Webber, *From Rebellion to Reform in Bolivia. Class Struggle, Indigenous Liberation and the Politics of Evo Morales* (n 926) 85.

by indigenous movements, as they continued to operate under a white supremacy paradigm.<sup>1091</sup> Finally, in the context of the Constituent Assembly, through political parties such as PODEMOS who would represent their interests, the Eastern elites opposed indigenous autonomies, legal pluralism and the pluri-national state, among many other issues.<sup>1092</sup> This opposition to key demands of indigenous organisations reflected the very different perspectives on the political regime and state model between the groups that had traditionally been in power and the rising social movements.

In Sucre, where the Constituent Assembly opened its sessions, the Civic Committee of Sucre demanded a ‘full capital’ (*capitalia plena*). In other words, it requested for the headquarters of the Legislature and the Executive to be transferred from La Paz to Sucre—an old historical conflict that in this context acquired racial, class and regional dimensions.<sup>1093</sup> Some Sucre citizens mobilized violently and threatened the Constituent Assembly delegates, targeting indigenous representatives in order to assault them and publically humiliate them. As a result, the constituent delegates had to negotiate with the military in order to be evacuated from Sucre to Oruro.<sup>1094</sup>

In addition to the commotion around the Constituent Assembly process, internally the Constituent Assembly was far from the original expectations of the social movements that had fought to create it.<sup>1095</sup> First, the Law of Convocation of the Constituent Assembly established that only political parties could participate. Consequently, social organisations could only be involved through a political party.<sup>1096</sup> Thus, Pacto de Unidad had to present its constitutional project through the MAS Party. Second, party dynamics paralysed the Constituent Process for many months. The right wing elites

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<sup>1091</sup> Webber, *From Rebellion to Reform in Bolivia. Class Struggle, Indigenous Liberation and the Politics of Evo Morales* (n 926) 84-98.

<sup>1092</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 223

<sup>1093</sup> Ibid, 223. Sucre is the capital of Bolivia since its independence in 1825. However, since the federal war between Sucre and La Paz in 1899, the latter is the government’s headquarters (*‘sede de gobierno’*). Currently the Legislature and Executive are located in La Paz, while Sucre only kept the Judiciary.

<sup>1094</sup> Ibid, 223; Interview former constituent delegate of the MAS Party. (La Paz, 26 April 2014).

<sup>1095</sup> Webber, *From Rebellion to Reform in Bolivia. Class Struggle, Indigenous Liberation and the Politics of Evo Morales* (n 926) 85.

<sup>1096</sup> Ibid, 85; The Pacto de Unidad systematization document also points out that the number of Aymara and Quechua delegates was disproportionately high in relation to the populations from the lowlands. Garcés (n 61) 40. Schavelzon explains that of the 55.8% that identified as part of a specific ethnic group, 31.8% were Quechuas, 16.9% Aymaras, 6 Chiquitanos, 4 Mojeños, 4 Tacanas and 1 of each of other 4 Amazon ethnic groups (Gurani, Guarayo, Itonama y Joaquiniana). 33% said to be from rural areas Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 146.

demanded a clause in the Law of Convocation of the Constituent Assembly that would guarantee the representation of ‘minorities’—referring to the white-mestizo elites.<sup>1097</sup> This demand put the MAS Party in the position of not having sufficient representatives to secure a majority in the Constituent Assembly.

The MAS Party tried to avoid this problem by stating that only a simple majority (half the Assembly plus an additional delegate) was required in order to approve the Articles of the Constitution instead of a qualified majority (two thirds of the delegates). This statement provoked protests and the suspension of the process for eight months.<sup>1098</sup> At the end, the Constituent Assembly created twenty-one commissions (one for each area of discussion), which reached decisions on each Article through a simple majority vote.<sup>1099</sup> The final draft of the Constitution was approved by the totality of the Constituent Assembly delegates using a qualified majority vote.<sup>1100</sup> The Constituent Assembly produced two different drafts of the Constitution: the version discussed in Chuquisaca and the version discussed in Oruro. There was a third version, product of the modifications the National Congress made to the Oruro draft.<sup>1101</sup> As discussed below, it is possible to see the gradual weakening of Pacto de Unidad’s constitution project, which was initially utilised as the basis for the Constituent Assembly discussion. That original project was nevertheless still present in the drafts produced in Chuquisaca and Oruro, but considerably marginalised in the final draft that was presented for referendum.

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<sup>1097</sup> Garcés (n 61) 40; Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 145-146.

<sup>1098</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 147-149.

<sup>1099</sup> These commission were: (1) State Model (*‘Visión de País’*), (2) Citizenship, Nationality and Nationalities, (3) Constitutional Rights, Duties and Guarantees, (4) Organization and Structure of the State, (5) Legislature, (6) Judiciary, (7) Executive, (8) Other State Organs, Autonomies and Territorial Organization, (9) Education and Interculturality, (10) Integral Social Development, (11) Hydrocarbons, Mining and Metallurgy, (12) Water and Energy, (13) Productive Development, Agrarian Development and Agro-industrial Development, (14) Renewable Natural Resources, (15) Land, Territory and Environment, (16) Integral Development of the Amazon, (17) Coca, (18) Economic Development and Finance, (19) National Borders, (20) Foreign Affairs and Integration, (21) Security and National Defence (own translation from Spanish). Inés Valeria Carrasco Alurralde and Xavier Albó, ‘Cronología de la Asamblea Constituyente’ (2008) 11 Tinkazos 101, 103.

<sup>1100</sup> Webber, *From Rebellion to Reform in Bolivia. Class Struggle, Indigenous Liberation and the Politics of Evo Morales* (n 926) 97-98; Garcés (n 61) 27-28.

<sup>1101</sup> Eliana Aguirre and others, *Pensar este Tiempo: Pluralismo Jurídico* (Susana Kass and Claudia Heins eds, Fundación Konrad Adenauer 2010) 40-47.

### 5.3.2. The Weakening of Plurinationalism in the Constitution of Bolivia of 2009

The Constituent Assembly, with its 255 delegates, constituted a complex process of negotiation between different sectors of society represented by the political party system. It had the spirit of ‘joining opposites’, or reconciling the autonomist project of indigenous organisations, the leftist-nationalist project of the MAS Party, and the right wing or liberal project.<sup>1102</sup> Joining opposites also required indigenous identity movements to make alliances with peasant unions, as well as for highland and lowland indigenous organisations to reach agreement. The MAS Party, or ‘Evismo’ (alluding to the personalist nature of the MAS Party), very much reflected this conciliatory spirit in relation to the opposition, but especially in relation to the indigenous population. According to Quiroga, through the racialization or ‘ethnification’ of politics, the popular nationalism (*‘nacionalismo plebeyo’*) of Evismo joined different ethnic groups and interest sectors into a single subaltern sector. This subaltern subject would become the political subject of the Constitution, in an act of ‘expansive nationalism’<sup>1103</sup> that would be reflected in the motto ‘we are all indigenous’. According to Schavelzon, a few years later this collective subject would become a generic and official racial discourse promoted by the MAS government that is close to the idea of *mestizaje*.<sup>1104</sup>

Despite the fact that indigenous and popular movements seemed to have the upper hand in the period of crisis of the neoliberal government, from 2005 onward the opposition against radical reform became stronger. The MAS Party, now in power, was caught in a potential civil war. Seeing its own interests to remain in power jeopardised, the party elites convinced indigenous and peasant organisations to moderate their demands, by telling the delegates that the most profound reforms were to follow once the Constitution had been approved.<sup>1105</sup> At the same time, the MAS placated the opposition by satisfying many of its requests. Hence, for Weber, ultimately the Constitution of Bolivia of 2009 was the result of an elite pact between the MAS Government and the

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<sup>1102</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 65, 496.

<sup>1103</sup> María Virginia Quiroga, ‘Lo popular y el populismo en el ‘Evismo’ (VII Congreso Latinoamericano de Ciencia Política (ALACIP), Bogotá, 25-27 September 2013), 11. The term *‘nacionalismo plebeyo’* is of Stefanoni(2003).

<sup>1104</sup> Schavelzon, ‘Mutaciones de la identificación indígena durante el debate del censo 2012 en Bolivia: mestizaje abandonado, indigeneidad estatal y proliferación minoritaria ’ (n 4) 346.

<sup>1105</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 151, 217-219.



Eastern Bolivian autonomy movements in order to ensure that the Media Luna would not continue to paralyse the country.<sup>1106</sup> In addition to being a strategic decision at that specific juncture, some interviewees and authors consider that the Constituent Assembly was never a priority for the MAS government in the first place. Once in power, the MAS did not need to push forward such a risky process. Consequently, the MAS Party only supported the process half-heartedly.<sup>1107</sup> In this regard, Weber argues that the MAS Party had already moderated its discourse in the process of constructing alliances and in the context of electoral politics, in relation to its birth as a political instrument of indigenous organisations.<sup>1108</sup>

Plurinationalism was also weakened by the fact that, despite the Constituent Assembly being ‘originary’ (*originaria*) (that is, constituted after a revolution rather than summoned by a state organ), it was treated as a ‘derived’ Assembly (*derivada*). Consequently, the final draft produced by the Constituent Assembly had to be approved by the National Congress and also through a referendum.<sup>1109</sup> The Legislature (comprising the political parties MAS, PODEMOS, National Unity or UN, and MNR) changed over a hundred articles of the 411 articles of the Constitution produced by the Constituent Assembly.<sup>1110</sup> The opposition in the Legislature was averse to the modification by the Constituent Assembly of aspects related to state model and political regime, such as the structure of the Legislature, the integration of the judicial organs, the constitutional recognition of legal pluralism, the possibility of presidential re-election, the integration of the Electoral Court, and the need for a two-thirds majority to partially reform the Constitution.<sup>1111</sup> The legislature also re-introduced the terms ‘nation’ and ‘republic’ in the Constitution,<sup>1112</sup> producing a text fraught with

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<sup>1106</sup> Webber, *From Rebellion to Reform in Bolivia. Class Struggle, Indigenous Liberation and the Politics of Evo Morales* (n 926) 99-100.

<sup>1107</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48); Luis Tapia Mealla, *El Estado de Derecho como Tiranía* (CIDES-UMSA 2011), 91-93; Interview Former constituent delegate for the MAS Party (La Paz, 26 April 2014; Interview Head of NGO (May 2014)

<sup>1108</sup> Webber, *From Rebellion to Reform in Bolivia. Class Struggle, Indigenous Liberation and the Politics of Evo Morales* (n 926) 63-64. Webber argues that after the MAS Party had a positive outcome in the elections of 2002, it changed its strategy from protest politics to electoral politics, and from being mainly indigenous to accommodating other constituencies. According to Webber, this strategy made the MAS Party more moderate than it was originally intended to be, and later on more willing to negotiate with the right during the Constituent Assembly process. *Ibid*, 62.

<sup>1109</sup> Garcés (n 61) 28-29.

<sup>1110</sup> *Ibid*, 28.

<sup>1111</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 497 based on Romero (2009).

<sup>1112</sup> *Ibid*, 70.

contradictions and therefore difficult to understand without taking into account the historical context of its creation.

Pacto de Unidad expressed disappointment with the results of the process, particularly the changes made by the legislature to the work executed by the Constituent Assembly. It was of the view that the plurinationalism was significantly limited in order to fit liberal framework:

The text agreed by the Congress advanced the design of a moderate, domesticated plurinationalism. It reinforces the contention forms that reduce fear to destabilize ‘the nation’ and liberal institutionalism. It is a plurinationalism that establishes limits to the self-determination of the peoples [...]. The result was the title of the plurinational but a plurinationalism that is tamed and controlled by the constituted power.<sup>1113</sup>

Pacto de Unidad considered that indigenous peoples lost out in crucial topics such as autonomies, land and territory, and the representation system. In relation to indigenous autonomy, regionalization—which was an important demand because indigenous territories are divided by the state’s territorial administration—was only partial. Under the new Constitution, regions do not affect the administrative division of Bolivia into departments and they do not have significant management capacity.<sup>1114</sup> Second, the members of Pacto de Unidad were discontent with the fact that indigenous autonomies were constitutionally circumscribed to municipal local governments. This norm was in accord with the decentralization model of the Law of Popular Participation designed and implemented during the neoliberal multicultural period. In addition, the new department assemblies reduced the competences of the legally recognized indigenous autonomies.<sup>1115</sup>

In relation to land and territory, Pacto de Unidad did not agree with the centralization or state monopoly over the management of lands, water and forests. Furthermore, it disagreed with the fact that the right to prior consultation on the Constitution did not entail a right to prior consent. Consequently, the state under the new Constitution has the obligation to consult indigenous peoples when taking decisions that affect them or

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<sup>1113</sup> Garcés (n 61) 30. Own translation from Spanish.

<sup>1114</sup> Ibid, 28-29.

<sup>1115</sup> Ibid.

their lands, but the opinion of the affected indigenous communities is not binding.<sup>1116</sup> Another important setback in relation to land was that the constitutional norms relating to the maximum amount of hectares that can be owned by an individual are not retroactive.<sup>1117</sup> This means that the idea of an agrarian reform was significantly limited and as a result, the existing *latifundios*, or large estates, remained unaltered.

In relation to representation, initially indigenous peoples had proposed a system in which all ethnic groups would be represented in Congress. However, the Constitution did not abolish the bi-cameral system and only assigned seven seats to indigenous peoples, which would alternate between different ethnic groups and which excluded indigenous communities in urban areas.<sup>1118</sup> The result according to Tapia was a Constitution that included plurinationalism only in four ways: recognition of cultural difference, bilingual education, incorporation of indigenous symbols as official state symbols, and indigenous autonomy but subordinated to state sovereignty, particularly in relation to natural resource management.<sup>1119</sup> Accordingly, the existing model is not very different from the multiculturalist model implemented in the 1990s.

The weakening of the plurinationalism project was also the result of internal divisions within Pacto de Unidad. The MAS Party constituencies, which were coca grower and peasants sectors (CSUTCB, Bartolina Sisa, and the coca leaf producers confederation), disagreed with some of the demands of the indigenous identity organisations (CIDOB and CONAMAQ), particularly indigenous autonomy.<sup>1120</sup> Indigenous identity organisations (which represented indigenous minorities and an autonomist movement<sup>1121</sup>) advocated legal pluralism, the control over renewable and non-renewable natural resources and the constitutionalization of their right to territory (and not only individual legal title). For these purposes, they appealed to the right to self-determination as well as recognition of their legal orders.<sup>1122</sup> They also sought a deeper

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<sup>1116</sup> Ibid.

<sup>1117</sup> Ibid.

<sup>1118</sup> Marxa Chávez León, 'Autonomías indígenas' y 'Estado Plurinacional'. Proyectos políticos de los movimientos indígenas y campesinos en Bolivia' (2008) 24 Revista OSAL (Observatorio Social de América Latina, CLACSO) 51, 58.

<sup>1119</sup> Tapia Mealla, 'Consideraciones sobre el Estado Plurinacional' (n 621) 150.

<sup>1120</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 180-188.

<sup>1121</sup> Schavelzon, 'Mutaciones de la identificación indígena durante el debate del censo 2012 en Bolivia: mestizaje abandonado, indigeneidad estatal y proliferación minoritaria' (n 970) 346

<sup>1122</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48).

modification of state structures and mechanisms of political participation and representation.<sup>1123</sup>

In contrast, the MAS party and peasant and coca unions advocated a strengthening of the state, the nationalization of natural resources, particularly hydrocarbons, the use of traditional mechanisms of representation and political participation (electoral politics, political party system), a unified legal system and private property. In addition, they viewed indigenous rights as conferred by the state instead of ‘recognized’ by it. The latter interpretation implies that indigenous rights precede the state by virtue of indigenous peoples’ self-determination and their inhabiting Bolivian territory before the creation of the state.<sup>1124</sup> Finally, for peasant groups the way to overcome neoliberalism was by giving more power to the state over the economy, by the nationalization of natural resources, and by the creation of social and economic rights.<sup>1125</sup> Ultimately, the conflict not only responded to differences in the conceptualization of the state and its role in society but to specific conflicts over land and territory and natural resources—particularly between highland settlers and coca leaf producers on the one hand, and lowland indigenous communities on the other.<sup>1126</sup>

Despite these important differences, the secessionist threat by the economic elites of Eastern Bolivia and their attempts to boycott the Constituent Assembly process prompted indigenous and popular organisations to form a single front against a common opponent and to support the MAS government. The differences will nevertheless re-emerge in 2011, when the MAS government, with the support of peasant and coca grower unions and without consulting lowland indigenous organisations, decided to construct a highway over the TIPNIS (Isiboro Securé National Park and Indigenous Territory) with a loan from a Brazilian public bank. This national park was legally declared an indigenous territory after the March of Dignity and Territory of 1990. In September 2011, the lowland indigenous organisations along with their supporters marched against the highway and were repressed by the MAS government police in

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<sup>1123</sup> Garcés (n 61) 33.

<sup>1124</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 176-180; Garcés (n 61) 33; Tapia Mealla, ‘Una reflexión sobre la idea de Estado plurinacional’ (n 994) 90-94.

<sup>1125</sup> In relation to the tension between autonomy and nationalization see Tapia Mealla, ‘Una reflexión sobre la idea de Estado plurinacional’ (n 994) 59-61; Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 96-112.

<sup>1126</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 177.

Chaparina. Despite the attempts of the MAS government to repair the situation afterward with a consultation process, this event marked the breaking of Pacto de Unidad and the rupture of CONAMAQ and CIDOB with the MAS government.<sup>1127</sup> Already these organisations had been marching against the government since 2010 because of the way the Constitution was being implemented and against the extractivist economy of the Morales government, which was affecting their territories.<sup>1128</sup>

## 5.4. Indigenous Legal Orders in the Constitution of Bolivia of 2009

As introduced in Section 5.3, in the Constituent Assembly process there were several sectors opposing the emerging Plurinational Constitutionalism. In the specific case of legal pluralism, the liberal-conservative opposition as well as the MAS Party did not agree with the idea of an equal hierarchy of the state jurisdiction and indigenous jurisdiction. Rather, taking a multiculturalist approach, they proposed a single state judicial function in which indigenous legal orders could assume a role as alternative resolution mechanisms for minor cases.<sup>1129</sup> In addition, conservative perspectives of indigenous peoples as ignoble savages and liberal concerns with individual rights in indigenous communities were reinforced by representations in the media of ‘indigenous

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<sup>1127</sup> Pacto de Unidad was dissolved and currently there are tensions between indigenous and peasant organisations to the point that in 2014 CONAMAQ was intervened by the CSUTCB and the Government. Verónica Ardanaz, ‘CONAMAQ: La dignidad originaria del pueblo boliviano ante el mundo’ Interview to Tata Walberto Baraona 14 January 2014 <<http://www.cidob-bo.org/>> accessed 25 March 2014; Emily Achtenberg, ‘Rival Factions in Bolivia's CONAMAQ: Internal Conflict or Government Manipulation?’ 3 February 2014 <[nacla.org](http://nacla.org)> accessed 25 March 2014. In relation to the TIPNIS conflict see for example, Barroso Mendizabal (n 810); Salvador Schavelzon, ‘La plurinacionalidad en tiempos de consulta del TIPNIS’ *Rebelión*, 18 August 2012 <[www.rebelion.org](http://www.rebelion.org)> accessed 18 November 2013; Jeffery Webber, ‘Revolution Against "Progress": The TIPNIS Struggle and Class Contradictions in Bolivia’ (2012) 133 *International Socialism* 1.

<sup>1128</sup> Schavelzon, ‘Mutaciones de la identificación indígena durante el debate del censo 2012 en Bolivia: mestizaje abandonado, indigeneidad estatal y proliferación minoritaria ’ (n 4) 346; in relation to the extractivist economy in the MAS government and the ‘new left’ in South America see for example Maristella Svampa, ‘Resource Extractivism and Alternatives: Latin American Perspectives on Development’ in Miriam Lang, Lyda Fernando and Nick Buxton (eds), *Beyond Development Alternative Visions from Latin America* (English edn, Fundación Rosa Luxemburg 2013).

<sup>1129</sup> Schavelzon, *El nacimiento del Estado Plurinacional de Bolivia. Ethnografía de una Asamblea Constituyente* (n 48) 486; Valencia García and Égido Zurita (n 811) 143. Valencia García and Égido Zurita also point out that there was opposition to have indigenous individuals be judges in the state judiciary. Ibid

justice'<sup>1130</sup> as arbitrary and barbaric in relation to high-profile cases of flogging and lynching.<sup>1131</sup>

This thesis does not address the issue of the tensions between specific indigenous legal orders and individual human rights. The focus of this work is on the radical potential of indigenous collective rights and their role in a decolonization project. In this regard, the thesis has sought to establish how different enunciators and different paradigms (multiculturalism and plurinationalism) influence the meaning and scope of indigenous collective rights in ways that benefit or limit the demands of indigenous and peasant organisations. Nevertheless, it is worth briefly addressing the aforementioned media allegations of indigenous justice being 'barbaric'. First, the high-profile cases that appear in the media are not representative of indigenous justice. Some of them, as the case of the flogging of the CIDOB leader Marcial Fabricano in Beni, or the assault of former vice-president Víctor Hugo Cárdenas and his family, are not the result of a legal procedure but a response to a heated political situation that followed the entry into force of the new Constitution in 2009.<sup>1132</sup> In the case of lynching, anthropological studies and human rights reports indicate that it is not constitutive of most indigenous legal orders. Rather, it is a phenomenon related to the absence of state police and judicial institutions, particularly in low-income peri-urban areas composed of internal migrants of indigenous descent.<sup>1133</sup> It is also related to the way community interactions have been shaped by state violence and political and economic reforms in Latin America.<sup>1134</sup>

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<sup>1130</sup> 'Indigenous justice' is the term commonly use in Bolivia to refer to indigenous legal orders. The media also utilises the term 'community justice', although this last term is now linked to lynching and it has fallen in disrepute.

<sup>1131</sup> Some examples of cases reported in the media are: the lynching of four policemen in Uncía 'Ayllus violan derechos humanos a nombre de justicia comunitaria' *FM Bolivia* (La Paz, 8 June 2010) <<http://www.fmbolivia.com.bo/noticia29188-ayllus-violan-derechos-humanos-a-nombre-de-justicia-comunitaria.html>> ; the case of the two Brazilians lynched in Mabel Azcui, 'El linchamiento de dos brasileños en Bolivia tensa las relaciones bilaterales' *El País* (Cochabamba, 16 August 2012) Internacional <[elpais.com](http://elpais.com)> ; and the attempt of lynching in El Alto of a suspect of murdering two journalists, 'Turba intenta linchar al sospechoso de matar a dos periodistas en Bolivia' *Agencia EFE* (La Paz, 7 March 2012).

<sup>1132</sup> Agencia EFE, 'Dirigente indígena opositor denuncia azotes de parte de seguidores de Morales' *Los Tiempos* (11 May 2009) Nacional <[www.lostiempos.com](http://www.lostiempos.com)> For an analysis of the case of Fabricano and how it got out of hand see Xavier Albó, 'Justicia indígena en la Bolivia plurinacional' in Boaventura de Sousa Santos and José Luis Exeni Rodríguez (eds), *Justicia indígena, pluriculturalidad e interculturalidad en Bolivia* (Abya Yala; Fundación Rosa Luxemburg 2012) 234-237; in the case of Cárdenas Luz Mendoza, 'Comunarios destierran a Cárdenas y a sus familiares de Omasuyos; éste va a juicio' *Eju!* (Santa Cruz, 14 March 2009)

<sup>1133</sup> Defensor del Pueblo, *Monitoreo sobre la Cobertura Noticiosa de los Casos de Linchamientos en Bolivia durante 2007 y el Primer Trimestre de 2008* (Defensoría del Pueblo de la República de Bolivia 2008) 7-8; John L. Hammond, 'Indigenous Community Justice in the Bolivian Constitution of 2009'

Having said this, various indigenous communities do utilise flogging as a form of punishment for criminal offences, along with fines, community work, confinement, expulsion from the community, and other forms of corporal punishment like stocks.<sup>1135</sup> Furthermore, Goldstein and Aguirre et al mention that stoning and the death penalty, respectively, are forms of punishment among some indigenous communities.<sup>1136</sup> How the use of corporal punishment in judicial cases and other aspects of indigenous legal orders that are in tension with IHRL<sup>1137</sup> are handled would depend on the constitutional arrangement in place. Consequently, the Constitution and legislation would need to specify the extent to which human rights are to be implemented in non-state jurisdictions, their interpretation (from an IHRL multiculturalist paradigm or plurinationalist paradigm) and what organ is to implement the human rights system (e.g. local indigenous authority, central state organ, mixed organ).

As will be developed below, the Constitution of Bolivia of 2009 possesses a normative and institutional arrangement that favours a human rights approach. In the case of flogging, however, the Vice-Ministry of Indigenous Justice, taking as a precedent a resolution of the Constitutional Court of Colombia, considers that flogging in the context of judicial processes in an indigenous community is not a violation of human

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(2011) 33 Human Rights Quarterly 649, 672; Jim Handy, 'Chicken Thieves, Witches and Judges: Vigilante Justice and Customary Law in Guatemala' (2004) 36 Journal of Latin American Studies 533, 560-561.

<sup>1134</sup> Angelina Snodgrass Godoy, *Popular Injustice: Violence, Community, and Law in Latin America* (1st edn, Stanford University Press 2006).

<sup>1135</sup> Aguirre and others (n 1101) 80-89; for the case of the Aymara in Yaku. Kimberley Inksater, *Resolving Tensions Between Indigenous Law and Human Rights Norms Through Transformative Juricultural Pluralism* (University of Ottawa 2006) 26; for a more thorough and systematic analysis of Aymara justice and the meaning and use of flogging see Fernández Osco (n 297)

<sup>1136</sup> Daniel M. Goldstein, "'In Our Own Hands': Lynching, Justice and the Law in Bolivia' (2003) 30 American Ethnologist 22, 38 when referring to *t'inku* in rural Andean societies; Aguirre and others (n 1101) 89 when referring to the Quechua in Tapacari, Cochabamba; Fernández Osco in relation to Aymara communities also consider lynching in cases such as reiterated theft as consequent with the Andean juridical system. Fernández Osco (n 297) XXVIII, XXVIX.

<sup>1137</sup> IHRL expressly forbids the use of corporal punishment in judicial cases. UNHRC 'General Comment No. 20, Article 7' (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment) HRI/GEN/1/Rev.1 at 30 (30 September 1992) para 5. The Committee has sustained this position in various communications such as *Errol Pryce v Jamaica*. Communication No. 793/1998 (15 March 2004) CCPR/C/80/D/793/1998, *Boodlal Sooklal v Jamaica*. Communication No 928/2000 (25 October 2001) CCPR/C/73/D/928/2000, and *George Osbourne v Jamaica*. Communication No. 759/1997 (15 March 2000) CCPR/C/68/D/759/1997; *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (30 August 2005) Note by the Secretary-General. A/60/316 UNGA, para 18-21; Inter-American Court, *Caesar v Trinidad and Tobago* (Merits) Series C No 123 (11 March 2005) and the concurring vote of Judge Sergio Ramírez.

rights.<sup>1138</sup> The interviewee, however, held the opinion that the Vice-Ministry of Indigenous Justice is like an ‘implant’ in a Ministry of Justice that favours legal centralism.<sup>1139</sup> Thus, the work of organs such as the Vice-Ministry of Indigenous Justice or the Vice-Ministry of Decolonisation, which are more aligned with a plurinationalist approach, in some aspects conflicts with an institutional and legal framework that favours a liberal multiculturalist perspective.

Whatever the constitutional arrangement may be, I follow Merry in considering that the analysis of these cases should not be constrained to the ‘merely cultural’. This would entail circumscribing flogging or lynching to the domain of ‘traditional beliefs and values’ (a Herderian view of culture) of racialized groups—leaving out political and economic structural factors<sup>1140</sup> that influence the systematic use of flogging or lynching in indigenous communities or their isolated use in a given case. In addition, the indigenous community and their legal system should not be considered in isolation (for they are not isolated) but in relation to other state and non-state legal systems.

The use of reified views of culture can be utilised in ways that both favour (the ‘cultural defence’<sup>1141</sup>) or counter indigenous demands for autonomy. As discussed in Chapter 2, in both cases there is a tendency to resort to primitivist representations of indigeneity and to portray the state as an impartial arbiter instead of a stakeholder in matters related to indigenous peoples. For example, the Constitutional Court of Colombia held that the use of flogging with a *fuete* (whip) in the Páez community was in accordance with IHRL. It reached this conclusion because of the allegedly purificatory and symbolic use of the whip, and because the Court concluded that *fuete* does not inflict as much pain and corporal harm as to be considered torture. In addition, the Court considered that the whip does not cause as much humiliation as to be considered cruel, degrading and inhumane treatment. Moreover, the Court argued that it is not humiliating because everyone agrees with it and its ultimate aim is to reincorporate the individual into the community and restore harmony.

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<sup>1138</sup> Interview COO Vice-Ministry of Indigenous Justice (La Paz, 30 April 2014) referring to Constitutional Court of Colombia, T-523/97 (4 February 1997) referring to the use of the ‘fuete’ (whip) among the Páez.

<sup>1139</sup> Interview COO Vice-Ministry of Indigenous Justice (La Paz, 30 April 2014).

<sup>1140</sup> Merry, ‘Human Rights and the Demonization of Culture (And Anthropology Along the Way)’ (n 124) 63.

<sup>1141</sup> Phillips (n 50).



The Constitutional Court of Colombia seems to establish here that the degree of suffering, corporal damage and humiliation of a person are criteria for determining whether or not corporal punishment constitutes torture or is cruel, inhumane and degrading treatment—criteria that are not present in IHRL.<sup>1142</sup> More importantly for my argument, to make assertions such as that *everyone* agrees with this practice, or to imply that flogging *always* restores community peace, entails a homogenising view of the Páez. It also points to an over-simplification, possibly based on currently popular views of indigenous legal orders as restorative and harmonious (which are linked to the noble savage representation in IHRL).

More generally, as has been argued throughout the thesis, the resolution of cases of individual rights violations by state judicial organs have important limitations, which include the following: treating indigenous law as facts<sup>1143</sup>, the use of authenticity tests, the use of *ad hoc* anthropological studies for the purposes of a court case that over-simplify indigenous legal orders in order to fit the needs of the court,<sup>1144</sup> the silencing of indigenous authorities while privileging ‘expert testimonies’, the stereotyping of indigenous groups based on the facts of a specific case,<sup>1145</sup> the reification of indigenous law and therefore assuming that there is no internal dissidence or alternative interpretations of a given case or norm, and the use of constitutional courts by applicants as a way of appealing against the decisions of indigenous authorities (instead of utilising the appeal organs within the indigenous system itself).

While the thesis does not deal with this subject, my preliminary opinion on this matter is that if the goal is to implement a human rights system in indigenous communities in the context of a unitary state that incorporates IHRL into its normative framework, the implementation of these rights should be carried out at a local authority level. In addition, the implementation of individual rights should stem from a political will from the communities to modify their law and culture in a way that favours specific causes. This is the case with groups of indigenous women in Chiapas and Oaxaca, Mexico, who advocate both indigenous autonomy and reforming indigenous legal orders and cultures

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<sup>1142</sup> Constitutional Tribunal of Colombia, Resolution T-523/97, section 3.3.3 (b)

<sup>1143</sup> Anker, ‘The Law of the Other. Exploring the Paradox of Legal Pluralism in Australian Native Title’ (n 265) Section 2.4.3.

<sup>1144</sup> Engle, *The Elusive Promise of Indigenous Development* (n 3) 11.

<sup>1145</sup> As explained in Chapter 2. Peroni Manzoni (n 301) in relation to the European Court of Human Rights.

in order to achieve gender equality.<sup>1146</sup> In addition to the limitations mentioned above, another problem with implementing human rights through the state judiciary is that cases of allegation of individual rights violations in indigenous communities may be utilised by the state in order to further limit indigenous legal orders and prove the point that indigenous peoples are unable to self-govern.<sup>1147</sup>

#### **5.4.1. The Scope of Indigenous Legal Orders in the Current Legal Framework**

The Constitution project presented by Pacto de Unidad in 2007 envisaged a large scope for indigenous legal orders. The same can be said for the Constitution project approved in Chuquisaca on 24 November 2007, and, to a lesser extent, the Constitution project approved in Oruro on 14 December 2007. However, the final draft that was modified by the Congress and then approved by referendum made a number of modifications that limited Pacto de Unidad's proposal. First, the Constitution project presented by Pacto de Unidad stated that indigenous jurisdictions can rule on any matter. It extends to its members inside or outside the indigenous territory, as well as to individuals who are not part of the community but 'who violate the rules or act against its members, territories, natural resources, goods and interests'.<sup>1148</sup> The drafts of Chuquisaca and Oruro re-affirmed that indigenous jurisdictions may rule on any matter. However, they limited the scope to the members of the given indigenous nation or people and to situations that occurred within their territory.<sup>1149</sup> It is worth mentioning that the limitations *ratione personae* added to these drafts are in accordance with a view of indigenous law as an expression of indigenous culture and therefore as applicable only to the members of a given ethno-cultural group.

The Constitution of 2009 that is currently in force established the same scope *ratione loci* and *ratione personae* as the Constituent Assembly drafts, but created a statutory

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<sup>1146</sup> On how the reification and limitation of indigenous legal orders affects the struggle for indigenous women for equality see María Teresa Sierra, 'Las mujeres indígenas ante la justicia comunitaria. Perspectivas desde la interculturalidad y los derechos' (2009) 31 *Desacatos* 73; Rosalva Aída Hernández Castillo, 'National Law and Indigenous Customary Law: The Struggle for Justice of Indigenous Women in Chiapas, Mexico' University of Texas Faculty/Researcher Works <<http://repositories.lib.utexas.edu/handle/2152/4083>> accessed February 2013.

<sup>1147</sup> Watson, 'Sovereign Spaces, Caring for Country, and the Homeless Position of Aboriginal People' (n 294); Sierra, 'Las mujeres indígenas ante la justicia comunitaria. Perspectivas desde la interculturalidad y los derechos' (n 470) 74-75.

<sup>1148</sup> Article 102 of the Constitution Project of Pacto de Unidad of 2007. Own translation from Spanish.

<sup>1149</sup> Article 175 (a) (b). The Draft of Oruro does not change what was established in the Draft of Chuquisaca in relation to indigenous jurisdictions and only changes the wording (Article 200).

reserve for indigenous jurisdictions to be regulated by a Law of Jurisdictional Delimitation (Ley de Deslinde Jurisdiccional or ‘Law 073’).<sup>1150</sup> This law accords with the Constitution in relation to *ratione personae* and *ratione loci* but it limits *ratione materiae* to matters that have been ‘historically and traditionally dealt with’ by indigenous peoples.<sup>1151</sup> In doing so, this norm establishes an authenticity regime. As is the case with the Supreme Court of Canada, the UNHRC and the Inter-American System for the Protection of Human Rights,<sup>1152</sup> indigenous peoples will have to prove that their customs, economic activities and ways of life are ‘traditional’ in order to be entitled to exercise their own law. Moreover, by alluding to ‘traditional matters’, this norm on *ratione materiae* is based on a reified perspective of indigenous legal orders and cultures as isolated spheres that are static and incapable of change. Finally, there is no consideration in the current constitutional and legal framework of the already existing interactions between indigenous legal orders and the state.<sup>1153</sup>

Law 073 is careful to specify that ‘traditional matters’ do not include administrative law, labour law, social security law, tax law, mining law, hydrocarbons law, forestry law, IT law (‘Derecho Informático’), international public law, international private law and agrarian law, except for that which is related to communal property.<sup>1154</sup> Hence, indigenous law cannot interfere with key competencies of a centralized capitalist state, such as natural resource management and extraction, taxes, conflicts involving the state (administrative law), foreign affairs,<sup>1155</sup> and the regulation of the labour force (social security, labour law).

Law 073 also responds to the critiques of liberal opposition sectors towards indigenous communities because of violence toward women and children. While these are valid concerns and are addressed in the law by explicitly prohibiting violence against women, children and adolescents in any jurisdiction,<sup>1156</sup> the law goes a step further by making it

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<sup>1150</sup> Constitution of Bolivia of 2009, Articles 191.II and 192.III.

<sup>1151</sup> Law 073, Article 10.I.

<sup>1152</sup> Chapter 2.

<sup>1153</sup> The Constitution and the law does refer however to the need to establish coordination mechanisms between jurisdictions. Constitution of Bolivia of 2009, Articles 192.II and 192.III; Law 073 Articles 13-17.

<sup>1154</sup> Law 073, Article 10.II (b) (c)

<sup>1155</sup> In relation to the functions of the state, Oscar Oszlak, *Formación Histórica del Estado en América Latina: Elementos Teórico-Metodológicos para su Estudio* (Centro de Estudios de Estado y Sociedad (CEDES) 1988)

<sup>1156</sup> Law 073, Article 5. Interview COO Vice-Ministry Indigenous Justice (La Paz, 30 April 2014) in relation to concerns with the treatment of women and the elderly among highland communities; in

illegal for indigenous authorities to deal with several criminal offences at all. Consequently, indigenous jurisdictions cannot process situations involving minors, cases of rape, murder and manslaughter, as well a number of conducts sanctioned by international criminal law, such as corruption, human trafficking, drug trafficking and crimes against humanity.<sup>1157</sup> In this regard, Law 073 reflects the doubts about indigenous communities' ability to deal (alone or even in coordination with state institutions) with criminal law issues. Thus, the aforementioned law echoes authoritarian liberal perspectives of indigenous peoples as incapable of governing themselves.

Law 073 further reasserts the subordination of indigenous legal orders to state law by leaving an open clause for later establishing further limitations to indigenous jurisdictions through legislation.<sup>1158</sup> Therefore, this law takes a multiculturalist approach according to which indigenous legal orders are tolerated only if they respect individual rights and limit their function to minor cases—almost as an alternative conflict resolution mechanism. Rather than recognising indigenous legal orders, this law contributes to regulate them in a way that expands the rule of law of the state.<sup>1159</sup>

It should be noted also that while the limitation of indigenous jurisdictions to minor civil and criminal cases goes against the project presented by Pacto de Unidad, it is in keeping with the current IHRL framework for the toleration of the use of 'customary law'. The UNHRC has established that when states recognise courts based on customary law, or religious courts, they should ensure that these courts cannot lawfully hand down binding judgements unless they follow a number of requirements. In addition to the respect of the rights to due process and non-discrimination, these requirements limit the proceedings to minor civil and criminal matters.<sup>1160</sup>

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relation to allegations of gender inequality and violence toward women in highland communities see Favio Chacolla Huanca, 'Órigenes y Consecuencias de la Justicia Indígena Originario Campesina' in *Tiempos de Cambio en la Justicia* vol Diálogo Jurídico No. 7 (Prensa de la Corte Suprema de Justicia de Bolivia. 2010) 164-166.

<sup>1157</sup> Law 073, Article 10.II (a).

<sup>1158</sup> Ibid, Article 10.II (d).

<sup>1159</sup> According to my fieldwork of 2011, the Law of Autonomies—which regulates the creation of indigenous territorial autonomies—performs a similar function.

<sup>1160</sup> UNHRC 'General Comment No. 32, Article 14' (Right to equality before courts and tribunals and to fair trial) UN Doc CCPR/C/GC/32 (23 August 2007) section V, p. 5.

#### 5.4.2. The Predominant Position of Multiculturalism in the Constitution

Congressman Pedro Nuni encapsulated the sentiments among indigenous organisations about Law 073 when he expressed that this law limited indigenous legal orders to the processing of petty crimes such as ‘hen theft’ (*robo de gallinas*).<sup>1161</sup> According to Albó, Law 073 was meant to be the outcome of a process of consultation with indigenous communities. The Vice-Ministry of Indigenous Justice along with the High Commissioner of the United Nations for Human Rights and the Swiss agency COSUDE facilitated the execution of this consultation process (in accordance with indigenous peoples’ collective right to prior consultation).<sup>1162</sup> However, the Congress ignored this process of participation and approved a document that reflected their views on indigenous justice,<sup>1163</sup> as well as their fears about expanding the right to self-determination.<sup>1164</sup> This strategy of inviting civil society to participate but then taking a decision behind closed doors that does not reflect the process of consultation was also applied by the Bolivian government when approving the Constitution of Bolivia of 2009 and, as discussed in Chapter 4, when approving the law of agrarian reform of 1996.

This law was considered a betrayal on the part of the MAS party towards its indigenous supporters, as well as potentially unconstitutional.<sup>1165</sup> In an interview, the Operations Manager of the Vice-Ministry of Indigenous Justice added that while some of the main Pacto de Unidad organisations did not agree with this law and wanted a new one, they did not wish to undermine the ‘process of change’ (*el proceso de cambio*) and the MAS Party government. He added that currently some indigenous communities have accepted this law while others have not (so presumably they do not apply it).<sup>1166</sup> In this regard it is worth remembering that the situation of legal pluralism in Bolivia responds to the weakness and uneven presence of the state in the territory, as well as to the hegemony of indigenous authorities in certain areas. Thus, it is difficult to implement a

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<sup>1161</sup> Head of the Regional Programme on Indigenous Peoples’ Political Participation, Konrad Adenauer Foundation (La Paz, 25 April 2014). Nuni gave this declaration 10 December 2010.

<sup>1162</sup> Albó, ‘Hacia el poder indígena en Ecuador, Perú y Bolivia’ (n 394) 148.

<sup>1163</sup> Ibid, 148.

<sup>1164</sup> Interview Operations Manager Vice-Ministry of Indigenous Justice. La Paz, 30 April 2014; For a more detailed account of this consultation process for the Law of Jurisdictional Delimitation and how it was ignored by the Legislative Assembly, see Albó, ‘Justicia indígena en la Bolivia plurinacional’ (n 1047) 241-248.

<sup>1165</sup> Head of the Regional Programme on Indigenous Peoples’ Political Participation, Konrad Adenauer Foundation (La Paz, 25 April 2014); Head of the Unit of Communication Project and Foreign Affairs of the Ministry of Communication (La Paz, 2 May 2015).

<sup>1166</sup> Interview COO Vice-Ministry of Indigenous Justice (La Paz, 30 April 2014).

law on indigenous justice without the agreement of indigenous organisations and communities, particularly those that are removed from the influence and presence of the state.

I agree that Law 073 violates the right to self-determination and the principle of equality between jurisdictions present in the Constitution of Bolivia of 2009. Nonetheless, I also consider that the Constitution was already taking a predominantly liberal multiculturalist approach in relation to the treatment of indigenous legal orders. Hence, Law 073 only deepens the already existing multiculturalist approach present in the Constitution. As mentioned previously, while plurinationalism is present in some of the constitutional norms alluding to legal pluralism, these norms are neutralised by other constitutional norms that strengthen the state as well as a monistic, centralist and legal positivist perspective of the law. Therefore, the constitutional and legal framework in Bolivia is at odds with a constitutional system of multiple jurisdictions that, as the UN Committee against Racial Discrimination states, could have better reflected the situation of legal pluralism in Bolivia.<sup>1167</sup>

To better explain the marginal position of plurinationalism in relation multiculturalism in the Constitution of Bolivia of 2009, I will refer to the theory of the ‘constitutional transplant’ and ‘diluted reforms’ of Gargarella and Courtis.<sup>1168</sup> These authors refer to the difficulties of ‘transplanting at the margins’ principles that are at odds with the main constitutional framework. For instance, they explain the difficulty of inserting social and economic rights in predominantly liberal or liberal-conservative Latin American constitutions in the early 20<sup>th</sup> century.<sup>1169</sup> They also mention the dilution of clauses related to participatory democracy (plebiscites and referenda) in predominantly representative democratic systems during the ‘second wave’ of constitutional reforms in Latin America. The representative system gives power to the legislature to decide on the

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<sup>1167</sup> UNHRC ‘Informe Anual de la Alta Comisionada de las Naciones Unidas para los Derechos Humanos sobre las Actividades de su Oficina en el Estado Plurinacional de Bolivia’ A/HRC/19/21/Add.2 (2 February 2012) para 53 citing the UN Committee Against Racial Discrimination.

<sup>1168</sup> Roberto Gargarella and Christian Courtis, ‘El Nuevo Constitucionalismo Latinoamericano: Promesas e Interrogantes’ [2009] Serie Políticas Sociales, CEPAL; a similar discussion is found in Roberto Gargarella, ‘Latin American Constitutionalism Then and Now: Promises and Questions’ in Detlef Nolte and Almut Schilling-Vacaflor (eds), *New Constitutionalism in Latin America Promises and Practices* (Kindle edn, Ashgate 2012) loc 3474-3575.

<sup>1169</sup> Gargarella and Courtis, ‘El Nuevo Constitucionalismo Latinoamericano: Promesas e Interrogantes’ (n 1168) 23-25. These authors are referring here to the three major trends in Latin American Constitutionalism: conservative, which is perfectionist and elitist, the liberal project, which advocates for a minimal state and claims to be neutralist, and the radical project, which has nationalist-popular principles. Ibid.

design and promotion of participatory mechanisms, thus jeopardising the integration of such mechanisms.<sup>1170</sup> A similar assertion can be made in relation to the insertion of plurinationalist principles in a constitution that preserves many aspects of the previous one in relation to state model and political regime. Consequently, in the case of legal pluralism, the plurinationalist framework is ultimately ‘diluted’ or ‘absorbed’,<sup>1171</sup> by the multiculturalist framework of the neoliberal period, which is further strengthened through legislation.<sup>1172</sup>

In this train of thought, in its dogmatic section,<sup>1173</sup> the Constitution of Bolivia of 2009 establishes the right to self-determination, and it derives from it the right to autonomy, the right to self-government, the right to culture, the recognition of indigenous institutions and the consolidation of indigenous territorial autonomies.<sup>1174</sup> In this context, legal pluralism is treated both as a collective right that derives from self-determination<sup>1175</sup> and as a constitutional principle for the judicial function.<sup>1176</sup> However, in its organic section, the Constitution affirms that the judicial function is exclusive of the state, and indigenous jurisdictions are conceptualised as part of the state legal system.<sup>1177</sup> As a result, the institutional framework is one of absorption of indigenous legal orders into state law, and not the creation of separate jurisdictions that could threaten the hegemony of the central state. Law 073 reinforces this view of limiting

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<sup>1170</sup> Gargarella, ‘Latin American Constitutionalism Then and Now: Promises and Questions’ (n 1168) 3512-3527.

<sup>1171</sup> Gargarella and Courtis, ‘El Nuevo Constitucionalismo Latinoamericano: Promesas e Interrogantes’ (n 1168) 28.

<sup>1172</sup> A similar position is held by Postero, who sees a tension in the government of Morales between the struggle against colonialism and neoliberalism and the ‘embrace of liberal political institutions’. Nancy Postero, ‘The Struggle to Create a Radical Democracy in Bolivia’ [2010] *Latin American Research Review* 59, 59, 70-73, 75. Although she considers that the solution for the tensions between liberalism and ‘local ethnic particularism’ in the Constitution and the current government of Morales is to develop a vernacular version of liberalism, which she considers is actually already being created.

<sup>1173</sup> In continental law, the Constitution has two sections: a dogmatic section, which refers to fundamental rights and liberties, and an organic section that explains the political and legal structure of the state, the political regime and the structure of the legislative, executive and judicial functions. For example, Gargarella and Courtis, ‘El Nuevo Constitucionalismo Latinoamericano: Promesas e Interrogantes’ (n 1168) 27-35.

<sup>1174</sup> *Ibid*, Article 2 (right to self-determination of indigenous peoples because of their pre-colonial presence and their dominium of ancestral territories); Article 30.II (4) (indigenous collective right to self-determination and territory).

<sup>1175</sup> *Ibid*, Article 30.II (14) (indigenous peoples’ collective right to use of their own law, and economic and political system). In relation to its justification using a self-determination interpretative framework see Constitutional Tribunal of Bolivia, resolution 1422-2012 of 24 September 2012, section IV.1, p.12; Leonardo Tamburini, ‘La jurisdicción indígena y las autonomías indígenas’ in Boaventura de Sousa Santos and José Luis Exeni Rodríguez (eds), *Justicia Indígena, Plurinacionalidad e Interculturalidad en Bolivia* (Abya Yala; Fundación Rosa Luxemburg 2012) 253.

<sup>1176</sup> Constitution of Bolivia of 2009, Article 178.

<sup>1177</sup> *Ibid*, Article 179.I.

self-determination in favour of state sovereignty and territorial integrity with the ambiguous statement that the ‘exercise of separate jurisdictions’ has the aim of preserving the unity and territorial integrity of the state.<sup>1178</sup>

This absorption is also reinforced by the subordination of indigenous legal orders to the Constitution and to IHRL. In this regard, in a plurinationalist spirit, the Constitution establishes that there shall be an equal hierarchy between the state jurisdiction (*jurisdicción ordinaria*) and the indigenous jurisdiction (*jurisdicción indígena originario campesina*).<sup>1179</sup> Nevertheless, it also establishes that the latter shall respect the right to life and the right to defence as well as all other fundamental rights in the Constitution.<sup>1180</sup> The special mention of the right to life and the right to defence are a response to the concerns mentioned previously about cases of lynching (which is then explicitly prohibited in the Law of Jurisdictional Delimitation<sup>1181</sup>) and the perception of indigenous justice as being arbitrary or violating the right to due process.<sup>1182</sup>

More generally, as developed in Chapter 2, the subordination of indigenous collective rights to individual rights is a common clause in IHRL instruments in relation to the regulation of indigenous ‘customary law’. It should be highlighted at this point that in the Constitution of Bolivia of 2009, IHRL instruments ratified by the Bolivian state have the same status as constitutional norms<sup>1183</sup> and therefore are part of its constitutional framework (*bloque de constitucionalidad*). Consequently, when the Constitution and legislation of Bolivia indicate that indigenous jurisdictions have the obligation to respect the rights and liberties established in the Constitution, this also includes the IHRL instruments that have been ratified by the Plurinational State of Bolivia. Human rights instruments even acquire a supra-constitutional status in cases in which they have granted more ‘favourable rights’ to those present in the Constitution.<sup>1184</sup>

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<sup>1178</sup> Law 073, Article 4 (a).

<sup>1179</sup> Ibid, Article 4 (d); Constitution of Bolivia of 2009, Article 179.II.

<sup>1180</sup> Constitution of Bolivia of 2009, Article 190.II.

<sup>1181</sup> Law 073, Article 5.V.

<sup>1182</sup> Interview COO Vice-Ministry of Justice (La Paz, 30 April 2004); Perry (n 505) 102.

<sup>1183</sup> Constitution of Bolivia of 2009, Article 410; Law of the Plurinational Constitutional Tribunal, Article 4.II; Law 073, Article 2.II.

<sup>1184</sup> Constitution of Bolivia of 2009, Article 256.I. In the case of the UNDRIP, although this is not a binding instrument, it acquired the status of a law in Bolivia (Law 3897 of 26 of June of 2008). Article 13.IV of the same Constitution could also be interpreted to establish the supra-constitutional position of IHRL where it says, ‘The international treaties and covenants ratified by the Plurinational Legislative



Finally, despite Pacto de Unidad's attempts to introduce the idea of an 'inter-cultural interpretation of human rights' (which seems to allude to the possibility of a non-liberal interpretation), this clause was eliminated by the Congress from the articles relating to indigenous legal orders.<sup>1185</sup> Instead, the Constitution affirms that the 'rights and duties' established in the constitutional text shall be interpreted in accordance with the IHRL instruments ratified by Bolivia.<sup>1186</sup> Hence, when deciding on the scope and meaning of fundamental rights,<sup>1187</sup> the Constitutional Tribunal must take into account IHRL instruments and their official interpreters. Law 073 revives the idea of an 'inter-cultural interpretation' but it gives it a multiculturalist turn firstly by establishing it as principle to be considered by state judicial organs when administering justice, and second by defining it as 'taking into account' cultural difference.<sup>1188</sup>

The Constitutional Tribunal of Bolivia is also meant to consider as a criterion of interpretation the 'will of the constituent delegate' (*la voluntad del constituyente*) by taking into account the minutes, resolutions and other documents produced during the Constituent Assembly, and also the 'literal meaning of the [constitutional] text'.<sup>1189</sup> The Law of the Constitutional Tribunal also refers to a systematic and teleological interpretation of the Constitution.<sup>1190</sup> These interpretation norms could potentially open the door to a plurinationalist perspective. However, a systematic interpretation may also

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Assembly that recognise human rights and forbid their limitation by states of exception prevail over the internal order' (own translation).

<sup>1185</sup> Constitution project of Pacto de Unidad of 2007, Article 102.IV: 'When imposing sanctions, the autochthonous indigenous peasant jurisdiction shall observe respect to the right to life, the right to physical integrity and the dignity of individuals and of human rights interpreted culturally in accordance with the norms of each nation.' Also *ibid*, Article 111 related to the Constitutional Tribunal: 'International human rights treaties are subject to the Constitution, they will be interpreted inter-culturally within the framework of cultural pluralism and legal pluralism' (own translation from Spanish). The idea of inter-cultural interpretation of human rights in relation to indigenous jurisdictions was kept in the drafts produced during the Constituent Assembly process (Article 176 of the Draft of Chuquisaca of 24 November 2007, Article 199.II of the Draft of Oruro of 14 December 2007) but was eliminated by the Legislature from the final draft that was approved by referendum and entered into force 7 February 2009.

<sup>1186</sup> Constitution of Bolivia of 2009, Article 13.IV. This norm of interpretation however is contradicted by Article 256.II of the same Constitution that establishes that the rights in the Constitution shall be interpreted in accordance with IHRL treaties only when these treaties contain more favourable norms. This last norm is obscure in its meaning but it has been the one reproduced in the Constitutional Procedure Code of 2012 (Article 2.II (2)).

<sup>1187</sup> In continental constitutional law, the human rights that are incorporated to the Constitution are referred to as 'fundamental rights'.

<sup>1188</sup> Law 073, Article 4(d). The norm is supposed to imply that all jurisdictions (indigenous, agro-environmental and ordinary) shall consider cultural difference when imparting justice. However, this principle does not make sense for indigenous jurisdictions for they are limited in their scope to refer only to members of their own community.

<sup>1189</sup> Constitution of Bolivia of 2009 Article 196.II; Law of the Constitutional Tribunal, Article 6.I.

<sup>1190</sup> Law of the Constitutional Tribunal, Article 6.II.

be used to support the predominant multiculturalist framework that the Constitution utilises in relation to legal pluralism.

In addition to utilising individual rights and state sovereignty as the limits to legal pluralism, other elements of a multiculturalist approach in the Constitution are the introduction of a definition of indigeneity that is similar to the one used in IHRL, and the justification of collective rights based on cultural difference. In relation to the latter, the Constitution states that indigenous jurisdictions are founded upon the ‘special connection’ (*‘el vínculo particular’*) that indigenous peoples have with their communities or nations.<sup>1191</sup> As for the definition of indigeneity, following the ILO Convention 169, the Constitution defines it in terms of the possession of ancestral lands, the pre-colonial character of indigenous populations<sup>1192</sup> and the presence of a common culture and of shared institutions.<sup>1193</sup> This strict definition is replicated in the Law of Autonomies and Decentralisation that regulates the creation of indigenous territorial autonomies<sup>1194</sup> and in Law 073.<sup>1195</sup> The presence of these norms stands in tension with the constitutional norms that establish a wider definition of the indigenous subject and that draw on self-determination as the justification for indigenous collective rights.

According to Tamburini, in the case of the Law of Autonomies and Decentralisation, the decision to include this strict definition of indigeneity actually came from indigenous organisations seeking to guarantee indigenous autonomies. Lowland organisations considered that the indeterminacy of the ‘indigenous-autochthonous-peasant’ subject of the Constitution of Bolivia of 2009 aggravated their situation in disputes over land with highland settlers, or between lowland communities and white-mestizo agro-industrial farmers that have claims over those lands.<sup>1196</sup> However, as explored in Chapter 2, the issue with the strict definition is firstly that it entails the use of authenticity tests by state organs in order to determine who can exercise collective rights. This is precisely the case with the Plurinational Constitutional Tribunal (as will

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<sup>1191</sup> Constitution of Bolivia of 2009, Article 191.I.

<sup>1192</sup> Ibid, Article 2.

<sup>1193</sup> Ibid, Article 30.

<sup>1194</sup> Law of Autonomies and Decentralization, Article 6.III.

<sup>1195</sup> Law 073, Article 2.I (indigenous peoples have self-determination because of their pre-coloniality and because of their dominium over ancestral territories), Article 2.II (establishes ILO Convention 169 as one of the basis for this law. Such Convention contains a definition of indigeneity in Article 1.1).

<sup>1196</sup> Leonardo Tamburini, ‘Contexto constitucional y legal de las autonomías indígenas’ (2014) 21 *Separata Artículo Primero (CEJIS)*, (version provided by the author) 9, 16.

be discussed below) and with the Vice-Ministry of Indigenous Justice.<sup>1197</sup> It should be noted also that in Law 073, the strict definition is accompanied by ecological native representations as it establishes the spiritual connection of indigenous peoples with Mother Earth.<sup>1198</sup>

### **5.4.3. The Plurinational Constitutional Tribunal of Bolivia**

#### **i. The Role of the Constitutional Tribunal in the New Constitution**

The number of functions of the Constitutional Tribunal in relation to indigenous jurisdictions is another example of the marginal position of plurinationalism in the institutional design set in the Constitution. Following the Pacto de Unidad project, the Constitution establishes that the state judiciary cannot revise judgements by indigenous authorities.<sup>1199</sup> However, the Constitution of Bolivia does give the Constitutional Tribunal a significant number of functions in relation to indigenous jurisdictions and territorial autonomies that limit indigenous autonomy. Hence, in addition to examining allegations of human rights violations (*habeas corpus*, *amparo constitucional*),<sup>1200</sup> the Constitutional Tribunal also exercises constitutional control over the statutes of creation of indigenous territorial autonomies,<sup>1201</sup> rules on conflicts between the indigenous jurisdiction and the state jurisdiction,<sup>1202</sup> rules on conflicts between the central government and decentralised territorial autonomies including indigenous autonomies,<sup>1203</sup> and resolves inquiries by indigenous authorities in relation to the application of juridical norms in a specific case (and the decision of the Constitutional Tribunal in this regard is binding).<sup>1204</sup> More generally, the decisions of the Constitutional Tribunal are binding for all state organs including all judicial tribunals, and these resolutions carry no possibility of appeal.<sup>1205</sup> In accordance with its wide

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<sup>1197</sup> Interview COO Vice-Ministry of Indigenous Justice (La Paz, 30 April 2014).

<sup>1198</sup> Law 073, Article 10.I.

<sup>1199</sup> Constitution of Bolivia of 2009, Article 192 (I) (public authorities shall respect the decisions taken in the indigenous jurisdiction); Law 073, Article 12.1 (decisions produced by indigenous authorities are binding and will be respected by all persons and authorities) and Article 12.II (other jurisdictions cannot revise the decisions of the indigenous jurisdiction). It should be noted that this norm goes against the requirements of the UNHRC in relation to the regulation of customary law and religious law courts. UNHRC 'General comment no. 32, Article 14' section V.

<sup>1200</sup> Constitution of Bolivia of 2009, Article 202.

<sup>1201</sup> Ibid, Article 202 (1)

<sup>1202</sup> Ibid, Article 202 (11)

<sup>1203</sup> Ibid, Article 202 (3)

<sup>1204</sup> Ibid, Article 202 (8)

<sup>1205</sup> Ibid, Article 203; Law of the Constitutional Tribunal, Article 8.

constitutional remit, the popularly elected Constitutional Tribunal of Bolivia has produced hundreds of resolutions in relation to indigenous jurisdictions since it started exercising its functions in 2012.<sup>1206</sup>

In the Constitution Project of Pacto de Unidad, the Constitutional Tribunal was neither to refer to conflicts between jurisdictions, nor to exercise constitutional control over the statutes of indigenous territorial autonomies.<sup>1207</sup> Moreover, in Pacto de Unidad's project, IHRL instruments were hierarchically below the Constitution,<sup>1208</sup> and fundamental rights were to be interpreted inter-culturally and in accordance with a legal pluralism framework.<sup>1209</sup> Pacto de Unidad's project did not contemplate either giving the Constitutional Tribunal the role of resolving questions from indigenous authorities in relation to the application of norms pertaining to indigenous legal orders.<sup>1210</sup> This norm reaffirms the concentrated system of constitutional control,<sup>1211</sup> giving the state additional scope over indigenous jurisdictions.

Finally, Pacto de Unidad's Constitution project established that three magistrates and two deputy magistrates (*magistrados suplentes*) of the Constitutional Tribunal were to be elected directly by the indigenous representatives in Congress.<sup>1212</sup> In contrast, the Constitution in force only mentions that there shall be some degree of representation of both the state jurisdiction and indigenous-peasant jurisdiction in the Constitutional Tribunal<sup>1213</sup> and the constitutional magistrates shall be popularly elected.<sup>1214</sup>

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<sup>1206</sup> The Constitutional Tribunal started operating in January 2012, after being popularly elected on 16 October 2011 (Article 198 of the Constitution of Bolivia of 2009). Between 2009 and 2012 there was a Transitional Constitutional Tribunal elected by the executive that processed cases utilising the new Constitution or the old Constitution depending on the moment the case was presented. The resolutions of the Constitutional Tribunal are available online, particularly since 2014 (<http://www.tcpbolivia.bo/tcp/>).

<sup>1207</sup> Constitution Project of Pacto de Unidad of 2007, Article 112. Article 102 of this same Constitution project establishes that 'In cases of conflict of competences between indigenous jurisdictions and state jurisdiction, or in cases of allegations of violations of human rights by the former, the conflict shall be resolved by a judicial instance composed by authorities from both of the jurisdictions in conflict.' (own translation)

<sup>1208</sup> Ibid, Article 111.

<sup>1209</sup> Ibid, Article 112.

<sup>1210</sup> Ibid, Article 112.

<sup>1211</sup> Constitution of Bolivia of 2009, Article 196.I (concentrated system of constitutional control, which shall be exercised by the Constitutional Tribunal).

<sup>1212</sup> Ibid, Article 111.

<sup>1213</sup> Ibid, 197.I. The Law of the Constitutional Tribunal established that there shall be at least two magistrates who self-identify as indigenous. (Article 13 (2)) This law does not give a quota for indigenous deputy magistrates.

<sup>1214</sup> Ibid, Article 198. The magistrates can be proposed nevertheless by 'civil society and indigenous organisations' Constitution of Bolivia of 2009, Article 199.II. The idea of popularly elected magistrates stems from Pacto de Unidad's constitution project, but it was intended only for the Supreme Court Magistrates. Constitution project of Pacto de Unidad of 2007, Article 107.

Furthermore, while the Constitution Draft of Oruro made a distinction between the requirements for the magistrates coming from the state judiciary and those coming from indigenous jurisdictions,<sup>1215</sup> the current Constitution establishes the same criteria for all magistrates. These criteria include being a public servant, having a degree in constitutional law, administrative law or human rights law or eight years of experience in any of those fields.<sup>1216</sup> Since in practice this would, of course, significantly limit the possibility of indigenous authorities becoming constitutional magistrates, the norm also states that in an assessment of merits it will be taken into account that a candidate has been an indigenous authority.<sup>1217</sup> This clause does not, however, specify how many years the person should have served as an indigenous authority or in what the rank. It is assumed also that any indigenous authority may represent all indigenous legal orders, as if all indigenous communities had a single legal order.

## **ii. The Treatment of Non-State Legal Orders as a Single Indigenous Jurisdiction**

Tapia argues that what Bolivia has today is an ‘apparent plurinational state’. In other words, it has a state in which the ‘normative and discursive production’ is centred on the idea of plurinationalism while in practice there are ‘negation processes’.<sup>1218</sup> Thus, plurinationalism—and key concepts related to it such as ‘decolonization’ and ‘living well’—become rhetorical devices that contribute to mystify the continuation of former structures of domination.<sup>1219</sup> In this regard, Tapia explains that indigeneity and the communitarian currently function as a form of legitimation of a government that actually represses indigenous organisations that are not aligned with its policies.<sup>1220</sup> Therefore, the denomination plurinational state and the official discourse of ‘unity in diversity’ function as an ideological fantasy that obfuscates an existing situation of subordination of indigenous institutions and co-optation of the discourse of indigeneity by the MAS government. These terms also obscure the impossibility of combining a

<sup>1215</sup> Draft of Oruro of 2007, Articles 200.I and 200.I. Quoted in Albó, ‘Justicia indígena en la Bolivia plurinacional’ (n 1047) 228.

<sup>1216</sup> Article 199.I of the Constitution of Bolivia of 2009 and Article 17 of the Law of the Constitutional Tribunal.

<sup>1217</sup> Ibid.

<sup>1218</sup> Choque Mamani (n 1020) 9 (Prologue by Luis Tapia Mealla). The concept of an apparent state is from Zavaleta. It refers to the top-bottom construction of the nation that excludes the majorities. It is a state that excludes social sectors, regions, political practices and it is not able to articulate the whole of its territory. Andrea Florencia Puente, ‘Desafíos de la reconstrucción estatal posneoliberal en América Latina: el pensamiento de René Zavaleta Mercado revisitado desde la nueva coyuntura del Estado Boliviano’ CLACSO accessed August 2015.

<sup>1219</sup> In a similar sense Tapia in Choque Mamani (n 1020) 8-9.

<sup>1220</sup> Ibid, 9.

strong central government and a monistic legal system with strong indigenous autonomies and legal pluralism.

Tapia's argument finds support in resolution 1422-2012 of the Constitutional Tribunal. In creating new concepts such as 'plural constitutional control' and 'the living well paradigm test', as well as resorting to flag words such as 'decolonization', 'inter-cultural interpretation' or 'inter-cultural deliberation' (*'ponderación intercultural'*), the Constitutional Tribunal obscures the application of an authenticity test to indigenous jurisdictions. I will proceed to examine the treatment of the facts of this legal case by the Constitutional Tribunal in some detail before examining the authenticity test. The purpose is to provide an example of how the current situation of legal pluralism in Bolivia is quite complex, with different overlapping legal systems exercising control over the same territory, and how the Tribunal is ill equipped to deal with this reality.

In this case, the petitioner, Mr. Huanca-Alavi, presented a petition for *habeas corpus* before a Criminal Court (Juez Segundo de Instrucción en lo Penal de Chiquisaca)<sup>1221</sup> because the Neighbourhood Association of Poroma (Junta Vecinal de Poroma) in Oropeza, Sucre, allegedly cut the drinkable water supply from his house since 2010 and impeded his wife from performing economic activities such as selling food in the market and taking their cattle to graze.<sup>1222</sup> The petitioner also blamed the Junta Vecinal for discriminatory treatment towards his children and grandchildren by community members who ostensibly said the children were thieves like their father. The constitutional resolution does not provide documentation or evidence in relation to these allegations by Mr Huanca-Alavi. It only indicates that these measures began after the son of Mr. Huanca-Alavi (Mr. Huanca-Gonsales) committed a theft in the community for which he was 'detained' (presumably by the Junta Vecinal<sup>1223</sup>). It also states that Huanca-Gonsales returned the money in a formal public procedure witnessed by authorities of the Junta Vecinal, the Sub-Central (union system), the Bartolina Sisa sub-central and 'community in general of the three organizations of the Poroma Municipal Government'.<sup>1224</sup> A state Criminal Court was simultaneously processing this theft (Juez

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<sup>1221</sup> The Constitution establishes that the *habeas corpus* can be presented before any competent Criminal Court. Constitution of Bolivia of 2009, Article 125.

<sup>1222</sup> Plurinational Constitutional Tribunal of Bolivia, resolution 1422-2012, section I.I.1, pp. 1-2.

<sup>1223</sup> Ibid, section II.2, p.4.

<sup>1224</sup> Ibid, section II.1, p.4.

Tercero de Instrucción Penal). However, after the devolution of the stolen money in the context of the Junta Vecinal procedure, the criminal case was filed.

On 26 January 2012, a day before the Criminal Court gave its ruling on the *habeas corpus* petition, the Junta Vecinal ratified its decision of 15 January 2012 of expelling from the community Mr Huanca-Gonsales and his whole family. The reason given was that ‘these people have disrupted the peace and tranquillity of our homes and our families, there is no safety in our houses, since some time ago they steal from our houses [...]’.<sup>1225</sup> The Junta Vecinal resolution also stated that all the children in that family were learning to steal and harm people, and thus constituted a risk to the physical integrity of the community members.<sup>1226</sup> They gave the family a maximum of forty-eight hours to leave or else they would take action.<sup>1227</sup>

Importantly, the Junta Vecinal resolution of 15 January 2012 also specified that this family was not affiliated to any local organisation as an additional reason for their expulsion.<sup>1228</sup> This lack of affiliation helps explain why this family took the case to the state jurisdiction. Mr. Huanca-Alavi even claimed in the *habeas corpus* petition before the Criminal Court that he did not recognize the jurisdiction of the Junta Vecinal, which was a ‘modern institution’ and not an indigenous institution, and therefore had no legitimate jurisdiction over an ancestral territory.<sup>1229</sup> He also claimed that the Junta Vecinal is connected to state local governments and therefore has nothing to do with indigenous jurisdictions.<sup>1230</sup> The Junta Vecinal also shared this perspective. In their response to the *habeas corpus* petition, they specified that while the Junta Vecinal was linked to the ‘*junta originaria*’ (indigenous association), they were not acting as ‘*originarios*’, or in their indigenous authority capacity, but as a neighbourhood association. For this reason the representatives of the Junta Vecinal requested that the *habeas corpus* petition be rejected, mentioning also that the applicant had been refusing to cooperate in the procedure before the Junta Vecinal.<sup>1231</sup>

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<sup>1225</sup> Ibid, Section II.3, p.2 (own translation from Spanish).

<sup>1226</sup> Ibid, Section II.3, p.2

<sup>1227</sup> Ibid, Section II.2, p.3

<sup>1228</sup> Ibid, Section II.2, p.3

<sup>1229</sup> Ibid, Section I.1.1, p.2.

<sup>1230</sup> Ibid, I.2.1. p.3.

<sup>1231</sup> Ibid, Section I.2.2, p. 3.

The Criminal Judge decided on the *habeas corpus* petition on 27 January 2012, ordering the restitution of the right to water for the family.<sup>1232</sup> However, the judge did not refer to the other allegations of fundamental rights violations because they were not rights protected under the *habeas corpus*.<sup>1233</sup> Mr. Huanca-Alavi proceeded to take his case to the Constitutional Tribunal to appeal. The Tribunal requested the aid of its Decolonization Unit to conduct an anthropological study of Poroma. It should be highlighted that despite the name of the institution, its function is not different from the expert witnesses hired by the Inter-American Court to assess the authenticity of indigenous communities and provide an account of their law and culture.

Based on the anthropological study, which is summarised in several pages of the constitutional resolution,<sup>1234</sup> the Constitutional Tribunal ruled that the community of Poroma is an authentic Quechua pre-colonial indigenous community belonging to the Suyu Qhara Qhara.<sup>1235</sup> The Decolonization Unit reached this conclusion through historiographical and archival research and the national census of 2001.<sup>1236</sup> Another proof of the authenticity Poroma was that it had already been recognised as indigenous by the state in the context of the law of agrarian reform of 1996, and there was a process to declare its territory as indigenous.<sup>1237</sup>

According to the resolution, the Decolonization Unit also determined the existence of four forms of social organisation that deal with conflict resolution in Poroma: the neighbourhood association, the peasant union, the indigenous association (*junta originaria*, which is nevertheless subordinated to the peasant union), the *ayllu* system and state institutions.<sup>1238</sup> The resolution states that Poroma is part of the Unitary Sub-Central of Indigenous Workers of Poroma (Subcentralía Única de Trabajadores de Pueblos Originarios de Poroma), which possesses written statutes.<sup>1239</sup> Parallel to the union system is the *ayllu* system, or the indigenous authorities of Poroma (*‘autoridades originarias’*). In the Quechua territorial system, Poroma is the main town of the

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<sup>1232</sup> Ibid, section I.2.3, p.3

<sup>1233</sup> Ibid, I.2.3, p. 3-4.

<sup>1234</sup> Ibid, Section III, pp. 5-11.

<sup>1235</sup> Ibid, Section IV.8 (a), pp.22-23. A *suyu* is a form of territorial division in the Incaic empire and that is utilised nowadays in the Bolivian Andean regions.

<sup>1236</sup> According to the Constitutional resolution, in the national census of 2001 95% of the people in Poroma self-identified as Quechua, and 69% claimed to speak Quechua. Ibid, Sections III.1, III.2, pp.5-6.

<sup>1237</sup> Ibid, Section IV.8 (a), p. 22.

<sup>1238</sup> Ibid, Section III, pp. 6-10.

<sup>1239</sup> Ibid, Section III.3, p.6.



Marka<sup>1240</sup> Valle Tinkipaya of Poroma (which coincides with the territory of the municipality of Poroma) and is composed by six *ayllus*. According to the resolution, there are actually conflicts between the overlapping *ayllu* and union systems.<sup>1241</sup> Finally, the Junta Vecinal of Poroma is independent from the union system and the *ayllu* system. While not affiliated to the Federation of Neighbourhood Associations (FEJUVE), it is linked to the local government system.<sup>1242</sup>

While the respondent in this case is the Junta Vecinal, the resolution does not mention the conflict resolution procedures followed by this organ and instead it briefly explains the procedures in the union and *ayllu* systems in Poroma. Furthermore, the Constitutional Tribunal abruptly concludes that ‘it can be understood that since the community is organized as part of the Sub-Central of Indigenous Workers of Poroma, then this is the legal framework [the union statutes] that are applicable to community conflicts’.<sup>1243</sup> At the same time, despite deciding that the norms to be considered in this case are the union’s norms, the Constitutional Tribunal justifies its decision concerning the authenticity of Poroma by referring to the *ayllu* system. Thus, when assessing the elements of ‘ancestral territoriality’, rituality and cosmovision of its definition of indigeneity, the Tribunal refers solely to the *ayllu* system.<sup>1244</sup> The ‘rituality and cosmovision’ of Poroma are explained in four paragraphs. They refer to *ch’uwanchar* (conflict resolution), *thaki* (right path) and *khariwarmi* (the complementarity of men and women in the administration of justice).<sup>1245</sup> In an interpretation that reduces *ayllu* law to these axioms, these paragraphs will become central in the legal reasoning of the Constitutional Tribunal. They will substantiate the Tribunal’s conclusion that the Junta Vecinal did not adhere to Quechua cosmovision and procedures (again, without explaining how does the *ayllu* system relates to the Junta Vecinal).

In sum, the tribunal recognized the Neighbourhood Association (Junta Vecinal) but only after merging it with the union system (which provided the written law) and the *ayllu* system (which provided authentic indigeneity) and treating them as a single indigenous jurisdiction for the purposes of addressing the case. In this sense, the case demonstrates

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<sup>1240</sup> *Marka* is a form of administrative-territorial division in the *ayllu* system consisting of an aggregate of *ayllus*.

<sup>1241</sup> Ibid, Section III.3 (4), p.8; Ibid, Section III.3, p.6.

<sup>1242</sup> Ibid, Section III.3 (3) p.7

<sup>1243</sup> Ibid, Section III.7, p.9-10.

<sup>1244</sup> Ibid, Sections III.4, III.5, III.6, pp. 8-9.

<sup>1245</sup> Ibid, Section III.6, p.9.

that the Constitutional Tribunal is ill prepared to deal with multiple jurisdictions because the constitutional framework treats indigenous legal orders as a single jurisdiction. Furthermore, the case evidences the challenge the Constitutional Tribunal faces in attempting to exercise a concentrated constitutional control over indigenous jurisdictions with a constitutional and legal framework that vacillates between an inclusive and a strict definition of indigeneity.

In this sense, based on Article 30 of the Constitution, the Constitutional Tribunal establishes that for an indigenous community to have collective rights including that of self-determination it must have at least one of the following elements: cultural identity, language, administrative organization, ‘territorial ancestrality’, own rituals and ‘cosmovision’, ‘among other features’.<sup>1246</sup> It is worth noticing that despite its presence in the ILO Convention 169 and Bolivian national censuses since 2001, self-identification is surprisingly absent from this list.<sup>1247</sup> At the same time, the Constitutional Tribunal affirms that the concept of indigeneity includes ‘intermediate geographical areas that have been subject to a *mestizaje* process’.<sup>1248</sup> Therefore, the Constitutional Tribunal evidenced in this resolution that it is willing to recognize peasant organisations, neighbourhood associations and other institutions that ‘reflect the *mestizaje* process lived in the country’.<sup>1249</sup> As mentioned before, in this case the Tribunal resorted to conflating both definitions and recognising the Junta Vecinal while also ensuring its indigenous nature.

It should be highlighted that notwithstanding the aforementioned resolutions of the Junta Vecinal, in which the association justifies its decision to expel Mr. Huanca-Alavi’s family, ultimately the Constitutional Tribunal assesses the allegations of fundamental rights violations based on Criminal Court resolutions (which are thus treated as the only evidence). Therefore, for the Tribunal the only facts of this case are that there was a theft by the son of the petitioner and the case was filed because the money was returned. Hence, when looking at the proportionality of the measure taken by the Junta Vecinal (the expulsion from the community of the whole family), the Constitutional Tribunal ruled that it was disproportional because the family members had not committed any offence and the son had already returned the money. This is

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<sup>1246</sup> Ibid, Section IV.2, p. 14.

<sup>1247</sup> ILO Convention 169, Article 1.

<sup>1248</sup> Constitutional Tribunal of Bolivia, resolution 1422-2012, p 15.

<sup>1249</sup> Ibid.

symptomatic of a lack of recognition of indigenous authorities, instead treating them as objects of study, even when they are the respondent in the case. Thus, instead of coordinating with the different authorities involved, recognizing them as legitimate public authorities,<sup>1250</sup> the Constitutional Tribunal resorted to an ‘emergency’ anthropological study by its Decolonization Unit. The expression ‘emergency study’ is from Fernández Osco, who in his ethnographical work on Aymara legal orders states,

We wish to make clear that indigenous law and justice cannot be sought in pieces or segments of research; it cannot be understood either by the magic of speedy visits to the communities, as occurs with emergency studies. One shall attempt to understand them [indigenous law and justice] as part of a sustained fieldwork, because their practice and structure manifest in different times and spaces. We have also evidenced the existences of mechanisms of filtration and control of information, that is, gestures, somatizations, pauses and silences in communication.<sup>1251</sup>

### **iii. The Authenticity Test of the Constitutional Tribunal**

After several pages justifying the exercise by the Constitutional Tribunal of a ‘plural constitutional control’,<sup>1252</sup> the Constitutional Tribunal proceeds to present its ‘test of the living well paradigm’ (*test del paradigma del buen vivir*). It then analyses the facts of the present case in relation to those parameters, concluding that the actions of the Junta Vecinal of Poroma do not conform to any of them. Therefore, the Tribunal orders the Junta Vecinal to annul the order of expulsion. In addition, the state is to provide protection to the family of Mr Huanca-Alavi in relation to the long list of fundamental rights that were considered violated by the petitioner (the right to work, the right to physical integrity, the right to commerce, the prohibition of civil death, and the right to due process, among others).<sup>1253</sup> It is worth mentioning that the Constitutional Tribunal never engages in an analysis of the petitioner’s list of allegedly violated fundamental rights. Instead, as Clavero affirms, with its ‘living well test’ the Constitutional Tribunal goes beyond its constitutional remit by deliberating on what indigenous law should have actually been applied in this case.<sup>1254</sup> As will be developed below, the Tribunal engages

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<sup>1250</sup> In a similar sense, Bartolomé Clavero, ‘Bolivia: ¿Jurisprudencia constitucional plurinacional?’ Bolpress, 4 April 2013 <<http://www.bolpress.com/art.php?Cod=2013040401>> accessed 22 December 2014, 2.

<sup>1251</sup> Fernández Osco (n 297) 330 (own translation from Spanish).

<sup>1252</sup> Ibid, Sections IV.1, IV.2, IV.3, IV.4, IV.5, pp.11-18. Here the Constitutional Tribunal adds the idea of inter-culturality even if the Constitution of Bolivia had established that fundamental rights shall be interpreted in accordance to IHRL.

<sup>1253</sup> Ibid, ‘por tanto’, p.28. Ibid, I.1.2, p. 2.

<sup>1254</sup> Clavero (n 1250) 1-2.

in value judgements concerning the harmonious and peace-seeking nature of indigenous law, and how the measures taken by the Junta Vecinal do not adhere to this representation.

The use of the term ‘living well’ by the Constitutional Tribunal for its test is not explained in the resolution. ‘Living well’ (*vivir bien* in Spanish, or *suma qamaña* in Aymara) is an Aymara and Quechua principle incorporated to the Constitution of Bolivia.<sup>1255</sup> According to Huanacuni Mamani, it refers to living in harmony with oneself and with others, including Mother Earth.<sup>1256</sup> The Constitutional Tribunal only mentions the need of an inter-cultural interpretation of human rights in the context of indigenous jurisdictions, possibly with the aim of expanding indigenous rights. At the same time, this test is meant to be a ‘plural guarantee aimed at avoiding disproportionate decisions on behalf of indigenous jurisdictions that are contrary to the axiomatic guides of the Plurinational State of Bolivia’.<sup>1257</sup> Thus, the test is meant to keep indigenous jurisdictions within the parameters of toleration of the Bolivian state.

If one is to interpret these statements in the light of a liberal multiculturalist framework, what the Tribunal aims to do with the test is to incorporate a cultural difference approach in order to acknowledge cultural distinctiveness. In addition, the test will reinforce parameters of toleration that will limit the exercise of indigenous law in order to guarantee the centrality of the state as the main form of social control, and that will enforce the state’s moral and political regime. However, the ‘inter-cultural interpretation’ as applied by this Tribunal ends up being more restrictive for indigenous autonomy than a more mainstream approach for a constitutional court of analysing whether or not the Junta Vecinal’s resolution violates the fundamental rights listed by the applicant in the light of the constitutional framework.

The Constitutional Tribunal test has four elements. The first is ‘axiomatic harmony’, according to which the decisions of indigenous jurisdictions in their means and ends must be in accordance with ‘the materialization of supreme plural values like equality, complementarity, solidarity, reciprocity, harmony, inclusion, equality of conditions, common good, among others’. It should be applied through an ‘inter-cultural

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<sup>1255</sup> Constitution of Bolivia of 2009, Article 8.

<sup>1256</sup> Fernando Huanacuni Mamani, *Vivir Bien/Buen Vivir. Filosofía, Políticas, Estrategias y Experiencias Regionales* (1st edn, Instituto Internacional de Integración (III-CAB) 2010).

<sup>1257</sup> Ibid, Section IV.5, p.18.

deliberation’ (*ponderación intercultural*) by the Constitutional Tribunal.<sup>1258</sup> This parameter draws on an open-ended list of principles introduced by the Constitutional Tribunal that are not supported by constitutional norms and do not seem to be equally applied to the state jurisdiction. In the present case, the Tribunal decided that the Junta Vecinal failed to meet this parameter because the measure of expulsion ‘of the wife of the petitioner and his whole family’ is not in harmony with the ‘supreme plural values’.<sup>1259</sup>

The second element is that the decision by indigenous authorities has to be in accordance to their cosmovision. It should be emphasized that this parameter is not meant to assess the adherence of a procedure to due process parameters as established in the Constitution, in IHRL instruments and/or by the Junta Vecinal.<sup>1260</sup> Rather, it is a reduction of indigenous legal orders to cultural expressions. Therefore, based solely on its simplistic and succinct interpretation of the concepts of *thaki* and *ch’unchwar*, the Tribunal decides that the Junta Vecinal did not adhere to their own cosmovision because the family had not committed any offence.<sup>1261</sup> Even if the Constitutional Tribunal were to decide over a case that was known by *ayllu* authorities, or could prove that the Junta Vecinal operates under these principles, it is relevant to note that the Constitutional Tribunal does not include in its analysis of ‘indigenous cosmovision’ the gravity that theft, and particularly repeated theft (which according to the Junta Vecinal is the offence to be considered in this case), has in the *ayllu* system.<sup>1262</sup> It does not mention either how even the Aymara-Quechua principle ‘you shall not steal’ (*ama suwa*) has been incorporated into the Constitution.<sup>1263</sup> More importantly, as mentioned previously, the Constitutional Tribunal engages in an analysis of what should have been the applicable indigenous law, thus exceeding its own remit.

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<sup>1258</sup> Ibid, Section IV.5, p.18-19.

<sup>1259</sup> Ibid, Section IV.8 (i) pp. 24-25.

<sup>1260</sup> In this sense, the Constitutional Court of Colombia establishes that in the case of indigenous communities, the right to due process shall be assessed not in relation to state law but the specific procedures established in a given indigenous legal order in order to process a case. However, indigenous procedure shall adhere to the Constitution and the law. Constitutional Court of Colombia, resolution T-254-94 of 30 May 1994.

<sup>1261</sup> Ibid, Section IV.8 (ii) pp. 25-26.

<sup>1262</sup> Fernández Osco explains when looking at the Marka Yaku that in the ‘law of the *ayllu*’ reiterated theft is considered a major offence because it goes against the collective interests of the community. In the Marka Yaku these cases are examined by a general assembly and they used to be punished by death. He adds that in the last thirty years, in Yaku the punishment has been substituted with elevated fines, expropriation of lands, voluntary expulsion and flogging. Fernández Osco (n 297) 211.

<sup>1263</sup> Constitution of Bolivia of 2009, Article 8.

The third element of the Constitutional Tribunal test is ‘rituals shall be harmonic with the norms and procedures traditionally used by each indigenous people’. Here once more indigenous norms and procedures are exoticised as ‘traditional customs and rituals’. The Constitutional Tribunal did not deliberate on this point. It simply declared that the ‘procedures in accordance to indigenous cosmovision were not respected’—referring to the procedures established by the union system. Again, the union system was nevertheless initially presented as separate from the Junta Vecinal.<sup>1264</sup>

The fourth element is proportionality between the offence and the punishment and ‘strict necessity’. The Tribunal does not indicate by what criteria proportionality is measured. The Junta Vecinal failed this to act in accord with this element because the Constitutional Tribunal ruled that the expulsion was not proportional or in accordance to a ‘strict community necessity’.<sup>1265</sup> The Tribunal discretionally decided on this matter without properly substantiating the parameter and its ruling by referring to Bolivia’s constitutional framework. The Constitutional Tribunal also expressed that in cases in which women and children are involved, the Tribunal must exercise a ‘reinforced constitutional control’ as the rights of vulnerable groups are above indigenous peoples’ right to use their own law.<sup>1266</sup> The Constitutional Tribunal did not stop at the affirmation of this liberal multicultural principle (which is in accordance to Law 073). Rather, going beyond its constitutional power or authority, it proceeded to make a dubious attempt at justifying this affirmation by referring to the *ayllu* system. The Tribunal considered that since the Quechua administrate justice under the *khariwarmi* principle (in other words, that the Kuraka and his wife administrate justice), this means that also under ‘indigenous cosmovision’ the decision of the Junta Vecinal was unfair because women hold a special place in indigenous communities.<sup>1267</sup> It should be highlighted that throughout this entire analysis the Constitutional Tribunal actually never refers to the Neighbourhood Association but refers to ‘indigenous cosmovision’. Thus, the Tribunal leaves out the respondent and makes ‘indigenous cosmovision’ the centre of its discourse.<sup>1268</sup>

<sup>1264</sup> Constitutional Tribunal of Bolivia, resolution 1422-2012, Section IV.8 (ii) p. 26.

<sup>1265</sup> Ibid, Section IV.8 (iii), 26-27.

<sup>1266</sup> Ibid, Section IV.6, p.20, Section IV.8 (c) p. 27.

<sup>1267</sup> Ibid, Section IV.8 (c) 27.

<sup>1268</sup> The same argument is made by Peroni Manzoni in relation to the European Court of Human Rights in *Leila Şahin v. Turkey*. Application No 44774/98, 29 June 2004. Peroni Manzoni (n 301) 202-203.

In sum, this legal case illustrates the application of a regime of authenticity. The community of Poroma passed the authenticity test of being indigenous and their legal institutions being valid and legitimate, even if the Junta Vecinal was presented as closer to the state system than to the union or the *ayllu* systems. However, the decision of the Junta Vecinal did not adhere to the Tribunal's view of what Quechua cosmovision is, and therefore the Tribunal revoked it. The Constitutional Tribunal manifested a more insidious side when utilizing the language of plurinationalism in order to establish extra-constitutional parameters of toleration of indigenous legal orders that permitted the Tribunal to go beyond its own legal power or authority.

## **Conclusions**

This thesis has argued that the Constitution of Bolivia of 2009 contains competing norms in relation to the regulation of legal pluralism. These norms correspond to two different paradigms: plurinationalism and an IHRL approach. I further argued that these paradigms are incompatible because of the reifying view the human rights approach has of the indigenous subject, law and culture. The human rights approach therefore limits indigenous radical demands, such as the hierarchical equality between indigenous law and state law proposed in the plurinationalist project. This thesis evidenced that in the Constitution of Bolivia, the tensions are resolved by giving preference to the human rights approach over the plurinationalist approach presented by the indigenous and peasant organisations.

### **1. The Human Rights Approach to Indigenous Peoples**

#### **a. The Reification of the Indigenous Subject and Indigenous Cultures and Legal Orders**

Since the late 1980s, IHRL adopted a cultural difference perspective to indigenous collective rights in general and legal pluralism in particular. Thus, indigenous peoples are entitled to differentiated rights for the protection of their distinct culture as well as for the protection of the cultural diversity of humanity. Therefore, indigenous applicants can claim indigenous collective rights such as the right to land and territory and the right to use their own law to the extent that they are can demonstrate that the exercise of such rights contributes to the protection of their culture. In this regard, IHRL draws on an essentialist view of culture as a static self-contained whole that can be preserved, destroyed or made a tradable good.

IHRL also adopts a liberal multiculturalist perspective to indigenous rights similar to Kymlicka's liberal theory of minority rights. It does so in the sense that rather than 'recognising' indigenous peoples and their cultures and legal orders (understanding recognition in Hegelian terms), IHRL merely tolerates them. The parameters of toleration in a liberal multiculturalist perspective are autonomy endorsement and individual rights, as well as state sovereignty and territorial integrity. Hence,



multiculturalism operates as a practice of inclusion regulating the presence of the indigenous other in the national space. This means that the (white) dominant group retains the power to tolerate or not tolerate indigenous peoples, who are perceived as vulnerable minorities and as being outside the nation. Since the adoption of the ILO Convention 169, indigenous peoples are therefore represented in IHRL as ecological natives, and IHRL instruments and official documents emphasize the idea of indigenous peoples' spiritual connection to nature (or their 'special connection to land', as phrased by the Inter-American Court).

I argued in Chapter 1 that because of the way they are racialized (as noble savages), indigenous peoples are treated in human rights as minorities with special needs. As a result, they are granted collective rights to exercise their own law and to hold communal land—as opposed to other minorities who can only claim individual rights in connection to their right to culture. IHRL also operates with an essentialist view of indigenous legal orders as static and self-contained wholes. Furthermore, following a legal positivist perspective, indigenous law is treated in IHRL mainly as cultural expression and frequently referred to as 'customary law' in order to emphasize its inferior position in relation to state law. The authenticity of indigenous law is measured against the representation of indigenous legal orders being pre-colonial. In some instances, indigenous law is also imagined as being restorative and seeking community harmony.

As set out in Chapter 2, the essentialist view of culture has two main implications in the judicial context. First, international and domestic courts adopt a regime of authenticity. Therefore, the exercise of collective rights is conditioned by the state judiciary and IHRL organs to the ability of applicants to prove that they belong to authentic indigenous communities, and that their cultural practices and legal orders are also authentic. In other words, the regime of authenticity gives the courts the power to decide what is authentically indigenous, thus enabling the state to regulate the access to collective rights. The second implication is the depoliticisation of culture, thereby divesting it from its economic and political dimension. Thus, in the treatment of allegations of human rights violations by indigenous legal authorities, the source of oppression is located mainly in the 'domain of values and beliefs'<sup>1269</sup> (a Herderian

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<sup>1269</sup> Merry, 'Human Rights and the Demonization of Culture (And Anthropology Along the Way)' (n 124) 62.

concept of culture). Thus, the courts neglect to perform a careful analysis of the juridical and political context, and fail to examine how other legal orders (and power relations with sectors outside the community) affect a particular case. In addition, the decisions seem to be influenced by the way IHRL and constitutional norms represent indigenous peoples and their legal orders (as barbaric or civilized, as oppressive or seeking community harmony), as well as the way these legal orders are perceived by different social sectors. This was exemplified in the analysis of resolution 1422-2012 of the Constitutional Tribunal of Bolivia.

Furthermore, socio-environmental conflicts, such as the ones treated by the HRC in *Angela Poma Poma v Peru* or by the Inter-American Court in *Sarayaku v Ecuador*, are processed as a violation of cultural rights. As a result, such conflicts are reduced to an examination of the authenticity of the economic activities and ‘ways of life’ of the community. In this way, the courts seek to favour indigenous applicants by asserting that land and territory must be given to them in order to guarantee their cultural survival. In doing so, however, the courts draw on the ecological native, and therefore on colonialist representations of indigeneity, that place indigenous peoples in a subordinated position. More generally, the emphasis on the right to culture has entailed the displacement of self-determination as a possible interpretative framework and justification for indigenous collective rights. Furthermore, the cultural difference approach with its authenticity test means that the courts cannot deal with other facts related to the case that are directly related to the violation of individual and collective rights of the members of the indigenous community, such as state violence and structural racial discrimination.

## **b. Multicultural Constitutionalism in Latin America and the Use of Indigenous Rights as a Form of Governmentality**

In Latin America, the ratification of the ILO Convention 169 led to the recognition of the pluri-ethnic and multicultural character of the nation and the incorporation of indigenous collective rights. This occurred in the context of a transition to democracy in the region and the second wave of neoliberal reforms. Multicultural policies were also adopted at a time in which indigenous movements were strong in the region and were utilising the language of identity politics and indigenous rights in order to advance their

claims, as opposed to emphasising the use of a declining (and repressed) class and redistribution discourse.

The multiculturalist shift in Latin America propitiated states, local elites and international donors and creditors to pay heed to indigenous demands. This was a stark contrast to the invisibilisation of indigenous peoples of Social Constitutionalism in the first half of the 20<sup>th</sup> century, and the exclusion, disciplining and even extermination indigenous peoples underwent in the period of Authoritarian Liberal Constitutionalism in the 19<sup>th</sup> century. However, in the same way the ILO Convention 169 was drafted without the participation of indigenous peoples, Multicultural Constitutionalism in Bolivia was implemented without the participation of indigenous and peasant organisations. As a result, their proposals for political participation and land reform were ignored. Instead, multicultural policies reproduced the IHRL framework and consequently incorporated its primitivist and reified views of indigeneity, as well as the regimes of toleration and authenticity.

Indigenous rights and multiculturalist discourse were utilised by the state and international donors and creditors as a way of shaping indigenous subjectivities (the ‘rebel Indian’ and the ‘permitted Indian’<sup>1270</sup>) and containing indigenous radical demands. Hence, as each constitutional period articulated and enacted a specific political and economic regime, Multicultural Constitutionalism articulated and enacted in Latin America the neo-liberal and multicultural projects. ‘Neoliberal multiculturalism’ entailed the overlapping of colonial racial hierarchies with new forms of valuing populations in accordance to market calculations. This produced—and continues to produce—new categories of subjects that would be cut off from the benefits of global multicultural citizenship.

## **2. Plurinationalism as an Alternative to the Human Rights Approach**

### **a. Plurinational Constitutionalism**

As discussed in Chapter 4, plurinationalism is a decolonisation and nation-building project introduced by the Bolivian Katarist movement in the 1970s. In the 2000s, after

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<sup>1270</sup> Hale, ‘Rethinking Indigenous Politics in the Era of the “Indio Permitido”’ (n 246).

social movements were successful in overthrowing the neoliberal government, plurinationalism was incorporated into the Constitution proposal of the indigenous-peasant coalition Pacto de Unidad and thereafter commonly treated as a synonym of their proposal as a whole. Plurinationalism in this context was explicitly presented as an alternative to multiculturalism. Multiculturalist reforms recognising indigenous nations were thought to be merely rhetorical. In addition, the legislation that followed was seen as part of the problem and not the solution because of its tacit defence of the neoliberal system, which was at the centre of the grievances of Amazon and Andean indigenous and peasant sectors.

Plurinationalism is characterised by the incorporation of indigenous institutions and legal orders into the state. Therefore, it proposes a unitary state system (as opposed to a federal system) in which indigenous peoples nonetheless have strong territorial and political autonomy. The recognition of indigenous legal orders is at the centre of the plurinationalist proposal, as it entails the recognition of a long-standing situation in Bolivia of legal and institutional pluralism. In addition, the equal hierarchy of state law and indigenous law was proposed as a way of strengthening indigenous autonomy. At the same time, the analysis of the various sectors involved in the making of the plurinational proposal, of the debate during the Constituent Assembly and how plurinationalism was incorporated into the Constitution of 2009 evidenced a tension within plurinationalism. Peasant organisations advocated a strengthening of the state: a strong executive, legal centralism, a leading role for the state in the economy, and the nationalisation of natural resources. In contrast, the proposal of indigenous organisations weakened the state: legal pluralism, the creation of indigenous territorial autonomies, and a change to Bolivia's administrative and territorial division to acknowledge indigenous territorial divisions. This internal tension contributed towards the favouring of legal centralism over legal pluralism and towards a continuation of the human rights approach in the Constitution of Bolivia of 2009.

## **b. The Human Rights Approach and Plurinationalism as Paradigms in Tension**

Plurinationalism is an ongoing political project in Bolivia that was not fully developed in the current constitutional and legal framework. Despite its limitations and internal tensions, I argued in this thesis that it constitutes a valuable alternative to a human

rights approach. This is primarily because of the content of the proposal, which is based on the specificities of Bolivian indigenous peoples' historical trajectory and Bolivian political thought. In addition, plurinationalism in Bolivia was constructed in a bottom-up democratic process with wide participation of indigenous and peasant grassroots organisations.

Chapter 4 explained the differences between Plurinational Constitutionalism and Multicultural Constitutionalism as nation-building projects and forms of regulating indigenous peoples. In liberal multiculturalism (which I argued is predominant in IHRL), differentiated rights have the purpose of accommodating racialised minorities to a liberal democratic polity. In contrast, plurinationalism does not take liberal democracy as a starting point. Rather, based on the experience of liberal authoritarianism, plurinationalism is critical of the model of the modern liberal republic and proposes instead a communitarian democracy and the incorporation of non-liberal indigenous institutions and principles. Moreover, plurinationalism does not seek to accommodate minorities or protect them as if they were helpless victims, but to de-centre the white supremacy paradigm and to place the indigenous subject at the centre of her own liberation struggle. Second, in the human rights state-centred system, the state adopts the role of an impartial arbiter in conflicts involving indigenous peoples, as well as a guarantor of indigenous peoples' rights. Conversely, plurinationalism proposes a change in state model and questions state sovereignty because of it being founded on the dispossession, exploitation and political exclusion of indigenous peoples.

Third, as a nation-building project, multiculturalism is based on the idea of cultural enrichment. Thus, indigenous laws and cultures are subsidiary to those of the dominant group and are only tolerated to the extent that they are intelligible and do not disrupt the status quo. Plurinationalism, by contrast, proposes the creation of a state that recognises the multiplicity of indigenous ethnic groups and their political forms of organisation and legal institutions, and incorporates them into a unitary state. The purpose of this is to guarantee the political participation of indigenous peoples as full citizens. In addition, plurinationalism proposes a wide definition of the indigenous subject that includes regional, racial, class and gender elements, rather than the strict definition in IHRL.

Finally, plurinationalism incorporated indigenous collective rights as proposed by the IHRL framework. However, it utilises self-determination as the justificatory framework

for these rights, and the purpose of their recognition is to strengthen indigenous autonomy. Furthermore, in plurinationalism the discourse of indigenous rights is tied to anti-colonialism and is just one of several modes of struggle. The issue is that indigenous rights discourse carries structural limitations with it (specific representations of indigeneity, a state-centred system) thus constraining indigenous movements in what they can express and how they express it. It also exposes indigenous causes to co-optation by state and transnational policy-makers and human rights official interpreters, who under a human rights approach retain the power to define what is authentically indigenous and regulate access to collective rights.

### **3. The Predominance of a Human Rights Approach to Legal Pluralism in the Constitution of Bolivia of 2009**

Chapter 5 explained how despite the powerful position of indigenous and peasant movements at the time of the Constituent Assembly process, the plurinationalist project was marginalised in the Constitution of Bolivia of 2009. There were several political reasons for this, including structural limitations imposed upon the Constituent Assembly. For example, the Law of Convocation restricted the ability to directly participate in the Constituent Assembly to political parties. In addition, in the context of the political crisis of 2008, the Congress modified a significant portion of the Constitution approved by the Assembly. Second, there were external factors affecting the Constituent Assembly, such as the strong opposition of Eastern Bolivian elites. These conflicts prompted the MAS government to fulfil some of the opposition's demands and also to request indigenous and peasant sectors to agree to a compromise. Third, as mentioned earlier, there were important ideological differences within Pacto de Unidad itself. The support the MAS party and peasant organisations gave to strengthening the state and to legal centralism helped create a normative and institutional framework that favoured the continuation of a multiculturalist approach to indigenous legal orders over the plurinationalist model of equal hierarchy between indigenous and state jurisdictions.

As a result, the Constitution establishes a normative and institutional framework according to which indigenous jurisdictions are part of a single state judicial function. In addition, indigenous legal orders are subordinated to the fundamental rights

established in the Constitution and to IHRL instruments ratified by Bolivia. Fundamental rights are interpreted by the Constitutional Tribunal in accordance with IHRL, under a concentrated form of constitutional control. The Law of Jurisdictional Delimitation, which was censured domestically and internationally as a betrayal of Bolivian indigenous organisations, significantly limited the scope of indigenous jurisdictions in terms of *ratione materiae*, *ratione personae* and *ratione loci* in a way that accords with a human rights approach to indigenous legal orders. Finally, the Plurinational Constitutional Tribunal created an authenticity test (the ‘living well paradigm test’). This test goes even further than the Law of Jurisdictional Delimitation in the limits it imposes on indigenous legal orders. The test draws on reified perspectives of indigenous law and culture but nevertheless utilises the language of plurinationalism to legitimise the imposition of these extra-constitutional parameters of toleration.

As stated previously, legal pluralism is central to the plurinationalist project. The limitations to legal pluralism, as well as the use of the language of plurinationalism to justify these limitations, may be symptomatic of an ‘apparent plurinationalist state’.<sup>1271</sup> That is, it evidences the co-optation of plurinationalist discourse by a new political elite. The limitations to legal pluralism are also the result of the internal tensions within plurinationalism. In other words, they underscore the difficulties of implementing a human rights system that draws on a strict definition of indigeneity while simultaneously implementing legal pluralism and an inclusive definition of the indigenous subject.

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<sup>1271</sup> Choque Mamani (n 1020).

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## **Newspaper Articles**

'Ayllus violan derechos humanos a nombre de justicia comunitaria' *FM Bolivia* (La Paz, 8 June 2010) <<http://www.fmbolivia.com.bo/noticia29188-ayllus-violan-derechos-humanos-a-nombre-de-justicia-comunitaria.html>>

'Turba intenta linchar al sospechoso de matar a dos periodistas en Bolivia' *Agencia EFE* (La Paz, 7 March 2012)

Azcui M, 'El linchamiento de dos brasileños en Bolivia tensa las relaciones bilaterales' *El País* (Cochabamba, 16 August 2012) Internacional <[elpais.com](http://elpais.com)>

Corz C, 'Gobierno expulsa de Bolivia a la ONG IBIS por injerencia política' *La Razón* (La Paz, 20 December 2013) Nacional: Gobierno <<http://www.la-razon.com>>

EFE A, 'Dirigente indígena opositor denuncia azotes de parte de seguidores de Morales' *Los Tiempos* (11 May 2009) Nacional <<http://www.lostiempos.com>>

Mendoza L, 'Comunarios destierran a Cárdenas y a sus familiares de Omasuyos; éste va a juicio' *Eju!* (Santa Cruz, 14 March 2009)

Wills JJ, 'The World Turned Upside Down? A Critical Enquiry into the Counter-hegemonic Potential of Socio-Economic Rights Praxis in Global Civil Society' (PhD, School of Law, University of Leicester 2014)

## **Interviews**

Aymara intellectual and member of Coordinadora Andina de Organizaciones Indígenas (CAOI) (indigenous organisation) (La Paz, 15 May 2014) Duration of the interview: 1 hour.

COO of the Vice-Ministry of Vice-Ministry of Indigenous Justice (Vice-Ministerio de Justicia Indígena Originario Campesina) (La Paz, 30 April 2014) Duration of the interview: 45 minutes

Head of the Centre for Legal Studies and Social Research (CEJIS) (NGO) (Santa Cruz, 7 May 2014) Duration of the interview: 50 minutes

Head of the Regional Programme on Indigenous Peoples' Political Participation, Konrad Adenauer Foundation (La Paz, 25 April 2014) Duration of the interview: 45 minutes.

Head of the Union Confederation of Inter-Cultural Communities of Bolivia (La Paz, 30 April 2014). Duration of the interview: 30 minutes

Head of the Unit of Communication Project and Foreign Affairs of the Ministry of Communication (La Paz, 2 May 2015 and La Paz, 14 May 2014) Duration of interviews: 30 minutes and 50 minutes, respectively.

Former constituent delegate for the MAS Party (La Paz, 26 April 2014 and La Paz, 15 May 2014) Duration of the interviews: 2 hours and 3 hours, respectively.

Former Head of CEJIS (Santa Cruz, 8 May 2014 and Santa Cruz, 12 May 2014). Duration of the interview: 40 minutes and 50 minutes, respectively.