

# THE ROLE OF INTERNATIONAL HUMAN RIGHTS LAW IN BOLIVIA'S NEW CONSTITUTION: A FRESH STEP IN LATIN AMERICAN CONSTITUTIONAL THEORY AND PRACTICE

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## ABSTRACT

This Article argues that the Bolivian Constitution's framework for human rights marks a fresh and novel development in Latin American constitutional theory and practice, moving towards closer compliance with internationally recognized human rights standards. First, it discusses the features of the framework of Bolivia's 2009 Constitution for the recognition of human rights. Second, it probes several key provisions in the new constitution concerning the interpretation of rights that allow for the admission of international human rights law into the domestic legal system. Third, it explores the hierarchical status granted to international human rights treaties at the domestic level and the keys to their implementation. Fourth, on the basis of a discussion on the configuration of the system of protection of rights in Bolivia, this Article attempts to develop the implications of the Bolivian Constitution for integration and respect for international human rights law within the larger context of the Inter-American legal system.

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## I. INTRODUCTION

From 2005 to 2009, the South American nation of Bolivia underwent the most profound political, legal, and constitutional transformation in its history, and one of the most radical transformations in Latin America in the past fifty years. Although frequently overlooked by international relations specialists and legal scholars, Bolivia is the fifth largest nation in South America and has the largest proportion of indigenous peoples as a share of its population among all countries in the Western hemisphere.<sup>1</sup> With world-class deposits of lithium and the largest reserves of natural gas in Latin America, second only to Venezuela, it is bound to play an increasingly strategic role in the global economy.<sup>2</sup> The country's new constitution, debated and drafted by a Constituent Assembly from 2006-2009 through an extraordinary process of popular participation and consultation and subsequently adopted in 2009, marks a major departure from traditional Latin American constitution-making.<sup>3</sup> In particular, it creates a novel framework for the incorporation of the norms of international human rights law into the country's legal system. In essence, the new constitution invites and, in some cases, requires, the application of the norms of international human rights law to amplify its own protections, and even supersede them when the international norms offer a level of protection more extensive than that offered by the norms in the constitutional text itself. Bolivia's constitution thus offers a rich new paradigm and case study on both the evolution of Latin American constitution-making in the direction of greater openness to international human rights law and how domestic constitutional

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<sup>1</sup> Joseph Kiprof, *The Largest Countries in South America*, WORLDATLAS (Dec. 1, 2020), <https://www.worldatlas.com/articles/the-largest-countries-in-south-america.html> [<https://perma.cc/X3T2-DQHK>]; *Bolivia Country Profile*, BBC (Nov. 12, 2020), <https://www.bbc.com/news/world-latin-america-18727507> [<https://perma.cc/CDF5-A2P5>].

<sup>2</sup> Rick Mills, *Bolivia: Where Revolutionaries and Lithium Miners Go to Die*, MINING[DOT]COM (Dec. 26, 2018, 10:05 AM), <http://www.mining.com/web/bolivia-revolutionaries-lithium-miners-go-die/> [<https://perma.cc/J3BQ-45SK>].

<sup>3</sup> See Almut Schilling-Vacaflor, *Bolivia's New Constitution: Towards Participatory Democracy and Political Pluralism?*, 90 EUR. REV. LATIN AM. & CARIBBEAN STUD. 3, 3-4, 7 (2011).

norms can be structured to facilitate greater normative interaction with the rules and institutions of international law.

The present Article addresses several issues. First, it discusses the particular features in the new Bolivian constitution's framework that recognize human rights. Second, it probes several key provisions in the new constitution that concern the interpretation of rights that allow for the admission of international human rights law into the domestic legal system. Third, it explores the hierarchical status granted to international human rights treaties at the domestic level and the keys to their implementation. Fourth, on the basis of a discussion on the configuration of the system that protects rights in Bolivia, this Article attempts to develop the implications of the Bolivian Constitution for the integration of, and respect for, international human rights law within the larger context of the Inter-American legal system.

"The first of the great tasks that contemporary constitutions are set to undertake is to make a distinction between law, as a rule established by domestic legislators, and human rights, as absolute claims with their own legally independent validity."<sup>4</sup> The main consequence thereof is that human rights are no longer seen as being at the disposal of a legislator and, therefore, cannot be restrained by constitutional law or by any other type of norm, regardless of its rank.<sup>5</sup>

The protection of rights was one major object of concern to the Bolivian Constituent Assembly (2008-2009) during the process of developing the new constitution of 2009.<sup>6</sup> Under the previous constitutional system, human rights protection had degenerated into an inadequate body of laws, causing the then-existing constitutional order to enjoy no popular support whatsoever.<sup>7</sup> The

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<sup>4</sup> GUSTAVO ZAGREBELSKY, *EL DERECHO DÚCTIL: LEY, DERECHOS, JUSTICIA* 47 (Marina Gascón trans., Giulio Einaudi ed., 10th ed. 2011).

<sup>5</sup> See generally JUAN ANTONIO CARRILLO SALCEDO, *SOBERANÍA DE LOS ESTADOS Y DERECHOS HUMANOS EN INTERNACIONAL CONTEMPORÁNEO* (2d ed. 2001) (discussing the idea that human rights are above both constitutional bodies and constituent power).

<sup>6</sup> See Alex van Schaick, *Bolivia's New Constitution*, *NACLA* (Jan. 21, 2009), <https://nacla.org/news/bolivias-new-constitution> [<https://perma.cc/EFU3-CN9K>].

<sup>7</sup> See Schilling-Vacaflor, *supra* note 3, at 7-8; Tom Ginsburg, Svitlana Chernykh & Zachary Elkins, *Commitment and Diffusion: How and Why National Constitutions*

years of 2002-2005 saw large-scale social unrest and massive popular demonstrations by various social movements whose dissatisfaction gave rise to the election of the country's first indigenous leader, Evo Morales, as President in 2005, and a subsequent new constitutional project expected to provide better protection for oft-violated rights. Attempts were made in the new constitution to protect human rights through the effective recognition of internationally recognized standards<sup>8</sup> that would make it difficult for future Bolivian governments to infringe on them.<sup>9</sup> Thus began the process of restructuring human rights in the newly reformed, and newly named, Plurinational State of Bolivia.

As part of this process of structural reform of the entire Bolivian State, cultural pluralism has become a fundamental value as well as a protective stipulation attached to the different constitutional principles in the new constitution.<sup>10</sup> The literature on pluralism in the new constitutional text,<sup>11</sup> be it general or special, and independent of the current literature on the protection of minorities, fulfills the function that guarantees the constitution's openness to new rights, making it possible for the constitutional text to strengthen its capacity to evolve.<sup>12</sup> Bolivian constitutional evolution

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*Incorporate International Law*, 2008 U. ILL. L. REV. 201, 212 (2008) (explaining that to the extent that international law binds States and limits the options of policymakers, it can serve as a pre-commitment device, and that the ideal way of doing this is for constitutional designers to incorporate specific policies and international instruments into the constitutional text).

<sup>8</sup> NORBERTO BOBBIO, *EL TIEMPO DE LOS DERECHOS* 14 (Rafael de Asís Roig trans., 1991) (pointing out "the recognition of human rights is at the root of present-day democratic Constitutions, and these rights must be recognized and protected by the States and international systems alike"). *Id.*

<sup>9</sup> See ZAGREBELSKY, *supra* note 4, at 47.

<sup>10</sup> Antonio-Enrique Pérez Luño, *Dogmática de los Derechos Fundamentales y Transformaciones del Sistema Constitucional*, 20 *TEORÍA Y REALIDAD CONSTITUCIONAL* 495, 499 (2007). "One of the most outstanding signs in the systems of protection of fundamental rights in a constitutional democracy is certainly the shift from a 'center of gravity' deeply rooted in Unitarianism to a pluralist conception." *Id.*

<sup>11</sup> See René Kuppe, *Reflections on the Rights of Indigenous Peoples in the New Venezuelan Constitution and the Establishment of a Participatory, Pluricultural and Multiethnic Society*, in 12 *LAW & ANTHROPOLOGY* INTERNATIONAL YEARBOOK FOR LEGAL ANTHROPOLOGY 152 (René Kuppe & Richard Potz eds., 2005). "Latin American countries . . . are composed of a large number of ethnic groups and cultural traditions and[, consequently,] [e]ach individual legal system can develop various responses to these pluralist realities." *Id.*

<sup>12</sup> See PETER HÄBERLE, *EL ESTADO CONSTITUCIONAL* 47 (Héctor Fix-Fierro trans., 2003).

in matters of human rights can be assessed on the basis of its various clauses which guarantee the protection of rights from a pluralist viewpoint.<sup>13</sup> These clauses also make it possible to adopt international standards as guides to domestic legislation.<sup>14</sup>

Another key issue addressed by the new constitution was the creation of a basic structure for the protection of rights, as well as a context for interpretive solutions to various problems that may arise in cases where rights conflict with one another or where their application and enforcement would create conflicts with other constitutional norms.<sup>15</sup> In this regard, the solutions that the Plurinational Constitutional Court has been adopting throughout its jurisprudential activity since 2009 on the basis of the new Bolivian constitutional norms are particularly interesting for the defense of rights and the observance of international standards of protection and guarantee.<sup>16</sup>

## II. RECOGNITION OF HUMAN RIGHTS

The rearrangement of the system of protection of rights in the new constitution required going beyond the traditional limitations of the Bolivian constitutional tradition to make the new charter more open and flexible. In this respect, it is appropriate to analyze the

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<sup>13</sup> See Peter Häberle, *El Estado Constitucional Europeo*, in LA CONSTITUCIONALIZACIÓN DE EUROPA 31 (Miguel Carbonell & Pedro Salazar eds., 2004) (stating that giving preference to its own identification elements is no longer a valid argument to prevent a constitutional State's opening to the international community).

<sup>14</sup> JAVIER GARCÍA ROCA, EL MARGEN DE APRECIACIÓN NACIONAL EN LA INTERPRETACIÓN DEL CONVENIO EUROPEO DE DERECHOS HUMANOS: SOBERANÍA E INTEGRACIÓN 37 (2010); see also CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 179 (Bol.); CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 2, 1967 (Bol.); CONSTITUCIÓN POLÍTICA DE 1945 Nov. 24, 1945 (Bol.) (demonstrating that the human rights covered by constitutional declarations under external jurisdictional controls are very important limitations to the exercise of power).

<sup>15</sup> See KLAUS STERN, DERECHO DEL ESTADO DE LA REPÚBLICA FEDERAL ALEMANA 230 (1987).

<sup>16</sup> Héctor Fix-Fierro & Sergio López Ayllón, *El Impacto de la Globalización en la Reforma del Estado y el Derecho en América Latina*, in EL PAPEL DEL DERECHO INTERNACIONAL EN AMÉRICA 315, 327-28 (1997) (warning that the "growing influence of International law has gone beyond its supplementary and complementary application and facilitated the recognition of its prevalence, which begins to be obvious in the fields of international trade and human rights").

construction and treatment of human rights in the Bolivian system in order to establish not only the extent of its evolution regarding safeguards and guarantees, but also the structural keys of the current catalogue of rights with a view to their interpretation and implementation according to international standards.<sup>17</sup> Throughout this first section we start by examining the elements that gave shape to the catalogue of rights in constitutional texts prior to the 2009 constitution. Then we will discuss particular features of the new Bolivian catalogue of rights and, particularly, the keys that play a role in adjusting their content to that of the rights established in recognizably valid international instruments. The importance of this section lies in the fact that it is impossible to carry out a true analysis of the characteristics and implications related to the interpretation and hierarchy of such rights if the evolution, possibilities and limitations of the current list of rights are not properly known.

*a. A Brief Overview of Bolivian Constitutional History*

Before we address the constitutional changes related to the protection and guarantee of rights in the Bolivian context, it is essential to briefly go over their configuration in the country's constitutional history. This approach proves to be extremely useful not only to verify the historical structure of constitutional rights and their protection at the national level, but also to understand the way in which they have been defended by international human rights instruments and public authorities. We will start by examining the framework of protection provided by Bolivian constitutions since 1826 and the content of the internal system before the enactment of the constitution of 2009. Secondly, we will discuss the role played by international instruments concerning the degree of protection of these rights. Both elements are intended to provide a clearer picture of the human rights situation in the Bolivian normative system before the enactment of the constitutional text of 2009.

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<sup>17</sup> See Pérez Luño, *supra* note 10, at 502 (stating that “the guarantee of a multiplicity of jurisdictional entities for an effective defense of fundamental rights is another typical feature of present-day constitutionalism and that jurisdictional opening correlates to the surpassing of the State's field of reference, as results from a system immersed into a new order of international relations”).

*i. Fundamental Rights*

From 1825 onward, the fundamental problem of Bolivia's numerous constitutions was that the protection of rights was completely inadequate for the indigenous population and the overall impoverished masses, given its failure to recognize the principle of equality.<sup>18</sup> This fact, together with the guarantee of the exercise of political rights only on the basis of the individual's citizenship—which was in turn subject to exclusionary requirements related to economic and social status—strengthened the idea of the existence of first-class Bolivians, as opposed to second-class Bolivians who were at the service of the former's interests and had representation or protection.<sup>19</sup> Power was monopolized by an elite Spanish-based minority which guaranteed inferior treatment to anyone who threatened to interfere with their economic and class interests.<sup>20</sup> Not only were colonial arguments employed to deny indigenous peoples citizenship and even human status; “the indigenous peoples were also put on a level with minors, and under the permanent guardianship of a ‘boss’ who made all decisions for them.”<sup>21</sup>

The evolution of human rights and of their recognition went through a slow and painful process in the country's history. The Bolivian constitutions of 1826 and 1831 placed rights in their last clauses,<sup>22</sup> abiding by a criterion that gave preference to the State's

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<sup>18</sup> See generally Schilling-Vacaflor, *supra* note 3 (analyzing the need for the establishment of a constituent assembly).

<sup>19</sup> See LUIGI FERRAJOLI, *DERECHOS Y GARANTÍAS: LA LEY DEL MÁS DÉBIL* 127 (Perfecto Andrés Ibáñez & Andrea Greppi trans., 4th ed. 2004). Contrary to expectations, the fundamental rights in the Bolivian Constitutions did not act as limitations of correlative powers, nor used to defend the weakest subjects from the principle of survival of the fittest.

<sup>20</sup> Linda Farthing, *Evo's Bolivia: The Limits of Change*, NEXT SYS. PROJECT (Aug. 7, 2017), <https://thenextsystem.org/learn/stories/evos-bolivia-limits-change> [<https://perma.cc/4ZED-D7KE>].

<sup>21</sup> Juan Carlos Pinto Quintanilla, *Aportes a la reflexión política de la Constitución*, in *BOLIVIA: NUEVA CONSTITUCIÓN POLÍTICA DEL ESTADO: CONCEPTOS ELEMENTALES PARA SU DESARROLLO NORMATIVO* 57 (2010).

<sup>22</sup> CONSTITUCIÓN POLÍTICA DE 1826 Nov. 19, 1826, arts. 149-57 (Bol.); CONSTITUCIÓN POLÍTICA DE 1831 Aug. 14, 1831, arts. 149-65 (Bol.). See generally Antonio-Enrique Pérez Luño, *Las Generaciones de Derechos Humanos*, 10 *REVISTA DEL CENTRO DE ESTUDIOS CONSTITUCIONALES* 203 (1991) (explaining the succession of

structure and powers over the protection of human rights. This order of importance was not just formal in the constitutional text, but also the reflection of a society that sought to preserve a given order and set of privileges granted to a minority group to the detriment of the national majority.<sup>23</sup> These early constitutions laid down a simple enunciation of rights which, though under the title of “guarantees,” did not constitute in themselves a system capable of providing adequate mechanisms of protection. On the contrary, they revealed a total absence of measures underpinned by legal guarantees.<sup>24</sup> Furthermore, these rights could be revoked under the terms and circumstances established by the constitution,<sup>25</sup> which represented an enormous limitation on their enjoyment. The configuration of these constitutional texts supported and passively tolerated situations of widespread systematic violence and discrimination.<sup>26</sup>

Under the constitution of 1861,<sup>27</sup> the public authorities could no longer vest anyone with powers likely to place human rights at the

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“generations” of fundamental rights and the transition from a State subject to the rule of law to a “State of rights”). The late 19<sup>th</sup> century marked the beginning of a modern age in the legal field, when laws took center stage in favor of individual rights and gave rise to a generic agreement which praises the idea that rights and freedoms are the true foundation of any State subject to the rule of law. *Id.* at 203-04.

<sup>23</sup> See Raúl Prada Alcoreza, *Umbrales y horizontes de la descolonización*, in *EL ESTADO. CAMPO DE LUCHA* 43, 58 (2010).

<sup>24</sup> See Pedro Cruz Villalón, *Formación y Evolución de los Derechos Fundamentales*, 25 *REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL* 35, 49-51 (1989) (asserting France’s constitutions of the late 1700s did not adequately protect the fundamental rights they claimed to guarantee because they did not set forth legal remedies for violations of those rights). Cruz Villalón, following Adhémar Esmein, makes it clear that the guarantee of rights are truly positive laws with a force of their own and that protect individual rights from the legislators. *Id.* at 50-51.

<sup>25</sup> *CONSTITUCIÓN POLÍTICA DE 1826* Nov. 19, 1826, art. 157 (Bol.).

<sup>26</sup> See Prada Alcoreza, *supra* note 23, at 58-59; see also Hervé Do Alto, “*Cuando el nacionalismo se pone el poncho*”: Una mirada retrospectiva a la etnicidad y la clase en el movimiento popular boliviano (1952-2007), in *BOLIVIA: MEMORIA, INSURGENCIA Y MOVIMIENTOS SOCIALES* 21, 23-24 (2007) (describing the way in which indigenous Bolivians were stripped of their land and stigmatized with the label “indio” after the State was established).

<sup>27</sup> Professor Robert Alexy remarks that “fundamental rights play a twofold role as components of a democratic process and as elements to engage legislators, thus depriving a democratically-elected majority of any decision-making power. Therefore, there cannot be unlimited confidence in a democratic legislator, since the

mercy of either the government or another person,<sup>28</sup> thus introducing, for the first time, the significant criterion of “non-disposability” of rights in Bolivia.<sup>29</sup> However, it was still possible to suspend constitutional “guarantees” – rights – in cases of internal insurrection,<sup>30</sup> revealing that the enjoyment of rights was still subject to public authorities.<sup>31</sup> Moreover, the enjoyment and exercise of the rights of the majorities<sup>32</sup> was largely conditioned during the constitutional period by extensive property-holding requirements that in practice excluded citizenship.<sup>33</sup> Between 1880 and 1951 the number of people who had citizen status added up to only two to

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majority principle stands as a permanent threat over minorities.” Robert Alexy, *La Institucionalización de los Derechos Humanos en el Estado Constitucional Democrático*, 8 DERECHOS Y LIBERTADES: REVISTA DEL INSTITUTO BARTOLOMÉ DE LAS CASAS 21, 40 (2000).

<sup>28</sup> CONSTITUCIÓN POLÍTICA DE 1861 Aug. 5, 1861, art. 10 (Bol.).

<sup>29</sup> *See id.* The French Constitution of 1791 was the first to introduce the “non-disposability” criterion by stating that legislative power could not make any laws which infringed upon or obstructed the exercise of natural and civil rights. Nonetheless, Pedro Cruz Villalón explains that the purpose of this article failed insofar as no remedy was specified for the violation of rights by the legislators. Cruz Villalón, *supra* note 24, at 51.

<sup>30</sup> CONSTITUCIÓN POLÍTICA DE 1861 Aug. 5, 1861, art. 11 (Bol.).

<sup>31</sup> *See id.* The disposability of rights in cases of war or insurrection facilitates the violation of human rights, even in democracies otherwise deemed consolidated. *See generally* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) (ordering Japanese Americans into internment camps during World War II regardless of whether they were American citizens, which amounted to a serious violation of their rights); *Korematsu vs. United States*, 323 U.S. 214 (1944) (ruling Exec. Order No. 9066 to be constitutional); *Yasui vs. United States*, 320 U.S. 115 (1943) (affirming the conviction of appellant for violating the curfew issued by this Exec. Order); *Hirabayashi vs. United States*, 320 U.S. 81 (1943) (affirming that prescribing this Exec. Order was within the constitutional power of Congress and the Executive, and that the Exec. Order did not unconstitutionally discriminate against people of Japanese ancestry).

<sup>32</sup> *See* HUASCAR SALAZAR LOHMAN, LA FORMACIÓN HISTÓRICA DEL MOVIMIENTO INDÍGENA CAMPESINO BOLIVIANO. LOS VERICUETOS DE UNA CLASE CONSTRUIDA DESDE LA ETNICIDAD 20-21 (2013) (ebook) (estimating that in 1826 Bolivia had a total of 1,100,000 inhabitants, of which 800,000 were indigenous Bolivians, with ninety percent of them living in the countryside, especially in the Andean region).

<sup>33</sup> CONSTITUCIÓN POLÍTICA DE 1861 Aug. 5, 1861, art. 13 (Bol.). “As a result, women, the indigenous population, and peasants were not entitled to political and judicial rights. In this context, the indigenous peoples were absolutely nonexistent, deprived as they were of any civil and political rights.” *See* ÁLVARO GARCÍA LINERA, LA POTENCIA PLEBEYA: ACCIÓN COLECTIVA E IDENTIDADES INDÍGENAS, OBRERAS Y POPULARES EN BOLIVIA 177-78 (2d ed. 2009).

three percent of the overall Bolivian population.<sup>34</sup> This unstable situation left political decision-making power in the hands of a small group of people, exerting a negative influence on the recognition of the rights of the excluded population.<sup>35</sup>

All the same, the broadening of the catalogue of rights<sup>36</sup> in the 1861 constitution was a positive achievement. The document made it clear that those rights and guarantees it contained were not to be understood as a negation of other, not specifically enumerated, rights, as long as they were in keeping with the principle of popular sovereignty and the republican form of government.<sup>37</sup> In other words, the constitutional catalogue was open rather than closed or strictly narrow. But it was only with the constitution of 1945 that mechanisms aimed specifically at the protection of rights<sup>38</sup> became noticeable for the first time, with the appearance of procedures to request custody in cases of improper detention, prosecution or imprisonment.<sup>39</sup>

The constitution of 1967 incorporated a number of rules that made this text more progressive than the previous ones. For the first time a clause was included which established the principle of

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<sup>34</sup> GARCÍA LINERA, *supra* note 33, at 275.

<sup>35</sup> See, e.g., Schilling-Vacaflor, *supra* note 3, at 16 (describing the discrepancy between the strengthening of participatory democracy by the new Bolivian Constitution and the actual socio-political context). Since the new country was founded on theft and plundering, the indigenous nations were considered the main obstacle, taking into account that they were the owners of the riches. Consequently, they were the victims of a legal strategy of permanent aggression designed to dominate or exterminate them. See Félix Cárdenas Aguilar, *Mirando indio*, in BOLIVIA: NUEVA CONSTITUCIÓN POLÍTICA DEL ESTADO. CONCEPTOS ELEMENTALES PARA SU DESARROLLO NORMATIVO 17, 22 (2010).

<sup>36</sup> The first constitutional text to incorporate a provision stating the observance of rights not specifically enumerated in the constitutional text was the Constitution of the United States through the Ninth Amendment of the Bill of Rights. U.S. CONST. amend. IX. EDWARD CORWIN, *LA CONSTITUCIÓN DE LOS ESTADOS UNIDOS Y SU SIGNIFICADO ACTUAL* 587 (1987).

<sup>37</sup> CONSTITUCIÓN POLÍTICA DE 1861 Aug. 5, 1861, art. 18 (Bol.).

<sup>38</sup> CONSTITUCIÓN POLÍTICA DE 1945 Nov. 24, 1945, art. 8 (Bol.). Articles 1 to 19 of the Basic Law for the Federal Republic of Germany of May 23, 1949 established in an exemplary manner what is known today as the law of fundamental rights: general relationship, direct effectiveness, essential content and legal protection. Cruz Villalón, *supra* note 24, at 62.

<sup>39</sup> CONSTITUCIÓN POLÍTICA DE 1945 Nov. 24, 1945, art. 8 (Bol.).

equality<sup>40</sup> among Bolivians.<sup>41</sup> Another clause recognized and granted citizenship and political rights to all Bolivians of twenty-one years of age, regardless of their educational level.<sup>42</sup> Both provisions granted the Bolivian indigenous nations, workers, and peasants the right to participate for the first time as formal actors in the political power structure. Moreover, the key legal concepts of habeas corpus<sup>43</sup> and constitutional protection,<sup>44</sup> two important resources for the protection and guarantee of constitutionally established rights, were included, and they were to retain almost identical characteristics in the subsequent constitutional reforms of 1994, 2004, and 2005.

It goes without saying that inequality was still rampant even after these important legal principles were adopted<sup>45</sup> because, even though the constitution established the right to non-discrimination, the political system was still under the control of a Criollo-Mestizo elite.<sup>46</sup> All rights and guarantees notwithstanding, the public authorities worked regularly in favor of this minority's interests. At the very basis of the State there was a built-in disregard for indigenous identities and subjects, who were forced to live under an

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<sup>40</sup> See FRANCISCO RUBIO LLORENTE, *LA FORMA DEL PODER (ESTUDIOS SOBRE LA CONSTITUCIÓN)* (1993) (on the concept of equality). Bear in mind that equality is a relational concept and not a quality. At the same time, this relationship must have some form of diversity resulting from an assessment of a plurality of elements. *Id.* at 640.

<sup>41</sup> CONSTITUCIÓN POLÍTICA DEL ESTADO 1967 Feb. 2, 1967, art. 6 (Bol.); see ALF ROSS, *SOBRE EL DERECHO Y LA JUSTICIA* 278-79 (Eudeba 1963) (explaining that, in this case, "the requirement of equality was qualified through a reference to specific criteria that gave it a tangible meaning").

<sup>42</sup> CONSTITUCIÓN POLÍTICA DEL ESTADO 1967 Feb. 2, 1967, art. 41 (Bol.).

<sup>43</sup> *Id.* art. 18.

<sup>44</sup> *Id.* art. 19.

<sup>45</sup> See LIBBET CRANDON-MALAMUD, *FROM THE FAT OF OUR SOULS: SOCIAL CHANGE, POLITICAL PROCESS, AND MEDICAL PLURALISM IN BOLIVIA* 48-50 (1991) (discussing that the "equality clause is infringed when the defeat of a legal decision is the consequence of a special vulnerability to prejudice, hostility or stereotyping and the subject's situation is disparaged at the level of the community and that the purpose of this clause is to guarantee equality of treatment during the political process and deliberations"); see also RONALD DWORKIN, *VIRTUD SOBERANA: LA TEORÍA Y LA PRÁCTICA DE LA IGUALDAD* 451 (2003) (discussing the equality principle).

<sup>46</sup> CRANDON-MALAMUD, *supra* note 45, at 48-50.

institutional system, a body of laws, and a prevailing discourse bent on depriving them of their basic rights.<sup>47</sup>

To summarize, constitutional recognition and guarantees of fundamental rights in Bolivia were largely characterized in practice by discrimination against, and exclusion of, the national majorities. The evolution of constitutional articles on these issues moved at a slow pace and were characterized by three important phases. The first of them took place between the enactment of the constitutional texts of 1826 and 1945. It overlooked the protection of rights, laying down instead strong restrictions on the enjoyment of civil and political rights by the indigenous population.<sup>48</sup> The second phase, between the constitutions of 1947 and 1961, introduced slight variations which gradually reduced the requirements necessary for persons to exercise and enjoy their rights.<sup>49</sup> The third phase brought with it the promulgation of the constitution of 1967 – in force before the constitution of 2009 – and stipulated, for the first time, the principle of equality and safeguards for the protection of rights.<sup>50</sup> Even then, however, in view of the Bolivian social, economic and political power structures, the infringement of rights remained a commonplace practice.<sup>51</sup>

## *ii. International Law*

The violation of rights in Bolivia's constitutional history was also the result of a poor constitutional structure for the implementation

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<sup>47</sup> See generally LUIS TAPIA, *POLÍTICA SALVAJE* (2008) (discussing the systematic discrimination of the indigenous people in Bolivia).

<sup>48</sup> Angus McNelly, *The Latest Turn of Bolivia's Political Merry-Go-Round: The Constitutional Referendum*, VIEWPOINT MAG. (Feb. 18, 2016), <https://www.viewpointmag.com/2016/02/18/the-latest-turn-of-bolivas-political-merry-go-round-the-constitutional-referendum/> [https://perma.cc/A3TN-ANBY].

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See Dieter Grimm, *Types of Constitutions*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 99, 124-25 (Michel Rosenfeld & Andras Sajó eds., 2012) (discussing that a common problem of the constitutions was that, despite the enumeration of equal rights, they were applied to unequal conditions, so, consequently, this formal equality cemented the status quo).

of international human rights law. There is no denying that the legal loopholes in successive Bolivian constitutions—since the first constitution of 1826 until the constitutional reform of 1967—regarding the integration of international law into the national body of laws made it impossible for the treaties on protection of human rights to gain a real foothold in the Bolivian judicial culture, placing them on a merely declarative level instead.<sup>52</sup> As a result, most of the international human rights treaties ratified by Bolivia failed to be subsequently implemented, with an obviously negative impact on their domestic observance and validity.<sup>53</sup>

Bolivia ratified a number of important international human rights instruments between 1979 and 1982, at a time when the most bloodthirsty dictatorships in its history ruled the country. For example, Bolivia ratified the American Convention on Human Rights on June 20, 1979, even as the Inter-American Commission on Human Rights (IACHR) received numerous communications denouncing the violation of rights by Bolivian governments between 1970 and 1982—violations committed in most cases by the ruling military juntas. From 1974 to 1982, the IACHR held the Bolivian State responsible for cases of murder<sup>54</sup> and illegal detention

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<sup>52</sup> See CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 2, 1967 (Bol.); CONSTITUCIÓN POLÍTICA DE 1945 Nov. 24, 1945 (Bol.); CONSTITUCIÓN POLÍTICA DE 1861 Aug. 5, 1861 (Bol.); CONSTITUCIÓN POLÍTICA DE 1826 Nov. 19, 1826, art. 156 (Bol.) (demonstrating a deficient structure that does not allow the defense of human rights through international treaties).

<sup>53</sup> ELIZABETH SANTALLA VARGAS, *Bolivia, in PERSECUCIÓN PENAL NACIONAL DE CRÍMENES INTERNACIONALES EN AMÉRICA LATINA Y ESPAÑA* 83, 83 (Kai Ambos & Ezequiel Malarino eds., 2003); COMISIÓN ANDINA DE JURISTAS, *LA CORTE PENAL INTERNACIONAL Y LOS PAISES ANDINOS* 44-45 (2001).

<sup>54</sup> *Amalia Rada v. Bol.*, Case 1757, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.34, doc. 31 rev. 1 (1974); *Benjamín Miguel Harb v. Bol.*, Case 1798, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.37, doc. 20 corr. 1 (1975); *Artemio Camargo v. Bol.*, Case 7739, Inter-Am. Comm'n H.R., Report No. 26/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981); *Marcelo Quiroga Santa Cruz v. Bol.*, Case 7458, Inter-Am. Comm'n H.R., Report No. 27/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981); *Community of Caracoles v. Bol.*, Case 7481, Inter-Am. Comm'n H.R., Report No. 30/82, OEA/Ser.L/V/II.57, doc. 6 rev. 1 (1982).

including torture<sup>55</sup> and, in some cases, banishment.<sup>56</sup> During all those years, none of Bolivia's governments in office cooperated with the IACHR.<sup>57</sup>

Only on July 27, 1993<sup>58</sup> did Bolivia recognize the competence of the IACHR,<sup>59</sup> which on subsequent occasions condemned it and

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<sup>55</sup> Rubén Luis Romero Eguino v. Bol., Case 2720, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.47, doc. 13 rev. 1 (1978); Nila Heredia Miranda v. Bol., Case 2721, Inter-Am. Comm'n H.R., OEA/Ser.L./V/II.47, doc. 13 rev. 1 (1978); Maria Cristina de Choque v. Bol., Case 2722, Inter-Am. Ct. H.R., OEA/Ser.L/V/II.47, doc. 13 rev. 1 (1978); Nicanor Cuchallo Orellana v. Bol., Case 2723, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.47, doc. 13 rev. 1 (1978); Abel Ayoroa Argondoña v. Bol., Case 2756, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.47, doc. 13 rev. 1 (1978); Elsa Burgoa v. Bol., Case 2757, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.47, doc. 13 rev. 1 (1978); Sonia Flores v. Bol., Case 2758, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.47, doc. 13 rev.1 (1978); Edwin Antonio Guachalla Viana v. Bol., Case 2759, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.47, doc. 13 rev. 1 (1978); Julio Tumiri Javier v. Bol., Case 7472, Inter-Am. Comm'n H.R., Report No. 28/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981); Flaviano Unzueta v. Bol., Case 7473, Inter-Am. Comm'n H.R., Report No. 29/82, OEA/Ser.L/V/II.57, doc. 6 rev. 1 (1982); Guillermina Soria v. Bol., Case 7530, Inter-Am. Comm'n H.R., Report No. 31/82, OEA/Ser.L/V/II.57, doc. 6 rev. 1 (1982).

<sup>56</sup> Ramon Claure Calvi v. Bol., Case 2719, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.47, doc. 13 rev. 1 (1978); Vladimir Sattori Benquique v. Bol., Case 2760, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.47, doc. 13 rev. 1 (1978); Juan Antonio Solano v. Bol., Case 7823, Inter-Am. Comm'n H.R., Report No. 32/82, OEA/Ser.L/V/II.57, doc. 6 rev. 1 (1982); Diego Morales Barrera v. Bol., Case 7824, Inter-Am. Comm'n H.R., Report No. 33/82, OEA/Ser.L/V/II.57, doc. 6 rev. 1 (1982).

<sup>57</sup> See cases cited *supra* notes 54-55.

<sup>58</sup> Convencion Americana Sobre Derechos Humanos (Pacto de San Jose), Declaration of the Bolivian Government, OAS/MI/262/93, July 22, 1993 (declaring at the time of deposit of the instrument of recognition of the competence of the Inter-American Court on Human Rights (IACHR) in accordance with Article 62, stating that "the precepts of unconditionality and an indefinite term shall be applied in strict observance of the Political Constitution of the Bolivian State, especially of the principles of reciprocity, non-retroactivity and judicial autonomy").

<sup>59</sup> See, e.g., Velásquez Rodríguez v. Honduras, Merits, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (July 29, 1988); Olmedo Bustos v. Chile, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 73, ¶ 87 (Feb. 5, 2001) (stating that this entails the obligation to prevent, investigate, and punish any violation of the rights recognized by the Convention and, if possible, restore the right violated and provide compensation as warranted for damages resulting from the violation as well as adjustment of its internal legislation to ensure the fulfillment of the said obligations); see also Pueblo Bello Massacre v. Colombia, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 142 (Jan. 31, 2006) (emphasizing that the obligation of guaranteeing the rights protected under the American Convention

asked it to redress violations of rights.<sup>60</sup> Only in 2005 did Bolivia start to show its willingness to cooperate with the Inter-American Court and the Inter-American Commission, as evidenced by its signature on several agreements seeking a friendly solution in cases of violation of rights, thereby acknowledging the truth of the denounced violations and committing itself to measures of compensation along terms agreed to with both victims and the Court.<sup>61</sup> Even then, however, not all of these cases (or at least not all of those which, because of their nature, deserved to be submitted to the Court once the State's responsibility had been duly established) have displayed the same conciliatory attitude on the part of the government.<sup>62</sup> Since 2009, the jurisprudential activity of the Constitutional Court has gradually, albeit slowly, made some progress regarding the recognition of the competence of the Inter-American Court.<sup>63</sup> The judgments issued by the Constitutional

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on Human Rights is not exhausted by the existence of a normative body designed to make the fulfillment of said obligation possible, but it demands conduct by the government such that the real existence of effective guarantees is ensured with a view to the free and full exercise of the rights recognized by the Convention).

<sup>60</sup> *Salmón v. Bolivia*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 330 (Dec. 1, 2016); *I.V. v. Bolivia*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 329 (Nov. 30, 2016); *Pachecho Tineo Family v. Plurinational State of Bolivia*, Preliminary Objections, Merits, Reparations, and Costs, Inter Am. Ct. H.R. (ser. C) No. 272 (Nov. 25, 2013); *Cárdenas and Peña v. Bolivia*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 217 (Sep. 1, 2010); *Ticona Estrada v. Bolivia*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 199 (Nov. 27, 2008); *Trujillo-Oroza v. Bolivia*, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 92 (Feb. 27, 2002).

<sup>61</sup> *Petition 241/04, Friendly Settlement: Malaga v. Bolivia*, Inter-Am. Comm'n H.R., Report No. 98/05 (2005); *Petition 14/04, Friendly Settlement: Bustos v. Bolivia*, Inter-Am. Comm'n H.R., Report No. 97/05 (2005); *Petition 269-05, Friendly Settlement: Osorio v. Bolivia*, Inter-Am. Comm'n H.R., Report No. 82/07 (2007); *Petition 788-06, Friendly Settlement: Chávez v. Bolivia*, Inter-Am. Comm'n H.R., Report 70/07 (2007); *MZ v. Bolivia*, Case 12.350, Inter-Am. Comm'n H.R., Report No. 103/14, OEA/Ser.L/V/II.153 (2014).

<sup>62</sup> *I.V. v. Bolivia*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 329 (Nov. 30, 2016); *Pachecho Tineo Family v. Plurinational State of Bolivia*, Preliminary Objections, Merits, Reparations and Costs, Inter Am. Ct. H.R. (ser. C) No. 272 (Nov. 25, 2013); *Cárdenas and Peña v. Bolivia*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 217 (Sep. 1, 2010); *Ticona Estrada et al. v. Bolivia*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 199 (Nov. 27, 2008).

<sup>63</sup> Corte Constitucional, Nov. 12, 2001, Sentencia 1190/01-R (Bol.).

Court<sup>64</sup> testify to the development of fundamental principles related to due process based on the competence of the Inter-American Court and show advances in the recognition of rights.<sup>65</sup>

Failure to comply with international human rights treaties on account of their misinterpretation is not the only reason that human rights have been so poorly protected in Bolivia. Bolivia's membership in the World Bank and other international financial institutions such as the International Monetary Fund also have led to the violation of the Bolivian population's rights, as the government has often overlooked people's basic needs in its eagerness to discharge its financial obligations to these international bodies while carrying out restructuring programs.<sup>66</sup> The social and human rights costs of such programs have been much higher than their proponents have admitted.

All the same, one of the main problems that Bolivian law faced throughout the country's constitutional history between the text of 1826 and that of 1967 was its minimal concern for the observance of international human rights treaties at the domestic level, which played a key role in preventing international human rights law from being implemented in practice.<sup>67</sup> Human rights were subject to national standards of protection which proved insufficient to ensure real protection and guarantee of the Bolivian population's rights.<sup>68</sup>

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<sup>64</sup> Corte Constitucional, July 2, 2004, Sentencia 1020/2004-R (Bol.); Corte Constitucional, Nov. 7, 2002, Sentencia 1364/2002 (Bol.); Corte Constitucional, Jan. 20, 2003, Sentencia 0004/2003 (Bol.); Corte Constitucional, Apr. 15, 2003, Sentencia 0491/2003 (Bol.); Corte Constitucional, Nov. 28, 2003, Setencia 1730/2003 (Bol.); Corte Constitucional, Jan. 28, 2004, Setencia 0009/2004 (Bol.).

<sup>65</sup> Diego García-Sayán, *Justicia interamericana y tribunales nacionales*, in *DIALOGO JURISPRUDENCIAL EN DERECHOS HUMANOS: ENTRE TRIBUNALES CONSTITUCIONALES Y CORTES INTERNACIONALES* 805, 820-29 (2013).

<sup>66</sup> Lizet Cossio Villarroel, *La deuda externa y deuda ecológica*, 25 *Temas Sociales* 201, 201-03, <http://www.scielo.org.bo/pdf/rts/n25/n25a13.pdf> [<https://perma.cc/9EF5-ZBE6>]; *CAPÍTULO BOLIVIANO DE DERECHOS HUMANOS, DEMOCRACIA Y DESARROLLO, INFORME ANDINO DE LA DEUDA. MIRADAS A LA DEUDA EN LA REGION ANDINA* 41 (2010).

<sup>67</sup> See ANTÔNIO A. CANÇADO TRINDADE, *EL DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS EN EL SIGLO XXI* 276 (2009) (explaining that "the ultimate notions related to the protection of human rights go beyond the State law, which turns the need for internationalization into a phenomenon agreed by consensus").

<sup>68</sup> See Aniza García Morales, *La justiciabilidad como garantía de los derechos sociales*, in *LOS DERECHOS SOCIALES COMO DERECHOS JUSTICIABLES: POTENCIALIDADES Y LÍMITES* 11 (Gerardo Pisarello ed., 2009) (arguing that "since in almost all countries

Partly to remedy this existing state of affairs, the Bolivian Constituent Assembly sought to change the situation by means of a new constitutional text.

*b. Catalogue of Rights*

An examination of the Bolivian Constitution's provisions linking the constitutional text to international human rights law is now appropriate. We draw particular attention to two features: first, the extent to which these rights place limits on governmental power; and second, the norms laying down positive actions and proactive measures that the State is supposed to take to protect human rights.<sup>69</sup>

*i. Rights*

The fundamental rights promoted by the new Bolivian Constitution are set out in the Second Chapter of Title II, called "Fundamental Rights and Guarantees."<sup>70</sup> The enumeration of these

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of the world the social state was not formed as a constitutional state but conceived as a legislative and administrative state, people's rights, and particularly their social rights, were pushed into the background and became either principles of a political nature or privileges solely granted to those who could access the formal labor market").

<sup>69</sup> See Pierre Bon, *La Protección Constitucional de los Derechos Fundamentales: Aspectos de Derecho Comparado Europeo*, REVISTA DEL CENTRO DE ESTUDIOS CONSTITUCIONALES, Jan. – Apr. 1992, at 43, 43-44.

These two facets—the proclamation of rights and the establishment of clauses that make it possible to guarantee their protection—represent the twofold purpose that any constitution must serve in matters of protection of human rights. The guarantee of these rights is precisely the most controversial and essential function of a constitutional text.

*Id.*

<sup>70</sup> See generally GREGORIO PECES-BARBA MARTÍNEZ, RAFAEL ASÍS ROIG & MARÍA DEL CARMEN BARRANCO AVILÉS, *LECCIONES DE DERECHOS FUNDAMENTALES* (2004) (examining the origins, evolution, interpretation, and limits of fundamental rights).

rights<sup>71</sup> is presented in detail and focuses on elucidations of the principles and actions the government must undertake to achieve their realization.<sup>72</sup> The structure of these fundamental rights rests on the recognition of rights deemed essential to the development of a life with dignity. Although some of these rights could be classified as “basic,” and are not stipulated in much detail in other present-day constitutional texts around the world, they have been so disregarded throughout Bolivian history that in the new constitutional text they have become the State’s main point of action.<sup>73</sup>

Subsequent chapters of the Bolivian constitutional text set out further rights in detail. Among them we can find first-,<sup>74</sup> second-<sup>75</sup>

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<sup>71</sup> See 2 ENCICLOPEDIA HISTÓRICA DOCUMENTAL DEL PROCESO CONSTITUYENTE BOLIVIANO 2381-82 (Juan Carlos Pinto Quintanilla ed., 2012) [hereinafter ENCICLOPEDIA HISTÓRICA] (explaining that even if the right to water is recognized as a fundamental right, further on the constitutional text states that the right to water is an “extremely fundamental” right); Nataly Viviana Vargas Gamboa, *Los Derechos Fundamentales en la Nueva Constitución del Estado Plurinacional de Bolivia: un análisis indispensable del Derecho Al Agua*, in LA PROTECCIÓN DE LOS DERECHOS EN LATINOAMÉRICA DESDE UNA PERSPECTIVA COMPARADA. LOS CASOS DE BRASIL, BOLIVIA Y CHILE 251 (2013) (discussing the right to water in Bolivia); Nataly Viviana Vargas Gamboa, *¿Qué ha Pasado con el Agua en el Nuevo Estado Plurinacional de Bolivia?*, 69 AMÉRICA LATINA HOY 95 (2015) (discussing how, with the inclusion of the right to water, it can be said that the most emblematic of the fundamental rights has been incorporated into the new Bolivian constitutional text); Pablo Iglesias Turrion & Jesús Espasandín López, *La Globalización y los Movimientos Sociales Bolivianos*, in BOLIVIA EN MOVIMIENTO: ACCIÓN COLECTIVA Y PODER POLÍTICO 29, 49 (2007).

<sup>72</sup> See CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, arts. 15-20 (Bol.).

<sup>73</sup> Cf. *Ministerial Declaration of The Hague about Water Security in the 21<sup>st</sup> Century*, WORLD WATER F. (2000), [https://www.worldwatercouncil.org/fileadmin/world\\_water\\_council/documents/world\\_water\\_forum\\_2/The\\_Hague\\_Declaration.pdf](https://www.worldwatercouncil.org/fileadmin/world_water_council/documents/world_water_forum_2/The_Hague_Declaration.pdf) [<https://perma.cc/Y52H-JLCM>] (including the right to water as a basic right, which had a long way to go before it was recognized as a basic requirement for a dignified life).

<sup>74</sup> See CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, arts. 21-29 [Civil and Political Rights], 56-57 [Right to Property], 73-74 [Rights of Persons Deprived of Liberty], 106-107 [Social Communication] (Bol.); see also Domingo García Belaunde, *El Estado Social Re-visitado*, 15 PENSAMIENTO CONSTITUCIONAL 193, 197 (2011) (pointing out that the fulfillment of first-generation rights is a relatively simple process because they only request the State’s willingness to let, authorize or not prevent something to be done).

<sup>75</sup> See CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, arts. 35-45 [Right to Health and Social Security], 46-55 [Right to Work and Employment], 58-61 [Rights of Children, Adolescents and Youth], 62-66 [Rights of the Family], 67-69 [Rights of Elderly Adults], 70-72 [Rights of Disabled Persons], 91-97 [Higher Education], 104-

and third-<sup>76</sup> generation rights<sup>77</sup> which are now part of the longest catalogue of rights that a Bolivian constitution has ever had.<sup>78</sup> Significantly, these latter rights include specific clauses linked to the enumeration of specific indigenous rights, complementing the important indigenous symbolism found throughout the entire text.

The new rights stipulated in the text of the Bolivian Constitution embrace, without a doubt, the “rights of the indigenous peoples,”<sup>79</sup> also addressed more specifically in another clause related to the rights of cultures<sup>80</sup>—every one of them focused on the recognition and protection of the indigenous cultures. The incorporation of these groups of rights into the Bolivian constitutional text is one of the most important and significant measures to ensure the recognition and protection of the rights of the greater part of the country’s population. Such indigenous-related rights not only had been left out of previous Bolivian constitutions, they were also

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105 [Sports and Recreation] (Bol.); see also Eugenio Raúl Zaffaroni, *La naturaleza como persona: Pachamama y Gaia*, in BOLIVIA: NUEVA CONSTITUCIÓN POLÍTICA DEL ESTADO: CONCEPTOS ELEMENTARES PARA SU DESARROLLO NORMATIVO 109, 119-20 (2010).

As far as the configuration of environmental rights is concerned, while they are referred to as social and economic rights, the text mentions other living beings, which involves recognizing their rights as well. The practical consequence of this fact is that any citizen will be entitled to demand the protection of these rights in a court of law even if they are not directly affected by their violation, since the legal personhood of the Pachamama is recognized in its cultural dimension as Mother Earth.

*Id.*

<sup>76</sup> See CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, arts. 30-32 [Rights of the Nations and Rural Native Indigenous People], 33-34 [Right to the Environment], 35 [Right to Health and Social Security], 75-76 [Rights of Users and Consumers], 77-90 [Education], 98-102 [Cultures], 103 [Science, Technology and Research] (Bol.).

<sup>77</sup> See García Belaunde, *supra* note 74, at 27 García Belaunde makes it clear that “the division of human rights into generations is not due to priority considerations, but simply that it was contingent on the specific moment in history where it took place. In this connection, the division is merely chronological and neither good nor bad, but simply an unquestionable and chronologically defined event.”

<sup>78</sup> See LUIS MARÍA DÍEZ-PICAZO, SISTEMA DE DERECHOS FUNDAMENTALES 37-48 (2d ed. 2005) (describing the “inflation” of rights as a very serious problem, since, for fundamental rights to be truly effective, there should probably not be too many of them). The recognition of new rights is not a benign operation, but rather a task that entails setting new limitations to the State’s performance and, therefore, also symbolic ones, because the very idea of fundamental rights ends up damaged as a result.

<sup>79</sup> CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, arts. 30-32 (Bol.).

<sup>80</sup> *Id.* arts. 98-102.

regularly violated regardless of their international protection.<sup>81</sup> In fact, the inclusion of separate clusters of rights for the benefit of the indigenous sectors—rights of the indigenous peoples and “the rights of cultures”<sup>82</sup>—was one of the main grassroots demands that came up during the Constituent Assembly.<sup>83</sup> These sectors are among the most vulnerable population groups in Bolivia’s territory.<sup>84</sup> Once the Assembly recognized their overall situation, it took steps to protect their collective rights, all of them within the bounds of the collective defense<sup>85</sup> of these groups and their identity.<sup>86</sup>

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<sup>81</sup> See Diego Moreno, *El Nuevo Constitucionalismo Latinoamericano, en la Encrucijada: Cuatro tendencias y algunos desafíos para el futuro*, in *DERECHOS HUMANOS Y ORDEN CONSTITUCIONAL EN IBEROAMÉRICA* 147, 153-54 (Juan Manuel López Ulla ed., 2011).

Latin American constitutionalism recognizes the universal character of human rights and the existence of vulnerable groups who have been excluded and marginalized throughout history by incorporating a number of rules designed to ensure the recognition of these groups’ specific needs of protection, not only with non-discrimination guidelines but also with specific provisions for affirmative action measures aligned with the “pluralist” character of Latin American constitutionalism.

*Id.*

<sup>82</sup> Latin American constitutionalism, described by Li-Ann Thio as illiberal, is characterized by its failure to rely on individual rights, although it does resort to separated powers to constrain public power, on the premise that the State is non-neutral and privileges “a substantive vision of the good, informed by ethnicity, religion, or communal morality.” See Li-Ann Thio, *Constitutionalism in Illiberal Politics*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 133, 136 (Michel Rosenfeld & Andras Sajó eds., 2012).

<sup>83</sup> ENCICLOPEDIA HISTÓRICA, *supra* note 71, at 129-31.

<sup>84</sup> See generally Björn-Sören Gigler, *Poverty, Inequality and Human Development of Indigenous Peoples in Bolivia* (Geo. U. Ctr. for Latin Am. Stud., Working Paper No. 17, 2009), <http://pdba.georgetown.edu/CLAS%20RESEARCH/Working%20Papers/WP17.pdf> [https://perma.cc/Q5UY-9GNL] (examining the social and economic difference between the indigenous and non-indigenous population, and analyzing the underlying factors of the economic and social exclusion of these vulnerable groups in Bolivia).

<sup>85</sup> Although the communal ownership of rights entered the debate following the recognition of second-generation rights, the most decisive contribution to the recognition of communal ownership has been made by third-generation rights. See Pérez Luño, *supra* note 22, at 216.

<sup>86</sup> CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 135-36 (Bol.).

Since the goal of inclusion<sup>87</sup> was the main purpose of recognizing the rights of indigenous peoples and cultures, special attention was paid to the distinct symbolism of these groups.<sup>88</sup> The present structure of rights enumerated in the constitution centers upon fundamental rights, other clusters of rights, obligations and jurisdictional guarantees, and actions of protection.<sup>89</sup> While the structure of these rights responds to the classical one found in most constitutional texts, one of its main features is the inclusion of a large number of rights with strong cultural associations, accounting for a very long list of them.<sup>90</sup>

Nevertheless, the recognition of these rights could create boundary issues among the different clusters enumerated therein,<sup>91</sup> since the wide range of the Bolivian catalogue of constitutional rights also requires a similar level of protection and guarantee to all rights.<sup>92</sup> The degree of detail vested in constitutional rights may

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<sup>87</sup> See generally Tribunal Constitucional Plurinacional, Oct. 21, 2011, Sentencia Constitucional, No. 1688/2011-R (Bol.) (describing the diversity and Action of Liberty in Bolivia).

<sup>88</sup> One of the most important elements of Latin American constitutionalism is its social component as an imposition to and a need of regions having a high index of social and economic inequality and extreme poverty, which brings with it a diversity of profound implications for their political systems. See Moreno, *supra* note 81, at 168-69.

<sup>89</sup> See CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, arts. 125-27 [Action of Liberty], arts. 128-29 [Action of Constitutional Protection], arts. 130-31 [Action of Privacy Protection], arts. 132-33 [Action of Unconstitutionality], art. 134 [Action of Compliance], arts. 135-36 [Popular Action] (Bol.). As to the actions of protection and guarantee of rights, their extension is also noticeable, at least regarding their more specific classification. *Id.*

<sup>90</sup> Moreno, *supra* note 81, at 153. "It is noticeable that the new Latin American constitutions are usually characterized by the recognition of a wide and diverse range of fundamental rights. There are several explanations for this, one of them being the strengthening of the "social" nature of those Constitutions." *Id.*

<sup>91</sup> See generally Juan Irarrázabal Covarrubius, Book Review, 30 REVISTA CHILENA DE DERECHO 201 (2003) (reviewing JUAN CIANCIARDO, EL CONFLICTIVISMO EN LOS DERECHOS FUNDAMENTALES (2003)) (detailing the difficulties courts face in resolving conflicts).

<sup>92</sup> CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 109 (Bol.). The considerable division and stipulation of rights in the Constitution—especially in respect to the distinction between fundamental rights and other groups of rights—turns out to be somewhat useless, since the Bolivian constitutional text establishes that all rights are directly applicable and enjoy equal guarantees. *Id.* The division also indicates that the classification of rights does not determine any hierarchy or superiority of some rights over others. See *id.* art. 13. § III. Therefore, all the rights

seem a little excessive because, instead of acting as a safeguard, the details might become real obstacles to the rights' implementation. In such a case, the constitution requires a proportionality-based interpretation capable of effectively protecting the different clusters of rights.<sup>93</sup>

The very characteristics of the Bolivian system of rights give rise to another major problem. The fact that these rights are laid down in great detail, and that the specific characteristics of every single cluster of rights are supposed to be protected, could lead to interpretations intended to safeguard such characteristics at a national level while disregarding the more universal interpretations established by international law. In such cases, the interpreting bodies are expected to carry out their task with due regard to the fact that the universalization<sup>94</sup> of rights is precisely one of the elements that guarantee cultural pluralism<sup>95</sup> at a national level. Consequently, the more universal interpretations supplied by international law are not at odds with a domestic legal interpretation based on multiculturalism.

*ii. Obligations of the State*

Throughout Latin America, human rights are becoming increasingly stronger, at least formally if not in actual practice, revealing both negative dimensions of freedom and positive dimensions of applicability.<sup>96</sup> In other words, human rights

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enunciated in the Bolivian catalogue are considered to be fundamental, according to the constitutional text itself.

<sup>93</sup> See CARLOS BERNAL PULIDO, *EL PRINCIPIO DE PROPORCIONALIDAD Y LOS DERECHOS FUNDAMENTALES* 103 (3d ed. 2007); see also MIGUEL CARBONELL, *EL PRINCIPIO DE PROPORCIONALIDAD EN EL ESTADO CONSTITUCIONAL* (2007).

<sup>94</sup> Antonio-Enrique Pérez Luño insists that in the case of third-generation rights, the universal character is no longer an ideal postulate, becoming instead a practical necessity. Pérez Luño, *supra* note 22, at 216.

<sup>95</sup> FERRAJOLI, *supra* note 19, at 126-27 (remarking that "the constitutional and universal nature of these rights is the main guarantee of multiculturalism").

<sup>96</sup> MAURIZIO FIORAVANTI, *LOS DERECHOS FUNDAMENTALES: APUNTES DE HISTORIA DE LAS CONSTITUCIONES* 131 (G. Giappichelli, ed., Manuel Martínez Neira, Trans., 1996) ("These duties go beyond the simple defense and guarantee of the fundamental rights and freedoms, since the doctrine of modern-day constitutionality can no longer be just a guarantee of restrained governance, as it

generate positive as well as negative obligations. This tendency seeks to attain a top level of protection for human rights that will align with different actions of the State in order to ensure at least minimum levels of fulfillment. These obligations are binding on the State, and they prevail over both public authorities and any private individuals in a position to violate any right.<sup>97</sup>

It is safe to say then that the constitution is not just limited to the enunciation of rights in the constitutional text: its articles also establish norms of guarantee that entail specific obligations on the State that are highly significant for their observance.<sup>98</sup> These provisions stipulate parameters of State performance in the subsequent regulation of any aspect linked with human rights, as well as in the design and implementation of related public policies. In this respect, such obligations are exercised primarily in relation to the rights enunciated in the new Bolivian constitutional text.

While it is understood that human rights are potentially capable of imposing additional obligations on the State beyond the logical assumption—consistent with each of these rights—of the State's duty to take all necessary measures to facilitate the exercise by citizens of their rights, the enunciation of specific actions is one of the most interesting elements incorporated into the new constitution.<sup>99</sup> Just as the actions undertaken by the State are enforceable and considered constitutional parameters, so are the

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should represent the doctrine of government obligations.”); *see also* FERRAJOLI, *supra* note 19.

<sup>97</sup> See Organización Internacional para las Migraciones, Séptima Conferencia Sudamericana Sobre Migraciones: “Los Estándares Internacionales en Materia de Derechos Humanos y Políticas Migratorias” 3 (2007), [https://www.acnur.org/fileadmin/Documentos/BDL/2007/5577.pdf?view\[https://perma.cc/SUJ2-Y7E2\]](https://www.acnur.org/fileadmin/Documentos/BDL/2007/5577.pdf?view[https://perma.cc/SUJ2-Y7E2]) (claiming that human rights are understood as a program capable of guiding a State's public policies and contributing to democratic institutionalization).

<sup>98</sup> See JAVIER JIMÉNEZ CAMPO, *DERECHOS FUNDAMENTALES: CONCEPTO Y GARANTÍAS* (1999) (providing the definition and guarantee of fundamental rights); *see also* P. Cruz Villalón, *Derechos Fundamentales*, in *TEMAS BÁSICOS DE DERECHO CONSTITUCIONAL* 108, 108-09 (Manuel Aragón Reyes ed., 2001) (describing the character, evolution, and identity of fundamental rights provided in the Constitution).

<sup>99</sup> Oscar Vega Camacho, *Estado Plurinacional: Elementos para el debate*, in *DESCOLONIZACIÓN EN BOLIVIA: CUATRO EJES PARA COMPRENDER EL CAMBIO* 109, 126-27 (2011).

rights of citizens.<sup>100</sup> The demand of respect for human rights established in the constitution involves a requirement for the State to implement actions necessary for such purposes.<sup>101</sup>

The constitutional recognition of social and group rights as complex structures requires public authorities to act upon these rights by taking positive actions, that is to say, carrying out specific functions as well as negative actions or abstention.<sup>102</sup> However, the constitution has opted for a solution likely to overburden constitutional rights, in the sense that its articles assign a high number of actions to the Bolivian State that it cannot possibly fulfill nowadays.<sup>103</sup> Nevertheless, what the constitution stipulates should be understood only as a parameter to be achieved, that is, as the level of performance expected from the State for an effective observance of the rights enumerated in the constitutional text.<sup>104</sup> Although the

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<sup>100</sup> Rebeca E. Delgado Burgoa, *Algunas reflexiones sobre la Constitución Política del Estado*, in *BOLIVIA: NUEVA CONSTITUCIÓN POLÍTICA DEL ESTADO: CONCEPTOS ELEMENTALES PARA SU DESARROLLO NORMATIVO* 39, 47-48 (2010). No special or interpretative laws or regulations are necessary for a large number of the rights established in the Constitution. *Id.* However, the delimitation of these rights is undeniably necessary and it must be done on the basis of either the rulings made by the Plurinational Constitutional Court or, as applicable in this case, specific standards, since the degree of detail in their enunciation requires judicial precision. *Id.*

<sup>101</sup> In this way, an important problem arises that is not intended to be addressed in this Article but is no doubt worthy of mention: how to make jurisdictional demands about certain rights which depend neither on the parties nor the judges, but on the State or the community as a whole. See García Belaunde, *supra* note 74, at 27-29.

<sup>102</sup> Ricardo García Manrique, *Presentación*, in *DERECHOS SOCIALES Y PONDERACIÓN* 13, 29-30 (2d ed. 2009).

<sup>103</sup> For a discussion on the lack of economic resources as justification for the failure to protect human rights, see Alonso Manuel Chacón Mata, *Derechos económicos, sociales y culturales: Indicadores y justiciabilidad*, in *CUADERNOS DEUSTO DE DERECHOS HUMANOS* 51 (2007).

<sup>104</sup> *Id.* Chacón Mata remarks that the doctrine has repeatedly referred to economic, social, and collective rights as being subjective rights, thus giving the State the expectation of ownership of all the resources needed for development. *Id.* The power to demand their enforcement from the State turns into guidelines, projects or programs that the citizens hope to have with State support rather than into subjective rights with specific content that the State is compelled to protect. *Id.* at 35. On the other hand, Norberto Bobbio points out, in regard to social rights, that “it is mostly about expressing an aspiration to have future legislation which sets limits for the defense of the relevant rights, making a distinction between their proclamation and their effective fulfillment.” BOBBIO, *supra* note 8, at 21-22. Their great practical function is to give impetus to the claims of movements that demand

actions formulated by the State for the protection of rights may not be immediately enforceable in the desired degree of detail, they still dictate what the State should accomplish—or attempt to accomplish—with a view to their future fulfillment.<sup>105</sup> Meanwhile, the minimum standards laid down by international instruments are fully enforceable.

Although the Bolivian Constitution specifies rights in detail, a number of leading legal scholars favor interpreting the constitutional precepts to focus on achieving their minimum or essential content,<sup>106</sup> leaving to the legislature the task of developing them more specifically. This course of action would open up space for legislators to seek guidance from international law standards and establish legal foundations empowering “rights-owners” to file claims in cases of violation.<sup>107</sup> Ultimately, of course, the key to interpreting the State’s positive actions and their enforceability are to be found in international human rights bodies, a fact anticipated by the Inter-American human rights system, whose main challenge has been to guide State actions through standards and principles that establish the scope of rights<sup>108</sup> and the processes for formulating public policies effectively based on minimum standards.<sup>109</sup> In the case of Bolivia, the Inter-American system has provided the State

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for them and the rest of people that their new material and spiritual needs be met. The constitutional courts of Bolivia, Colombia, and Peru, as well as the Supreme Court, and the courts of Argentina and Chile, respectively, have gradually incorporated IACHR jurisprudence in what has been called a process of nationalization of international human rights law. *Id.*

<sup>105</sup> See LUIGI FERRAJOLI, JOSÉ-JUAN MORESO, MANUEL ATIENZA, GERARDO PISARELLO, & RICARDO GARCÍA MANRIQUE, *LA TEORÍA DEL DERECHO EN EL PARADIGMA CONSTITUCIONAL* (2d ed. 2009) (discussing rights and their interpretation and guarantee).

<sup>106</sup> See Chacón Mata, *supra* note 103, at 31 (discussing the minimum content of economic, social, and cultural rights).

<sup>107</sup> For an examination of Latin American constitutional norms since the adoption of the most recent Colombian Constitution, see García Morales, *supra* note 68, at 16.

<sup>108</sup> See generally García-Sayán, *supra* note 65 (supporting that the constitutional courts of Bolivia, Colombia, and Peru, as well as the Supreme Court and the courts of Argentina and Chile, respectively, have gradually incorporated IACHR jurisprudence in what has been called a process of nationalization of international human rights law).

<sup>109</sup> Víctor Abramovich, *Los Estándares Interamericanos de Derechos Humanos como Marco para la Formulación y el Control de las Políticas Sociales*, 2 ANUARIO DE DERECHOS HUMANOS 13, 19 (2006).

with valuable guidelines for the protection of human rights and constitutional obligations.

Thus, in accordance with its immediate-effect generic obligations, the State ensures that the laws are neither discriminatory nor exclusive, and that they are designed to diminish inequality among the most disadvantaged sectors.<sup>110</sup> Similarly, the State shall implement measures for a progressive advance towards the provision of adequate levels of protection that makes rights fully efficient.<sup>111</sup> At the same time, the State shall meet the minimum needs of each right established in international instruments<sup>112</sup> by making prioritized use of all available resources, as long as its actions do not entail a regression from the levels of satisfaction and guarantee already attained. In this regard, care should be taken to ensure that human rights legislation always represents an advancement, never a throwback, from current levels of protection and guarantee.<sup>113</sup>

### III. INTERPRETATION THROUGH INTERNATIONAL LAW

The new process of organizing the system of rights in the Bolivian constitutional text had to deal with a number of major issues. The main one was the creation of a system capable of giving a new turn to the protection of rights and, at the same time, putting an end to a long history of exclusion and discrimination against the poor, indigenous, and peasant sectors of society. The constituent assembly addressed this difficult challenge by means of different strategies, including the extension of the catalogue of constitutional rights, enactment of clear and detailed State obligations, and improvement of the mechanisms to guarantee their observance.

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<sup>110</sup> GREGORIO PECES-BARBA, *REFLEXIONES SOBRE LOS DERECHOS SOCIALES* 92 (2d ed. 2009).

<sup>111</sup> Tribunal Constitucional Plurinacional, June 8, 2012, Sentencia Constitucional, No. 0292/2012-R (Bol.) (stating that the Plurinational Constitutional Court has accepted the obligation to pay special attention to the party that, compared to the other, is at a disadvantage).

<sup>112</sup> See García Morales, *supra* note 68, at 26.

<sup>113</sup> See Tribunal Constitucional Plurinacional, Dec. 20, 2011, Voto Disidente, Sentencia Constitucional, No. 1513/2011-R, at 7 (Bol.).

Nevertheless, in light of Bolivia's historic systematic violation of human rights, the constituent assembly realized the need to do more about human rights protection and, therefore, clarify the keys to their interpretation. In the following section we discuss, first, the clauses that make it possible to extend the catalogue of rights to the inclusion of aspects that were yet to be enumerated in the constitutional text but already addressed in the international system. Second, we discuss the solutions that made it possible to enrich and expand the catalogue on the basis of the contents and standards of those rights already provided for in international human rights treaties.<sup>114</sup> Third, we address the subsequent decisions of the Constitutional Court about these issues.

*a. Interpretation of Constitutional Rights*

In the course of its work to provide the best possible protection of rights, the Bolivian Constituent Assembly understood that all constitutional rights must be capable of going beyond the "barrier" of national protection and be interpreted in accordance with international human rights law.<sup>115</sup> This interpretation proves to be all the more necessary when it comes to the extension of the Bolivian catalogue of human rights, which lends itself to tensions and contradictions among different rights, and requires the definition of clear standards of fulfillment. It is important now to examine both the keys allowing for an open catalogue of human rights, and the solutions found by the constituent assembly for the interpretation of constitutional rights on the basis of the content and standards laid down in international human rights treaties.

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<sup>114</sup> At the regional level we have seen the emergence of a common human rights law capable of providing minimally uniform answers to the problems that occur in practice. See DIEZ-PICAZO, *supra* note 78, at 34-35.

<sup>115</sup> BOBBIO, *supra* note 8, at 68. Bobbio points out that "the Universal Declaration of Human Rights originated with a dialectical movement that came into being with the abstract universality of natural rights, went through specific characteristics of national positive rights, and ended up in a concrete, rather than abstract, universality of positive rights." *Id.*

i. *The Open Clause*

Article 13.II of Bolivia's constitution states: "The rights declared in the Constitution shall not be understood to deny other rights hitherto left unmentioned."<sup>116</sup> This is an "open clause" aimed at protecting rights not specifically included in the constitutional text.<sup>117</sup> While this "open clause" was present in the previous constitution and thus was part of Bolivian constitutional law prior to 2009, its discussion is important as part of an evaluation of the newer constitutional provisions dealing with human rights and international law.

The "open-clause" technique has been commonplace in Latin American constitutions, albeit in very few instances without any conditioning elements, as is the case in Bolivia.<sup>118</sup> It is important to clarify that in most cases this clause is included with conditions. Nonetheless, interpretive bodies, such as courts, that may seek to place limits on new rights, can be in a position to accept certain rights based on previous court decisions (of either national or foreign tribunals within a regional legal system such as the Inter-American human rights system), and thus update the meaning and scope of the constitutional text.

The "open clause" makes it possible for a number of rights inherent to human personality and deprived of extended protection, including those contained in international human rights treaties,<sup>119</sup>

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<sup>116</sup> CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 13.II (Bol.).

<sup>117</sup> Pérez Luño, *supra* note 22, at 217 ("The catalogue of rights can never be a closed and finished work, since a democratic society must always be open to the emergence of new needs which make it possible to establish new rights.").

<sup>118</sup> See, e.g., CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA Aug., 2002, art. 44; CONSTITUCIÓN DEL PARAGUAY June 20, 1992, art. 45; CONSTITUTION OF THE ARGENTINE NATION May 1, 1853, § 33; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA Nov. 7, 1949, tit. V, art. 74; CONSTITUCIÓN POLÍTICA DE 1982, Jan. 20, 1982, art. 63 (Hon.); POLITICAL CONSTITUTION OF PERU Dec. 29, 1993, art. 3; CONSTITUCION DE LA REPUBLICA Nov. 27, 1966, sec. I, art. 73 (Uru.). Noticeable in these constitutional articles is the fact that, unlike the case of the Bolivian constitutional text, the open clause is contingent on the fulfillment of certain parameters related to the acceptance of a new law by the internal system which can be considered to be even more restrictive when it comes to the protection of new rights.

<sup>119</sup> The interpretation of the open clause of the Constitution of Panama made by the Supreme Court of Justice extended constitutional guarantees to the rights recognized in international instruments. Salvador Sánchez González, *El Derecho*

to be considered as fundamental rights in various regional systems, thereby making room for the incorporation of international human rights treaties into domestic legislation.<sup>120</sup> It must be underscored, however, that in many judicial decisions affirming the recognition of international human rights law through the “open clause”<sup>121</sup> we sometimes find reference to the direct incorporation of international human rights treaties.<sup>122</sup>

In the Bolivian case, this formula paves the way for the construction of solutions for situations in which the status of rights not enunciated in the constitutional text is not entirely clear, as in the case of norms not stated in the constitution but enunciated in non-ratified international texts or adopted from customary international law. In other words, the “open clause” enables these rights to be recognized, fully incorporated into the Bolivian catalogue of rights, and even granted constitutional rank, ensuring their protection through the various “Actions of Protection” specified in the constitution.<sup>123</sup>

It must be noted that the status of customary international law in domestic legislation is not expressly addressed in the new

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*Internacional de los Derechos Humanos y la Constitución Panameña*, 20 REVISTA PANAMEÑA DE POLÍTICA 115, 118-19 (2015).

<sup>120</sup> Allan R. Brewer-Carías, *La aplicación de los tratados internacionales sobre derechos humanos en el orden interno de los países de América Latina*, 46 REVISTA IBEROAMERICANA DE DERECHO PROCESAL CONSTITUCIONAL 219 (2006), <https://www.corteidh.or.cr/tablas/R22024.pdf> [<https://perma.cc/A644-8AVW>].

<sup>121</sup> CAROLINA LEÓN BASTOS, *LA INTERPRETACIÓN DE LOS DERECHOS FUNDAMENTALES SEGÚN LOS TRATADOS INTERNACIONALES SOBRE DERECHOS HUMANOS: UN ESTUDIO DE LA JURISPRUDENCIA EN ESPAÑA Y COSTA RICA* 48 (2010) (“While most fundamental rights are enumerated in national constitutions, any right not specifically included in the constitutional text shall be linked to the constitution on the basis of international treaties, either in a horizontal relation or one directly below in order of importance. Therefore, we can see that the rights do not necessarily have to be stated in a constitution to be considered as fundamental rights and granted the same guarantees as those already stated, because they can also reach constitutional status through the International Treaties ratified by the States.”).

<sup>122</sup> See, e.g., CONSTITUCIÓN DE 2008 Oct. 20, 2008, tit. VIII, ch. 2, art. 417 (Ecuador); CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA Dec. 1999, art. 22; CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] July 4, 1991, art. 94.

<sup>123</sup> Néstor Pedro Sagüés, *Los tribunales constitucionales como agentes de cambios sociales*, 17 ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 527, 534-35 (2011) (describing the open clause as an ideal instrument to carry out social change on the basis of constitutional competence and from which rights discovered and declared by constitutional judges have emerged).

Bolivian constitutional text.<sup>124</sup> However, its enforcement is understood as a non-written rule.<sup>125</sup> On the other hand, the comprehensive analysis of international law by the Bolivian constituent assembly was truly commendable. The discussions revolved around general international legal norms rather than ratified international human rights treaties, but with the clear intention to make as much open room as possible for international human rights law.<sup>126</sup> In this way, by means of a comprehensive interpretation of the Bolivian constitutional text, and on the basis of respect for the constituent assembly's will, the "open clause" can contribute to welcoming into the Bolivian legal system broader rights already recognized in non-formal international human rights instruments.

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<sup>124</sup> In the case of the United States, customary international law is not explicitly included in the supremacy clause, but the U.S. Supreme Court has repeatedly indicated that customary international law is to be treated as federal law and therefore constitutes the law of the land. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 714-25 (2004); *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Filártiga v. Peña-Irala*, 630 F.2d 876, 880-85 (2d Cir. 1980); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (holding that as international law does not prescribe use of the doctrine, the Act of State doctrine shall be applied even if it is claimed to be in violation of international law). *But see Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that the interpretations of the federal courts regarding customary law are not binding on the States, but also that these courts are compelled to follow decisions by the State courts if the State system decides to recognize the standards of customary law); *but see also* T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L LAW 91, 92-93 (2004) (providing a detailed analysis of the applicability of customary law in the U.S. system).

<sup>125</sup> ARACELI MANGAS MARTÍN, CUESTIONES PRÁCTICAS DE DERECHO INTERNACIONAL PÚBLICO Y COOPERACION JURÍDICA INTERNACIONAL 516 (1994). Mangas Martín points out that

there is an implicit rule in the constitution demanding that minimum standards of international law be respected, since the existence of such an implicit regulation of automatic adoption is accepted in the absence of a standard stating otherwise. *Id.* Moreover, the rule is based precisely on international legal codes, not on the national one.

*Id.* The doctrine of international law has understood that, given the absence of formal reception by general international law, an implicit rule for the automatic adoption of customary standards into the national legislation is embraced. MANUEL DÍEZ DE VELASCO VALLEJO, INSTITUCIONES DE DERECHO INTERNACIONAL PÚBLICO 219-20 (16th ed. 2007).

<sup>126</sup> *See generally* Pinto Quintanilla, *supra* note 21 (analyzing the normative development of rights, liberties, and powers involved in the adoption of Bolivia's constitution).

While most of the currently recognized human rights can be found either explicitly or implied as part of another specific right enumerated in the constitution, the Bolivian catalogue of rights is far from infallible or a finished product.<sup>127</sup> For the most part, human rights have been created through the course of history, gradually born under certain circumstances, and they have stemmed from an evolutionary process that has become one of the main indicators of historical progress.<sup>128</sup> Considering that new rights will likely be established as time goes by, the “open clause” is a remarkable tool to update the Bolivian catalogue of rights.

The extension of rights and the recognition of international sources prove to be essential to the interpretive work of the Constitutional Court, because the “open clause” contributes to keeping the catalogue of rights always open to the inclusion of new rights already stipulated in international instruments but yet to be incorporated into the catalogue of Bolivian fundamental rights. Starting from this premise, not only international human rights treaties, but also the norms arising from international judicial bodies and many other ordinary international norms are applicable, even if they were not considered binding at the constitution’s inception.<sup>129</sup> The placement of the “open clause” in the new constitutional text was the outcome of the constituent assembly’s realization that the catalogue of rights is essentially incomplete due to historical limitations on both the constituent process and the international instruments.<sup>130</sup> The clause ensures permanent qualification and ongoing development of human rights, as it automatically

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<sup>127</sup> See BOBBIO *supra* note 8, at 71 (remarking that “we do not need to let our imagination run wild to foresee that technological progress, improved knowledge, and the development of mass media will bring about sufficient changes in people’s lives and social relations to create new needs and, consequently, new demands for more freedoms and powers”).

<sup>128</sup> *Id.* at 14-19. In this respect, Bobbio highlights that “human rights are one of the main indicators of historical progress, the same rights which are gradually ‘born’ under certain circumstances marked by the defense of new freedoms against old powers.” *Id.*

<sup>129</sup> JOSÉ JOAQUIM GOMES CANOTILHO & VITAL MOREIRA, FUNDAMENTOS DA CONSTITUIÇÃO 116 (1991).

<sup>130</sup> Following Peter Häberle’s analysis, this clause, given Bolivia’s broad catalogue, could even be referred to as an “empathy clause of human rights.” Peter Häberle, *Elementos Teóricos de un Modelo General de Recepción Jurídica*, in DERECHOS HUMANOS Y CONSTITUCIONALISMO ANTE EL TERCER MILENIO 151, 151-86 (Antonio Pérez Luño ed., 1996).

incorporates into positive constitutional law values and ideas from ethics, politics and legal rights that are intrinsic to the concept of human dignity and the essence of what it is to be a human being. This amounts to a recognition that no right has to be recognized in the constitutional text, or even in ratified international treaties, to have constitutional rank, and that a new right can be included in the category of fundamental rights.<sup>131</sup>

ii. *Article 13.IV «in fine»*

Article 13.IV *in fine* of the constitution states: “The rights and obligations enshrined in this Constitution shall be interpreted in accordance with the international human rights Treaties ratified by Bolivia.”<sup>132</sup> One of the greatest concerns about the protection of human rights is how to establish normative frameworks that are sufficiently strong to allow for such protection as effectively as possible. As stated earlier, in order to be entirely protected, these rights need to be efficiently extrapolated to international law.<sup>133</sup> The new Bolivian constitutional text establishes an unprecedented clause that makes it possible to interpret constitutional rights from the standpoint of international human rights law.<sup>134</sup> Given the lack

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<sup>131</sup> MANUEL BARRETO & LIBARDO SARMIENTO, *DE LOS DERECHOS, LAS GARANTÍAS Y LOS DEBERES* 442-44 (Carlos Marín ed., 1997). For examples of the incorporation of rights through the interpretation of Article 94 of the Political Constitution of Colombia, see Corte Constitucional, Jan. 31, 1994, Sentencia T-028/94, Gaceta de la Corte Constitucional (Colom.); Corte Constitucional, Dec. 15, 1993, Sentencia T-594/93 Gaceta de la Corte Constitucional (Colom.); Corte Constitucional, June 24, 1992, Sentencia T-426/92 (Colom.); Corte Constitucional, Feb. 6, 1995, Sentencia T-032/95 Gaceta de la Corte Constitucional (Colom.).

<sup>132</sup> CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 13.IV (Bol.).

<sup>133</sup> In the words of Alejandro Saiz Arnaiz, “the contemporary constitutional State subject to the rule of Law can only be understood as being internationally situated and, for the same reason, limited from the same viewpoint.” ALEJANDRO SAIZ ARNAIZ, *LA APERTURA CONSTITUCIONAL AL DERECHO INTERNACIONAL Y EUROPEO DE LOS DERECHOS HUMANOS. EL ARTÍCULO 10.2 DE LA CONSTITUCIÓN ESPAÑOLA* 44 (1999).

<sup>134</sup> The role played by domestic courts within the international system does not depend only on international legislation. SHARON WEILL, *THE ROLE OF NATIONAL COURTS IN APPLYING INTERNATIONAL HUMANITARIAN LAW* 7-8 (André Nollkaemper & August Reinisch eds., 2014). In fact, the activity of such courts depends, above all else, on the nationwide empowerment of the domestic courts to

of constitutional protection of human rights throughout Bolivia's history, the inclusion of such a clause proves to be essential to give these rights effective support.<sup>135</sup> Obviously, in this respect, the Bolivian catalogue of rights is thus made easier to interpret in a much more effective way and endowed with a greater degree of interpretative breadth and openness.<sup>136</sup> Thanks to this rule, Bolivian constitutional rights have found a timely window to usher in international human rights law to enrich their content.

The insertion of this clause into the Bolivian constitutional text has quite a few consequences, since it leads the State to put aside its omnipotent role and allow the incorporation of international law through constitutional interpretation by the judicial branch.<sup>137</sup> Bolivian constitutional regulations about matters of human rights have brought about a positive and expected change concerning the interpretation of constitutional rights – the recognition by domestic courts of international sources of human rights is a constant feature

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apply international law through the appropriation of international obligations. *Id.* These domestic courts shall ensure that both national legislation and State policies fulfill their international obligations. *Id.*

<sup>135</sup> The Portuguese Constitution of 1976 includes in Article 16.1 a precedent of the constitutional rule of international openness in matters of human rights. See DECRETO DE APROVAÇÃO DA CONSTITUIÇÃO Apr. 10, 1976, art. 16.1 (Port.). This article contains no reference whatsoever to the fact that the applicable international standards must necessarily be based on instruments ratified by Portugal. See *id.* It thus establishes that the fundamental rights embodied in the Constitution do not exclude any other applicable group of laws or provisions stipulated by international law. GOMES CANOTILHO & MOREIRA, *supra* note 129, at 115.

<sup>136</sup> Araceli Mangas Martín stresses that

well-known universal international covenants such as the Universal Declaration of Human Rights and the International Covenants on Civil and Political Rights and of Economic, Social and Cultural Rights are likely to shed very little light on the interpretation of incidental obscurities found in constitutional rights on account of their too general nature and vagueness.

Araceli Mangas Martín, *Cuestiones de Derecho internacional público en la Constitución española de 1978*, 61 REVISTA DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD COMPLUTENSE DE MADRID 143, 151–52 (1980). Nevertheless, he explains that “there are plenty of hardly ambiguous covenants, some of them with a praiseworthy degree of precision regarding the content of the rights regulated therein, which play a decisive role when it comes to the interpretation of rights.” *Id.*

<sup>137</sup> Matthias Herdegen, *La internacionalización del orden constitucional*, 16 ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 71, 73 (2010). The tensions related to international norms and the internal legal code can be better addressed when there is a Constitution with a flexible interpretation capable of endowing the local system of laws with permeability. *Id.*

in international constitutional development.<sup>138</sup> Article 13.IV *in fine* has the highest relevance in the context of the Bolivian constitutional system. This clause stamps the entire constitutional system with an exceptional capacity to respond to international human rights law,<sup>139</sup> offering it a position of influence over the entire judicial system.<sup>140</sup>

The Bolivian Constitution only makes reference to international human rights *treaties*, so Article 13.IV *in fine* would seem to overlook the interpretative relevance of general or customary international law – although, as we have seen, this problem can be solved at least partially by resort to the “open clause” discussed earlier. We also must bear in mind that domestic judges enjoy a great margin of appreciation when it comes to the interpretation of customary law.<sup>141</sup> While some human rights-related rules are deemed *jus*

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<sup>138</sup> SAIZ ARNAIZ, *supra* note 133, at 87. In the case of Spain, the clause of openness to international human rights law is contained in Article 10.2 of the Spanish Constitution. LORENZO MARTÍN-RETORTILLO BAQUER, *LOS DERECHOS FUNDAMENTALES Y LA CONSTITUCIÓN: Y OTROS ESTUDIOS SOBRE DERECHOS HUMANOS* 72 (2009). By its interpretation, this clause refers to the fundamental rights included in the Universal Declaration of Human Rights and, by its general formulation, to the International Human Rights Treaties ratified by Spain. *Id.* The commitment to take into account the Universal Declaration when it comes to channeling the interpretation of fundamental rights and freedoms has found significant echo in Spanish constitutional jurisprudence. See, e.g., JULIO DIEGO GONZÁLEZ CAMPOS, *ALGUNAS REFERENCIAS A LA COSTUMBRE Y LOS TRATADOS INTERNACIONALES EN LA JURISPRUDENCIA DEL TRIBUNAL CONSTITUCIONAL* 513 (Lucius Caflish et al. eds., 2005); 1 DIEGO J. LIÑÁN NOGUERAS, *EL PROYECTO CONSTITUCIONAL EUROPEO Y LA INTERPRETACIÓN DE DERECHOS Y LIBERTADES EN LA CONSTITUCIÓN ESPAÑOLA: ¿UNA NUEVA DIMENSIÓN DEL ART. 10.2 CE?* 933-46 (2005); Antonio Remiro Brotons, *Política de los Derechos Humanos y Política con los Derechos Humanos*, 41 *REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL* 107 (1989).

<sup>139</sup> Martín-Retortillo Baquer explains that the guarantee of fundamental rights and individual freedoms is a multifaceted enterprise which requires different methodologies in the European context. MARTÍN-RETORTILLO BAQUER, *supra* note 138, 125-27.

<sup>140</sup> MANGAS MARTÍN, *supra* note 125, at 308. Nonetheless, in its judgments, the Spanish Constitutional Court refuses to accept that Article 10.2 has caused a constitutionalizing effect of international human rights instruments; Judgment 76/1982 of the Spanish Constitutional Court sets this precedent. See ANTONIO FERNÁNDEZ TOMÁS, *LA VÁLIDA CELEBRACIÓN Y LA INCORPORACIÓN DE LOS TRATADOS EN LA JURISPRUDENCIA CONSTITUCIONAL ESPAÑOLA* 353 (Manuel Pérez González ed., 1993).

<sup>141</sup> Alfonso J. Iglesias Velasco, *Reflexiones sobre la implementación de los tratados internacionales por los tribunales domésticos: especial referencia a España*, 29 *ANUARIO ESPAÑOL DE DERECHO INTERNACIONAL* 165, 169 (2013).

*cogens*,<sup>142</sup> problems arise when it is necessary to specify the content of the obligations that the member States of the international community are duty-bound to meet when these obligations go beyond the narrow scope of *jus cogens*.<sup>143</sup> But even if these problems are not easily solved, the establishment of a criterion of maximum openness is a great help, since an adequate interpretation of human rights involves having recourse not only to formal international instruments such as treaties but also to other types of non-formal instruments such as the recommendations of treaty bodies, and resolutions of certain international organizations that command broad authority.<sup>144</sup>

Starting from this assumption, the Plurinational Constitutional Court of Bolivia has ruled that the corpus juris of international human rights law shall be understood in a comprehensive manner and, to that end, even if some international legal instruments are not strictly binding, they still serve a purpose by assisting in the interpretation of the norms laid down in international treaties.<sup>145</sup> The Court's predecessor, the Provisional Constitutional Court,<sup>146</sup> has stated that all the norms, principles, and guidelines regarding various human rights-related topics are international instruments of great significance for the implementation of international human

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<sup>142</sup> Accordingly, the judicial contributions of international human rights law having *jus cogens* or customary international law status are especially justifiable. Wen-Chen Chang & Jiunn-Rong Yeh, *Internationalization of Constitutional Law*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1166, 1168 (Michel Rosenfeld & Andrés Sajó eds., 2012).

<sup>143</sup> See Antonio Fernández Tomás, *El Jus Cogens y las Obligaciones Derivadas de Normas Imperativas: Entre el Mito y la Realidad*, in SOBERANÍA DEL ESTADO Y DERECHO INTERNACIONAL 619 (Marina Vargas Gómez-Urrutia & Ana Salinas de Frías eds., 2005).

<sup>144</sup> SAIZ ARNAIZ, *supra* note 133, at 89. Saiz Arnaiz also highlights that, on the basis of full openness, "the Spanish Constitutional Court has had recourse not only to related international treaties but also to the decisions emanating from their treaty bodies, in addition to other texts produced by international organizations to which Spain is party but which are, in principle, non-binding." *Id.*; see also ARGELIA QUERALT JIMÉNEZ, LA INTERPRETACIÓN DE LOS DERECHOS: DEL TRIBUNAL DE Estrasburgo al Tribunal Constitucional (2008) (discussing the protection of human rights from the European supranational structure).

<sup>145</sup> Tribunal Constitucional Plurinacional, Sept. 6, 2012, Sentencia Constitucional Plurinacional, No. 1130/2012, at III.2 (Bol.).

<sup>146</sup> The Provisional Constitutional Court assumed the protection of the Constitution during the process to elect the Plurinational Constitutional Court, pursuant to the new rules of the Political Constitution of the Plurinational State of Bolivia. See *id.*

rights treaties and the constitution and, therefore, they constitute guidelines for their interpretation.<sup>147</sup> Constitutional standards should be addressed in a comprehensive way, with resort to various international instruments to specify the scope and content of human rights and guarantees.<sup>148</sup>

The Plurinational Constitutional Court of Bolivia has noted that, in accordance with the constitution's Article 13.IV *in fine*, the Court needs to include in its interpretative guidelines the principles developed by international human rights treaties, which expand even more the spectrum of relevance of international human rights law.<sup>149</sup> As far as its scope is concerned, there is no doubt that Article 13.IV *in fine* is unparalleled, since it not only refers to the interpretation of fundamental rights, but covers all the rights enumerated in the Bolivian constitutional text. On the basis of this rule, it is possible to prove that the Plurinational Constitutional Court of Bolivia is directly linked to the content of international human rights treaties. The Court uses these treaties to justify the open attitude adopted by its judges toward the interpretation of constitutional rights, properly completing what we might call the irradiation ratio of international human rights law upon the national legal system.<sup>150</sup> The Constitutional Court's jurisprudential activity is oriented toward the broadest possible interpretation of constitutional rights with full respect for international standards, endowing the new Bolivian constitutional text with a considerable degree of openness.<sup>151</sup>

Some scholars and justices on the Court have interpreted Article 13.IV *in fine* as a subsidiary clause, holding that a stricter, more literal method of constitutional construction is to be preferred with regard to human rights.<sup>152</sup> Should this method turn out to be insufficient to determine the scope of constitutional standards, then a subjective but still strict, literal method is to be used, with the scope of the constitutional text defined according to the intent of the

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<sup>147</sup> *See id.*

<sup>148</sup> Tribunal Constitucional Plurinacional, Apr. 27, 2010, Sentencia Constitucional, No. 0061/2010-R, at III.4.2 (Bol.).

<sup>149</sup> CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 13.IV (Bol.).

<sup>150</sup> Tribunal Constitucional Plurinacional, Sept. 6, 2012, Sentencia Constitucional Plurinacional, No. 1130/2012, at III.2 (Bol.).

<sup>151</sup> *See id.*

<sup>152</sup> *See* CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 13.IV (Bol.).

Constituent Assembly, as expressly demonstrated in its working documents.<sup>153</sup> If these two methods fail to establish clearly the meaning of a constitutional text, then the interpretation must be carried out in accordance with international human rights treaties.<sup>154</sup> This is a totally restrictive interpretation that most members of the Plurinational Constitutional Court have not embraced.

It is safe to say that Article 13.IV *in fine* becomes a real window that opens onto international human rights law, making it possible to choose an interpretation that lends the constitution an open quality capable of enriching and reinforcing the rights contained in the new constitutional text.<sup>155</sup> This window provides the Bolivian catalogue of rights with higher standards of protection that turn the national constitution into a truly progressive text. Bolivian domestic law can be described accurately as capable of influencing, and being influenced by, international law in its struggle for the defense of human rights and the search for proper levels of protection for its citizens.

*iii. Article 256.II*

In addition to Article 13.IV *in fine*, another rule must be considered which opens a window to the interpretation of constitutional rights through international instruments: Article 256.II of the constitution governs the interpretation of international human rights treaties, and is of crucial importance to the Constitutional Court's jurisprudential activity.<sup>156</sup> Article 256.II

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<sup>153</sup> Tribunal Constitucional Plurinacional, June 27, 2013, Sentencia Constitucional Plurinacional, No. 1011/2013, at III.1 (Bol.).

<sup>154</sup> Tribunal Constitucional Plurinacional, Apr. 29, 2011, Voto Disidente, Sentencia Constitucional, No. 0547/2011-R, at 2 (Bol.).

<sup>155</sup> Tribunal Constitucional Plurinacional, May 24, 2012, Sentencia Constitucional Plurinacional, No. 0224/2012, at III.5 (Bol.) (“[A]mong other interpretations, the right to defense must be interpreted in accordance with the International Human Rights Treaties ratified by the Plurinational State of Bolivia, pursuant to the last sentence of Article 13.IV of the Constitution, raising its interpretation to related parameters found in international documents.”).

<sup>156</sup> GOMES CANOTILHO & MOREIRA *supra* note 129, at 143 (pointing out that the introduction of international standards in the internal law of Portugal led to the promotion of international law by means of individual references). A similar

establishes that “the rights recognized in the Constitution shall be interpreted in accordance with international human rights treaties when the latter provide more favorable norms.”<sup>157</sup>

In this respect, the Constitutional Court issued an opinion centered around the principles of *pro homine*<sup>158</sup> and “progressive realization”<sup>159</sup> (precisely what is sought to be accomplished with “the most favorable interpretation”) regarding the interpretation of human rights, opting for the broadest sense of both principles.<sup>160</sup> *Pro homine* refers to interpreting norms consistently to give the widest possible scope to human dignity and well-being. “Progressive realization” speaks to the objective of achieving the highest possible standards of human rights protection over time. The Court has held that its jurisprudential activity must follow the principle of “progressive realization” and that, in the presence of various

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impression is made by Article 16.2 of the Portuguese Constitution. According to this criterion, the interpretation of Portuguese fundamental rights shall not prevail if it fails to lead up to a more favorable interpretation of those rights, which helps protect internal law when it is capable of providing the highest level of protection. See JOSÉ JOAQUIM GOMES CANOTILHO, *DIREITO CONSTITUCIONAL* 682-83 (6th ed. 1996).

<sup>157</sup> CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 256.II (Bol.).

<sup>158</sup> See *Enforceability of the Right to Reply or Correction* (Arts 14(1), 1(1) and 2, American Convention on Human Rights), Costa Rica, Advisory Opinion OC-7/85, Inter-Am. Ct. H.R. (ser. A) No. 7, ¶ 36 (Aug. 29, 1986) (Escalante, J., dissenting) (describing *pro homine* as “the fundamental criterion which creates the very nature of human rights [and] requires that the norms which guarantee or extend human rights be broadly interpreted and those that limit or restrict human rights be narrowly interpreted”).

<sup>159</sup> “The Inter-American Commission on Human Rights has been said to have made a twofold interpretation of the principle of progressive realization: on one hand, as an interpretation of the text that takes into account the objective of the term at the moment of its application and, on the other, as a method used to update the agreement that empowers the judge to revise it according to the current social needs.” Ezequiel Malarino, *Activismo Judicial, Punitivización y Nacionalización. Tendencias Antidemocráticas y Antiliberales de la Corte Interamericana de Derechos Humanos*, in *SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS Y DERECHO PENAL INTERNACIONAL* 25, 32 (Gisela Elsner, 2010).

<sup>160</sup> See Julieta Rossi & Víctor Abramovich, *La tutela de los derechos económicos, sociales y culturales en el artículo 26 de la Convención Americana sobre Derechos Humanos*, 9 *ESTUDIOS SOCIO-JURÍDICOS (SPECIAL ISSUE)* 34, 48 (2007) (arguing that “the principle of *pro homine* is useful to defining the scope of social rights addressed in Article 26 of the American Convention on Human Rights, but always in accordance with the regulations of international law that consecrate rights and not to help the interpreter establish beforehand whether a given right is implicit in the Charter of the Organization of American States [“OAS”] and, for that matter, in Article 26 of the American Convention on Human Rights”).

possible meanings, the broadest interpretation that least restrains the violated right or guarantee must be chosen<sup>161</sup> when it comes to the recognition of rights. Meanwhile, the most restrictive interpretation must be chosen when it comes to placing limits on the exercise of rights.<sup>162</sup> All of this ensures the broadest possible protection of rights. The Court's discussion of Article 256.II, however, makes it clear that, while there have been efforts to find a way to open constitutional rights to international law,<sup>163</sup> there also have been attempts to interpret such rights by placing restrictions likely to prevent such an opening from being unconditional,<sup>164</sup> even though this overlooks the fact that the minimum standards established by international law and adopted through universally recognized instruments should not be ignored.<sup>165</sup>

Article 256.II also states that the interpretative opening must be respectful of the interpreted text and, therefore, consistent with its tradition and context.<sup>166</sup> While human rights tend to become

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<sup>161</sup> See Mónica Pinto, *El principio pro homine. Criterios de hermenéutica y pautas para la regulación de los derechos humanos*, in LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES 163, 163-72 (1997) (describing the legitimate restrictions and the principle of *pro homine*).

<sup>162</sup> Tribunal Constitucional Plurinacional, Apr. 29, 2011, Voto Disidente, Sentencia Constitucional Plurinacional, No. 0547/2011-R, at 2 (Bol.); Tribunal Constitucional Plurinacional, Apr. 6, 2010, Sentencia Constitucional Plurinacional, No. 0006/2010-R, at III.1.2 (Bol.); Tribunal Constitucional Plurinacional, Apr. 13, 2010, Sentencia Constitucional Plurinacional, No. 0023/2010-R, at III.1 (Bol.).

<sup>163</sup> See Moreno, *supra* note 81, at 156-57 (noting that opening constitutional rights to international human rights law is another typical feature of certain contemporary Latin American constitutions, although there are differences concerning ways, effects, and purposes, depending on the relevant constitution).

<sup>164</sup> See LEÓN BASTOS, *supra* note 121, at 49-57 (noting that, owing to the preferential rank of human rights, the whole legal order is interpreted in such a way that they become more effective and capable of developing their potential, whether they come from a national or an international source). Such a favorable approach must be used to interpret not only the rights, but also the rest of the constitutional rules, since the rights are a parameter that the interpreter cannot possibly disregard.

<sup>165</sup> See Vásquez Vejarano v. Peru, Case 11.166, Inter-Am. Comm'n H.R., Report No. 48/00, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 55 (2000) (stating that "[a]lthough in general the 'margin of appreciation' is left to the states themselves" regarding the fulfillment of rights, the IACHR has underscored that such margin is not unlimited, as well as that the Commission has the duty to evaluate it and that "the margin of appreciation at the internal level goes hand in hand with inter-American supervision").

<sup>166</sup> See HANS PETER SCHNEIDER, *DEMOCRACIA Y CONSTITUCIÓN* 21 (1991) (arguing that it is necessary to update human rights by means of an effective policy of realization in addition to any legal definition and interpretation).

universal, their content cannot be understood as identical throughout all societies, because the protected “legal goods” vary from one country to another depending on the characteristics of their population.<sup>167</sup> This assertion is by no means a negation of the universal nature of principles and rights, but an indication that whenever the content of a right is not clear, an interpretation is preferred which proves to be more in keeping with the constitutional system from whence it comes, and, therefore, with the traditions and values of the society that protects them.<sup>168</sup>

It should be pointed out in this context that the structure of the catalogue of rights found in the constitution is vital at the international level, given the wide margin for interpretation allowed by the constitution’s considerable degree of detail and complexity. Article 256.II paves the way for two kinds of interpretation, as a two-way, dialectical mechanism of protection: on the one hand, an interpretation of constitutional rights as a function of international human rights law and, on the other, an interpretation of the latter as a function of the former. This turn towards domestic law in the stipulation of standards, however, must be totally in line with the minimum standards of protection and guarantee established at the

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<sup>167</sup> See Javier García Roca, *Soberanía Estatal Versus Integración Europea Mediante Unos Derechos Fundamentales Comunes: ¿Cuál es el Margen de Apreciación Nacional?*, in *INTEGRACIÓN EUROPEA A TRAVÉS DE DERECHOS FUNDAMENTALES: DE UN SISTEMA BINARIO A OTRO INTEGRADO* 15, 16-17 (Javier García Roca & Pablo A. Fernández Sánchez eds., 2009) (acknowledging that the European Court of Human Rights frequently uses the clause known as “national margin of appreciation,” through which “some governments facing accusations expect that absolute understanding of national sovereignty will allow the States to avoid European control in certain cases”). *But see* Roberto Toniatti, *Sovereignty Lost, Constitutional Identity Regained*, in *NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION* 49, 67 (Alejandro Saiz Arnaiz & Carina Alcoberro Llivina eds., 2013) (noting that the “recognition of the national margin of appreciation is invariably conditioned by the contextual recognition of its compatibility with the [European Convention on Human Rights] as interpreted by the [European Court of Human Rights]”).

<sup>168</sup> See DÍEZ-PICAZO, *supra* note 78, at 49-50. It is also noticeable that in certain cases the European Union’s system for human rights protection grants national authorities plenty of liberty to weigh the interests in dispute, recognizing national margins of appreciation as capable of invalidating communal norms when determining the need for and proportionality of the measure adopted to the detriment of communal freedom and in favor of the fundamental right which seemed to be better protected by national legislation. María Díaz Crego, *El Margen de Apreciación Nacional en la Jurisprudencia del Tribunal de Justicia de Las Comunidades Europeas Referida a Los Derechos Fundamentales*, in *INTEGRACIÓN EUROPEA A TRAVÉS DE DERECHOS FUNDAMENTALES: DE UN SISTEMA BINARIO A OTRO INTEGRADO* 55, 63-65 (Javier García Roca & Pablo A. Fernández Sánchez eds., 2009).

international level.<sup>169</sup> In light of this fact, the Constitutional Court is responsible for making an assessment that provides for the efficient implementation of both domestic and international norms, regardless of the original source of the standard of protection, in order to ensure respect for the *pro homine* and “progressive realization” principles.<sup>170</sup>

*b. Activity of the Constitutional Court*

“Constitutions generally include various material content shaped as rights, and drafted in such a way that their wide degree of openness gives rise to high levels of uncertainty and ambiguity and an obvious measure of subjectivity that makes those contents all the more difficult to specify.”<sup>171</sup> Although the Bolivian Constitution enumerates its catalogue of rights with a wealth of detail, and lays out positive actions to guarantee them, there is no denying that the whole document is characterized by a high degree of subjectiveness, invariably unavoidable no matter how detailed the constitutional text was intended to be. Since anticipating all possible solutions in a constitutional text is nothing less than unthinkable and impossible, the Constitutional Court will have to overcome this difficulty through a careful analysis of rights in the light of each specific case.<sup>172</sup> To this end, we now examine the activity of the

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<sup>169</sup> See, e.g., CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, Sept. 17, 2005, art. 5, ¶ 2 (recognizing limits to its sovereignty with respect to human rights).

<sup>170</sup> See Pinto, *supra* note 161, at 166-71. Thus, the principle of *pro homine* indicates that the customary treaties that explain the content of rights protected by international instruments have room in the domestic legal system as long as they improve its provisions.

<sup>171</sup> See Santiago Sastre Ariza, *La ciencia jurídica ante el neoconstitucionalismo*, in NEOCONSTITUCIONALISMO(S) 239, 241 (Miguel Carbonell ed., 2003); see also LEÓN BASTOS, *supra* note 121, at 42 (remarking that “the fundamental rights have a number of distinctive features that account for their different interpretation and, as a result of the language used to enumerate them in the Constitution and their highly emotional punch, their interpretation is open to different explanations from one system to another”).

<sup>172</sup> See generally Roberto L. Blanco Valdés, *Vigilar al legislador, vigilar al vigilante (legitimidad del control de constitucionalidad y selfrestraint judicial en los orígenes del sistema norteamericano: un breve apunte histórico)*, in LA JUSTICIA CONSTITUCIONAL EN EL ESTADO DEMOCRÁTICO 17, 17-39 (Eduardo Espín Templado & F. Javier Díaz Revorio eds., 2000) (illustrating that the constitutional interpretation is no less marked by limitations).

Constitutional Court regarding the open clauses that make it possible to update human rights and link their interpretation to international instruments. Special reference will be made as well to the interpretation of indigenous people's rights.

*i. Open Clauses*

As stated earlier, the "open clause" can be used to resolve the hierarchical rank of rights not enunciated in either the Bolivian constitutional text or those international human rights treaties ratified by Bolivia.<sup>173</sup> The spirit of the Bolivian Constitution is to provide full protection to human rights, whether or not they are included in the national constitutional text or the international human rights treaties ratified by the country. Nevertheless, so far, the work of the Constitutional Court has not always followed this path, developing instead a rather restrictive case law even as it seeks to ensure the incorporation of human rights into the Bolivian catalogue of rights.<sup>174</sup>

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<sup>173</sup> See Pablo Santolaya, *La apertura de las Constituciones a su interpretación conforme a los tratados internacionales*, in *DIÁLOGO JURISPRUDENCIAL EN DERECHOS HUMANOS: ENTRE TRIBUNALES CONSTITUCIONALES Y CORTES INTERNACIONALES* 447, 448 (Eduardo Ferrer Mac-Gregor & Alfonso Herrera García eds., 2013) (indicating that the open clause is about a dialogue-based system designed to use interpretation in order to integrate human rights into the fundamental rights of each instrument). The Constitution itself establishes the obligation of domestic courts to ensure the interpretative openness of fundamental rights through international treaties. *Id.*

<sup>174</sup> See, e.g., Tribunal Constitucional Plurinacional, Oct. 10, 2011, Sentencia Constitucional, No. 1448/2011-R (Bol.); Tribunal Constitucional Plurinacional, Apr. 25, 2011, Sentencia Constitucional, No. 0511/2011-R (Bol.); Tribunal Constitucional Plurinacional, Nov. 19, 2010, Sentencia Constitucional, No. 2238/2010-R (Bol.); Tribunal Constitucional Plurinacional, Nov. 19, 2010, Sentencia Constitucional, 2189/2010-R (Bol.); Tribunal Constitucional Plurinacional, Aug. 17, 2010, Sentencia Constitucional, No. 0922/2010-R (Bol.); Tribunal Constitucional Plurinacional, Aug. 10, 2010, Sentencia Constitucional, No. 0885/2010-R (Bol.); Tribunal Constitucional Plurinacional, Aug. 10, 2010, Sentencia Constitucional, No. 0874/2010-R (Bol.); Tribunal Constitucional Plurinacional, June 15, 2010, Sentencia Constitucional, No. 0334/2010-R (Bol.); Tribunal Constitucional Plurinacional, June 15, 2010, Sentencia Constitucional, No. 0325/2010-R (Bol.); Tribunal Constitucional Plurinacional, June 7, 2010, Sentencia Constitucional, No. 0296/2010-R (Bol.); Tribunal Constitucional Plurinacional, June 7, 2010, Sentencia Constitucional, No. 0295/2010-R (Bol.); Tribunal Constitucional Plurinacional, June 7, 2010, Sentencia Constitucional, No. 0275/2010-R (Bol.); Tribunal Constitucional Plurinacional, June

As far as Articles 13.IV *in fine* and 256.II of the constitution are concerned, however, the Court has used them to effectively make an open interpretation of human rights. Through the Court's interpretation of these articles, international human rights instruments have become a jurisprudential canon, by constitutional imperative, with a view to the regulation of constitutionally enunciated rights and freedoms bound to be an unavoidable reference.<sup>175</sup> Meanwhile, the international openness of Bolivian domestic legislation to international human rights law is beyond question. In this regard, the Court establishes that, in order to avoid infringing on the values of justice and equality and, therefore, the principle of reasonableness, any interpretation of the requirements or conditions to participate in the development of "cooperative willingness"<sup>176</sup> shall always be extensive, favorable, and in accordance with Articles 13.IV and 256 of the constitution.<sup>177</sup>

It must be underscored that, as part of the Court's jurisprudential activity, it is mandatory to have recourse to international treaties with a view to the interpretation of rights. The interpretative standards stipulated in Articles 13.IV and 256 must not be used unrestrainedly, as they compel the Court to interpret the rights and duties in the constitution in accordance with those

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7, 2010, Sentencia Constitucional, 0268/2010-R (Bol.); Tribunal Constitucional Plurinacional, June 7, 2010, Sentencia Constitucional, No. 0264/2010-R (Bol.); Tribunal Constitucional Plurinacional, May 31, 2010, Sentencia Constitucional, No. 0259/2010-R (Bol.); Tribunal Constitucional Plurinacional, May 24, 2010, Sentencia Constitucional, No. 0211/2010-R (Bol.); Tribunal Constitucional Plurinacional, May 24, 2010, Sentencia Constitucional, No. 0202/2010-R (Bol.); Tribunal Constitucional Plurinacional, May 24, 2010, Sentencia Constitucional, No. 0197/2010-R (Bol.); Tribunal Constitucional Plurinacional, May 4, 2010, Sentencia Constitucional, No. 0096/2010-R (Bol.); Tribunal Constitucional Plurinacional, May 4, 2010, Sentencia Constitucional, No. 0092/2010-R (Bol.). The Plurinational Constitutional Court of Bolivia, in these cases, did not grant the right to judicial protection for any constitutional status on grounds that it is not specifically stipulated as a right, refusing to provide the said legal safeguard through a Constitutional effective remedy. Such a decision entailed a restrictive interpretation of human rights, because, in accordance with the open clause of the Constitution, these rights deserve legal protection even if they are not explicitly defined as such. However, its alleged non-equivalence to be literally considered as a right has been sufficient for the Plurinational Constitutional Court of Bolivia to refuse the said protection.

<sup>175</sup> SAIZ ARNAIZ, *supra* note 133, at 153.

<sup>176</sup> "Cooperative willingness" refers to the attitude, or spirit, that should characterize the relationship of national judges to international judicial bodies.

<sup>177</sup> See Tribunal Constitucional Plurinacional, Apr. 16, 2012, Sentencia Constitucional Plurinacional, No. 0085/2012, at III.3.d (Bol.).

international human rights treaties ratified by Bolivia. While citing the international instrument in a judgment is not formally a requirement<sup>178</sup> (on the grounds that it is sufficient to adjust the content of interpretation to the standards of international human rights treaties already incorporated into domestic legislation<sup>179</sup>), their specific inclusion in a given Court decision is an adequate and desirable option. As maintained here, the mandatory nature of constitutional articles, and the fact that the judges cannot just put aside the interpretation of rights on the basis of international law whenever it suits them, means that their interpretation must be explicitly articulated in their decisions together with a reference to the relevant treaty. Only after its mention in the Court's decision can the use of one or more normative instruments be properly encouraged.<sup>180</sup> Therefore, while mentioning such an assessment in the judgment is not formally a *sine qua non*, it is strongly held to be extremely desirable in order to achieve a better understanding and implementation of the relevant canons of interpretation.

The interpretations of the Constitutional Court have proved to be indispensable in the application of external human rights sources to the new Bolivian context. These interpretations have been directed toward the accomplishment of the constitution's maximum

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<sup>178</sup> Steinhardt asserts that an effective protection of rights by domestic courts does not always require explicit consideration and application of the international treaties. Ralph Steinhardt, *The Role of Domestic Courts in Enforcing International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 267, 267 (Hurst Hannum ed., 4th ed. 2004).

<sup>179</sup> SAIZ ARNAIZ, *supra* note 133, at 205-06 (interpreting Article 10.2 of the Spanish Constitution).

<sup>180</sup> Javier Roldán Barbero, *Jurisprudencia en Materia de Derecho Internacional Público*, 62 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 165, 166 (2010). Professor Roldán Barbero concludes, in regard to

the case of Spain, that the incorporation of international parameters into jurisprudence is limited by a number of factors, including the terminological inappropriateness and conceptual uncertainty of judicial-international issues, the poor qualification required in international legislation to administer justice at the national level, and a governmental conception of foreign policy that forces judges to act with extreme caution when making incursions into this field, all of which turn the application of international law at the domestic level into a monotonous, repetitive, and hardly original task.

*Id.*

openness to international human rights law.<sup>181</sup> The Court has held that the constitution shall be mandatorily interpreted in accordance with Articles 256 and 13.IV, finding that constitutional rights must be interpreted according to international human rights treaties, and fully taking into consideration the historic origin of constitutional texts long devoted to throwing into relief the permanent struggle for the recognition and effectiveness of such rights.<sup>182</sup>

The Court also has found that this matter is completely in agreement with the intent of the Constituent Assembly, which established the guarantee of rights as one of the purposes and functions of the State, as stipulated in Article 8.4 of the constitution, revealing thereby its willingness to provide the best possible protection of rights.<sup>183</sup> By means of the dissenting vote cast by one of the members of the Constitutional Court – repeatedly used as case law – it was established that, in addition to the observance of the criteria laid down in Article 196.II of the constitution, that is to say, the literal tenor of the text and the intent of the Constituent Assembly, other sources which set forth the principle of

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<sup>181</sup> SCHNEIDER, *supra* note 166, at 18 (suggesting that “fundamental rights cannot be understood as a simple formal demarcation between certain degrees of willingness, since in that case they would waste away and become limits of non-intervention”).

<sup>182</sup> IACHR judgments mention the judicial guarantees and effective judicial protection of judges in Title III.1. They also reference the instruments stated in Title III.2.2 about the provision of protection in cases of failure to observe the said instruments. *See e.g.*, Tribunal Constitucional Plurinacional, Mar. 6, 2017, Sentencia Constitucional Plurinacional, No. 0171/2017-S2, at 19 (Bol.); Tribunal Constitucional Plurinacional, Dec. 5, 2016, Sentencia Constitucional Plurinacional, No. 1268/2016-S2, at 2-17 (Bol.); Tribunal Constitucional Plurinacional, Dec. 5, 2016, Sentencia Constitucional Plurinacional, No. 1264/2016-S2, at 10 (Bol.); Tribunal Constitucional Plurinacional, Nov. 7, 2016, Sentencia Constitucional Plurinacional, No. 1109/2016-S1, at 10 (Bol.); Tribunal Constitucional Plurinacional, Sept. 26, 2016, Sentencia Constitucional Plurinacional, No. 0922/2016-S2, at 4 (Bol.); Tribunal Constitucional Plurinacional, Dec. 7, 2015, Sentencia Constitucional Plurinacional, No. 1226/2015-S1, at 14-15 (Bol.); Tribunal Constitucional Plurinacional, Nov. 16, 2015, Sentencia Constitucional Plurinacional, No. 1181/2015-S1, at 2 (Bol.); Tribunal Constitucional Plurinacional, Nov. 6, 2015, Sentencia Constitucional Plurinacional, No. 1149/2015-S1, at 6-7 (Bol.); Tribunal Constitucional Plurinacional, Nov. 5, 2015, Sentencia Constitucional Plurinacional, No. 1101/2015-S3, at 7 (Bol.); Tribunal Constitucional Plurinacional, Nov. 5, 2015, Sentencia Constitucional Plurinacional, No. 1074/2015-S3, at 8-9 (Bol.); Tribunal Constitucional Plurinacional, Aug. 17, 2015, Sentencia Constitucional Plurinacional, No. 0832/2015-S3, at 10 (Bol.).

<sup>183</sup> Tribunal Constitucional Plurinacional, July 9, 2012, Sentencia Constitucional Plurinacional, No. 0510/2012, at III.3.3 (Bol.).

interpretation in accordance with international treaties<sup>184</sup> must be considered. Among these are Articles 13.IV and 256 of the constitution, which entail recognition of the principles of *pro homine* and “progressive realization.” These criteria are held to be typical of a *principista* (principles-based) and *garantista* (rights-based) Constitutional Court.<sup>185</sup>

Even beyond the interpretation criteria stipulated in Article 196.II of the constitution, the failure to implement Articles 13.IV *in fine* and 256 would bring with it an *interpretatio in peius* and, therefore, create a vacuum in Bolivian constitutional justice, causing judicial uncertainty in the Unified Social State of Plurinational Communitarian Law. The latter body of law imposes on constitutional interpreters the obligation to safeguard the values and principles of the Bolivian State, which in turn are intended to protect human dignity and “society’s sensibility.”<sup>186</sup> According to the Constitutional Court, any interpretation of the constitution must be based upon an extendable and favorable criterion, which requires the assurance of the best possible protection of constitutional rights through an interpretation underpinned by international standards in accordance with Articles 13.IV and 256.<sup>187</sup> In this connection, the Court also indicated that the interpretation of rights should comply with Article 29 of the American Convention on Human Rights to preserve the values of justice and equality, as well as to avoid jeopardizing the principle of reasonableness, thus giving full effect and judicial relevance to the interpretative canons of the American Convention.<sup>188</sup>

As emphasized by the Constitutional Court, Articles 13.IV and 256 explicitly stipulate that the rights enshrined in the constitution

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<sup>184</sup> See Eyal Benvenisti, *Judges and Foreign Affairs: A Comment on the Institut de Droit International’s Resolution on ‘The Activities of National Courts and the International Relations of their State’*, 5 EUR. J. INT’L L. 423, 427-28 (1994).

<sup>185</sup> Tribunal Constitucional Plurinacional, Oct. 21, 2011, Sentencia Constitucional, No. 1688/2011-R, at 4 (Bol.).

<sup>186</sup> Tribunal Constitucional Plurinacional, July 13, 2011, Voto Disidente, Sentencia Constitucional, No. 0406/2011-R, at 5 (Bol.).

<sup>187</sup> See *e.g.*, Tribunal Constitucional Plurinacional, Aug. 17, 2010, No. 0980/2010-R, at 5 (Bol.).

<sup>188</sup> García Roca, *supra* note 167, at 15-16. It is worth mentioning that “conferring jurisdiction over fundamental rights on international bodies is an obvious form of a State’s self-restraint in the exercise of its decision-making, jurisdictional, and revising competencies.” *Id.*

shall be interpreted in accordance with international human rights treaties that are similarly observed by other supranational bodies, including the Inter-American Court on Human Rights.<sup>189</sup> When it comes to the interpretation of rights, the Constitutional Court has incorporated not only formal but also material international instruments which, despite not being mentioned in the constitutional text, the Court has ratified and implemented in its jurisprudential activity. In this manner, the Court has treated non-formal international norms such as the interpretations made by international courts in matters of human rights as essential to the interpretation of constitutional rights on account of their axiological or principles-based values.

Thus, the Constitutional Court has embraced and validated interpretations of human rights stemming from international courts over which it has no jurisdiction.<sup>190</sup> This fact is fully consistent with the assumption that, in the process of judicial incorporation of human rights emanating from international instruments, the rights proclaimed by international instruments ensure that they be discussed or recognized. The decisions and interpretations made by international courts also have special relevance in the process of reinforcing and extending the international character of human rights.<sup>191</sup>

The Court also has declared unconstitutional the use of international instruments out of context, or when the instruments are manipulated to justify domestic actions even though such actions would constitute a flagrant violation of constitutional obligations.<sup>192</sup> As the Court sees it, the need to fulfill the

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<sup>189</sup> Tribunal Constitucional Plurinacional, July 14, 2011, Voto Disidente, Sentencia Constitucional, No. 0460/2011-R, at 2-3 (Bol.) (establishing that “another reason to give the Judgments emanated from the IACHR constitutional preeminence over domestic law is the so-called Doctrine of Useful Effect of the Judgments in matters of human rights, the same one developed by the IACHR itself”).

<sup>190</sup> *See id.*

<sup>191</sup> Chang & Yeh, *supra* note 142, at 1168.

<sup>192</sup> *See* Tribunal Constitucional Plurinacional, Feb. 21, 2014, Sentencia Constitucional Plurinacional, No. 0362/2014 (Bol.). Noticeable in this judgment is the declaration of the unconstitutional nature of imposing, as legal standards about military interventions in domestic conflicts, principles and regulations that govern the control of international armed conflicts, thus denouncing the capricious interpretation of the rules from the viewpoint of the State’s intent by pointing out

constitution's normative content demands a jurisprudential activity capable of bridging infra-constitutional gaps, solving conflicts, and preventing collision of laws, always considering the constitutional text as the preeminent source. The only exception to this understanding would be the appearance of international human rights law on the scene, in such a manner as established by Articles 13, 256.II, and 410 of the constitution.<sup>193</sup>

The treatment given to human rights through constitutional provisions is understood both in a unitary manner, as when rights are approached in a comprehensive way, and in a dynamic manner, because, according to its norms, the Bolivian catalogue of rights is always open and, therefore, in constant evolution. Another consequence of the new interpretative criteria is that the constitutional interpreters cannot make an interpretation of rights and their guarantees solely from a national standpoint. They also must make sense of their interpretation on the basis of the rules contained in international human rights instruments.<sup>194</sup>

With the inclusion of Articles 13.IV *in fine* and 256.II, the constitution envisages appropriate keys for the interpretation of constitutional rights, since it establishes guidelines intended to make it possible for Bolivian domestic law to influence, and be influenced by, international human rights law in order to guarantee effective protection of rights.<sup>195</sup> These provisions are new in

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that the instruments used to deal with armed conflicts shall not be taken as being similar to those used to solve domestic or social conflicts in the way intended by said regulations. *Id.* The Plurinational Constitutional Court indicated that the enforcement of international humanitarian law regulations in cases not recognized therein entail their normative infringement. *Id.* However, the dissenting vote cast by Judge Ligia Mónica Velásquez Castaños on February 21, 2014 said that the above-mentioned regulations should have been declared constitutional in light of the prevailing climate of conflicts in the country, wrongly putting the concepts of armed conflict and internal conflict on a level with occasional occurrences leading up to domestic conflicts, the extent and connotations of which are actually quite different. *Id.*

<sup>193</sup> Tribunal Constitucional Plurinacional, Aug. 16, 2013, Sentencia Constitucional Plurinacional, No. 1357/2013, at III.1 (Bol.).

<sup>194</sup> Tribunal Constitucional Plurinacional, Dec. 20, 2011, Voto Disidente, Sentencia Constitucional, No. 1132/2011-R (Bol.).

<sup>195</sup> It can be said that international human rights law has not evolved equally around the world, with the United States considered a special case. CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM, at xi-xiii (2013). On one hand, the scope of international law has increased significantly and gained a strong

Bolivian constitutional history. It is the first time that constitutional norms are enumerated in such a way that they open themselves up to interpretation with reference to international human rights instruments. This fact sets in relief Bolivia's awareness of the crucial relevance of international human rights law. With a basis on the constitution's interpretation, the Court's domestic constitutional legislation has widened the constitution's horizons regarding the protection of rights from what we might call a multilevel perspective.<sup>196</sup>

*ii. Indigenous Rights*

The content of Bolivian constitutional rights ranges from the symbolic consecration of rights and principles to the thorough definition of rights and their normatively precise guarantee, always on the basis of the defense and promotion of indigenous cultures and customs. Since the content of these rights cannot be expressed literally in all their possible dimensions, it is essential to have recourse to other normative frameworks. This, in turn, brings international human rights law to the foreground, as part of an attempt to make combinations among, and set boundaries between, the rights of the indigenous peoples and other types of rights.<sup>197</sup>

The appeal to international human rights law must preserve the meaning of national norms and the characteristic identity of constitutional norms as much as possible, paying particular

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presence in domestic legislation, particularly when it comes to human rights, as evidenced by the fact that the Supreme Court of the United States has ruled over a number of cases on the basis of international human rights law. *Id.* On the other hand, however, the U.S. approach can be seen as "selective and pragmatic," always concerned about which international law to incorporate into its legislation, and undeniably bent on giving control over the application of international law to political organs. *Id.* at xiii. So even if judges play a role in the enforcement of international law, they usually abide by the decisions and actions of the U.S. executive branch and Congress. *Id.*

<sup>196</sup> See PAOLA BILANCIA & FEDERICO GUSTAVO PIZZETTI, ASPETTI E PROBLEMI DEL COSTITUZIONALISMO MULTILIVELLO 259-66 (2004) (discussing the conflicts and synergies concerning the protection of rights on various institutional levels).

<sup>197</sup> HÄBERLE, *supra* note 12, at 99-104. "As a result of interpretative openness, it is always possible to make lone interpretations of a right contained in different findings of the regional Constitutional Courts with a view to enriching the court's own assessments and interpretations." *Id.*

attention to the rights of the indigenous peoples.<sup>198</sup> The circumstances surrounding the activity of legal systems are of paramount importance to understanding how to enforce their rules because the various interpretations of conflicting rights are contingent on their individual features. All these considerations put special obstacles in the path of the interpretation of rights.<sup>199</sup> The complex nature of the catalogue of rights stipulated in the constitution makes it impossible to seek conventional solutions if we take into account that it would be highly difficult for such solutions to succeed in the vast diversity of dimensions that characterize and define Bolivian rights. The wide-ranging catalogue of rights established in the new Bolivian constitutional text can give rise to conflicts among them and even to reciprocal relations likely to be identified “zero sum.”<sup>200</sup> Therefore, the treatment of these rights from a constitutional viewpoint is an extremely sensitive matter.<sup>201</sup>

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<sup>198</sup> See Horst Schönbohm, *El Pluralismo Jurídico – Una Comparación a Nivel de América Latina*, in *LOS DERECHOS INDIVIDUALES Y DERECHOS COLECTIVOS EN LA CONSTRUCCIÓN DEL PLURALISMO JURÍDICO EN AMÉRICA LATINA* 35, 37 (Susanne Käss & Claudia Heins eds., 2011) (stating that “through the ratification of international instruments, Bolivia starts to recognize judicial pluralism and that a comprehensive review of international law will contribute to making indigenous rights twice as strong, both at the national and international level”).

<sup>199</sup> See ERNST-WOLFGANG BÖCKENFÖRDE, *ESCRITOS SOBRE DERECHOS FUNDAMENTALES* 67-68 (Juan Luis Requejo Pagés & Ignacio Villaverde Menéndez trans., 1993) (stating that in no case would any theories of interpretation be excluded, which means that the interpretation of rights can find support in different foundations at the interpreters’ discretion).

<sup>200</sup> Anna Pintore, *Derechos insaciables*, in *LOS FUNDAMENTOS DE LOS DERECHOS FUNDAMENTALES* 243, 258 (Antonio de Cabo & Gerardo Pisarello eds., Perfecto Andres, et al. trans., 2001).

<sup>201</sup> Rights in Bolivia start by reconstructing judicial logic from a collective perspective and transforming individual canons, which does entail an adaptation to post-colonial pluralism, according to long-settled accumulated procedures. Farit L. Rojas Tudela, *Del Monismo al Pluralismo Jurídico: Interculturalidad en el Estado Constitucional*, in *LOS DERECHOS INDIVIDUALES Y DERECHOS COLECTIVOS EN LA CONSTRUCCIÓN DEL PLURALISMO JURÍDICO EN AMÉRICA LATINA* 21, 28-31 (Susanne Käss & Claudia Heins eds., 2011). In reference to the problems of compatibility between indigenous rights and other rights, Waldo Albarracín Sánchez holds that “there is no extrapolation between them, nor do any of those rights subordinate to another, since they are not only perfectly compatible, but also mutually dependent and capable of complementing one another.” Waldo Albarracín Sánchez, *La Protección de los Derechos de los Pueblos Indígenas en el Derecho Internacional*, in *LOS DERECHOS INDIVIDUALES Y DERECHOS COLECTIVOS EN LA CONSTRUCCIÓN DEL PLURALISMO JURÍDICO EN AMÉRICA LATINA* 67, 82 (Susanne Käss & Claudia Heins eds., 2011).

For these reasons, the main goal in constitutional jurisprudence is to encourage an interpretation that prevents the links among constitutional instruments from manifesting themselves as a relationship based on independence or hierarchy rather than one based on continuity and mutual reciprocity. Weighing the different norms<sup>202</sup> in this case proves to be the perfect procedure to solve cases involving principles that tend to be contradictory but capable, theoretically speaking, of coexisting together with the relevant laws or regulations that enshrine those principles. In this respect, rather than challenging the constitutional character of a right-protecting law, judges interpret it in such a way that the strength of its underlying principle is in harmony with that of the conflicting principle.<sup>203</sup>

In light of Bolivia's multi-ethnic and pluricultural characteristics, it is necessary to consider various solutions vis-à-vis the interpretation of the rights of indigenous peoples.<sup>204</sup> We must bear in mind that a superficial universality of human rights based only on Western ontological conceptions can prove to be largely incompatible with native models that are not in harmony with them, even when those Western conceptions might enjoy international acceptance. The negation of a constructive dialogue about the indigenous models would be opposite to the spirit of human rights, as it would entail a sort of "ultracriminalization" of the native systems.<sup>205</sup> Under this premise, the constitution recognizes

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<sup>202</sup> For analysis concerning ponderation as a technique to apply instruments based on fundamental rights, see Díez-PICAZO, *supra* note 78, at 51-54.

<sup>203</sup> Luis Prieto Sanchís, *Neoconstitucionalismo y Ponderación Judicial*, 5 ANUARIO DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD AUTÓNOMA DE MADRID 201, 205 (2001).

<sup>204</sup> See Ley de Deslinde Jurisdiccional [Law of Jurisdictional Demarcation], Ley No. 073, art. 12 (2010), Gaceta Oficial de Bolivia (Bol.). One of the main conflict-creating aspects has been the stipulation that the decisions related to "Indigenous Jurisdiction" shall be mandatory and cannot be revised by other jurisdictions. *Id.* The Plurinational Constitutional Court has not only made it clear that it is important to have different judicial systems to protect Bolivian pluralism, but has also emphasized that the systems, just like any other jurisdiction, shall be subject to the control of the Plurinational Constitutional Court, which is as much binding on formal legislation as it is on the laws of the indigenous peoples, be they enunciated or not. Tribunal Constitucional Plurinacional, June 18, 2012, Sentencia Constitucional Plurinacional, No. 0300/2012, at III.1.2 (Bol.).

<sup>205</sup> Armin Von Bogdandy, *Configurar la Relación entre el Derecho Constitucional y el Derecho Internacional Público*, 6 INT'L J. CON. L. 397 (2007).

“indigenous jurisdiction”<sup>206</sup> as equal in status to the ordinary jurisdiction<sup>207</sup>. Such jurisdiction is to be exercised by the indigenous community authorities, who shall apply their own principles, cultural values, norms and procedures, while respecting the rights and guarantees established in the constitution.<sup>208</sup>

The exercise of “indigenous jurisdiction” is subject to further restrictions<sup>209</sup> defined by the minimum standards of international law. In this respect, Bolivian legislation has stipulated that “indigenous jurisdiction” shall respect and guarantee the exercise of women’s rights, participation, presence and permanence, both regarding their right to equal and just access to any job or position, and to the control of, decisions about, and participation in, the

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<sup>206</sup> According to article 191 of the Bolivian Constitution, the Indigenous Jurisdiction applies to the members of the indigenous peoples whose relations and juridical acts, or the resulting effects thereof, take place within the indigenous community. CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 191 (Bol.). On the other hand, Article 8 of the Law of Jurisdictional Demarcation emphasizes that the Indigenous Jurisdiction is exercised in the areas of personal, material, and territorial legal effect when these elements concur, which means that only exclusively indigenous affairs shall be subject to this jurisdiction, whereas any other matter shall be under the ordinary jurisdiction *See* Ley de Deslinde Jurisdiccional [Law of Jurisdictional Demarcation], Ley No. 073, art. 8 (2010), Gaceta Oficial de Bolivia (Bol.).

<sup>207</sup> CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 179 (Bol.).

<sup>208</sup> *Id.* art. 190.

<sup>209</sup> Under “Indigenous Jurisdiction” courts shall not hear crimes against international law, crimes against humanity, crimes against the internal State and external security, terrorism, tax and customs law violations, corruption and any other crime against the State, human trafficking and people smuggling, arms dealing and crimes related to drug-trafficking, crimes against the physical integrity of children and teenagers, rape, murder or homicide, any process to which the State is party or interested third party through its central decentralized autonomous administration, and all crimes related to copyright law. *See* Ley de Deslinde Jurisdiccional [Law of Jurisdictional Demarcation], Ley No. 073, art. 10 § II (2010), Gaceta Oficial de Bolivia (Bol.). Nor shall it hear legal matters related to labor, social security, taxation, administrative affairs, mining operations, hydrocarbons, forestry, computer science, international law and agrarian law, except those concerning the internal distribution of lands under legal ownership or collective proprietary right. *Id.* Regarding this demarcation of the competence of “Indigenous Jurisdiction,” its final scope only addresses peripheral matters, that is, whatever can be resolved through legal control systems, which requires that true indigenous justice is bound to be structured on the basis of the new Bolivian constitutional text. CARLOS ALBERTO GOITIA, CONSTITUCIÓN POLÍTICA Y JUSTICIA INDÍGENA ORIGINARIA CAMPESINA: POTESTADES DE GENERACIÓN NORMATIVA Y DE ADMINISTRACIÓN DE JUSTICIA 345 (2012).

administration of justice.<sup>210</sup> In no case shall the rulings of the indigenous courts mandate the loss of land by, or the expulsion of, senior citizens or persons with disabilities on grounds of their failure to fulfill duties, obligations, contributions or communal responsibilities.<sup>211</sup> The legislation also categorically prohibits and punishes all forms of violence against children, teenagers and women, and rules out any form of conciliation related to these offenses, declaring that any agreements involving these matters are illegal.<sup>212</sup>

It is important to highlight the expected interpretation of constitutional rights as *individually* and *collectively* recognized, since both forms of recognition involve a special type of protection. This new approach to understanding human rights in the Plurinational State of Bolivia must be carefully followed by the Constitutional Court in order to pay attention to, and preserve, the existing boundaries between collective and individual rights. Owing to the forms of communal relationships embraced by the indigenous peoples, the ways of enforcing legislation are also deemed to encompass the overall indigenous population rather than merely the individual.<sup>213</sup> This is also in line with recognition of indigenous rights by the Inter-American Court of Human Rights.<sup>214</sup>

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<sup>210</sup> Ley de Deslinde Jurisdiccional [Law of Jurisdictional Demarcation], Ley No. 073, art. 5 § II (2010), Gaceta Oficial de Bolivia (Bol.).

<sup>211</sup> *Id.* art. 5; see also CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 191 (Bol.) (establishing that courts exercising rural native indigenous jurisdiction hear rural native matters as set out in the Law of Jurisdictional Demarcation).

<sup>212</sup> Ley de Deslinde Jurisdiccional [Law of Jurisdictional Demarcation], Ley No. 073, art. 5 §§ III, IV (2010), Gaceta Oficial de Bolivia (Bol.).

<sup>213</sup> Vega Camacho, *supra* note 99, at 257-58

<sup>214</sup> See *Mayagna (Sumo) Awás Tingni Community v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001) (“Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community.”). It is also recognized that that “[i]ndigenous peoples’ customary law must be especially taken into account.” *Id.* at ¶ 151. The IACHR also recognizes the customary practices of indigenous communities and their communal link with their territories. See, e.g., *Comunidad Garífuna Triunfo de la Cruz y sue Miembros v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 305, ¶ 100 (Oct. 8, 2015); *The Kaliña and Lokono Peoples v. Suriname*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 284, ¶ 129 (Nov. 25, 2015); *The Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and

The recognition of rights from a multiethnic and pluricultural perspective undoubtedly goes beyond the old conception of rights contained in previous constitutional texts. The inclusion of these new rights makes it necessary for the constitution to open itself widely to the incorporation of new cultural values and principles which have been hitherto systematically disregarded. While Article 13.IV *in fine* paves the way for an interpretation in keeping with international law, Article 256.II establishes at the same time that the most favorable norms shall have preferential application. As this provision clearly stipulates, the interpretation of rights shall be based on the best protection that a norm can provide regardless of its source and, therefore, it is imperative to ensure such protection.

International human rights law is then a strong driving force and measure of human rights, but it always must be adjusted to an indigenous people's own system of laws. Even if the norms related to human rights tend to become universal, it is also true that the typical characteristics of every culture must be carefully weighed in each particular case. The indeterminate provisions found in the constitution can be considered a possible route for bringing in international human rights law as a tool to resolve conflicts within the indigenous jurisdiction.

Both the "open clause" and Articles 13.IV *in fine* and 256.II of the constitution represent a significant evolution in regard to the interpretation of constitutional rights, because they respectively allow for, and mandate, any interpretation to be based on the provisions laid down in international human rights treaties.

The chief purpose of these measures is to safeguard the minimum standards or contents of these rights insofar as they are recognized in international instruments. In light of the fact that the aforementioned norms, which are binding even on legislators, specify non-negotiable standards protected by the Constituent Assembly, but are in permanent evolution.<sup>215</sup>

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Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 145 (June 27, 2012); The Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v. Panama, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 284, ¶ 111 (Oct. 14, 2014).

<sup>215</sup> Santolaya, *supra* note 173, at 449

Furthermore, their importance is maximized when they count upon legal entities that are in charge of their interpretation and possible revision.<sup>216</sup>

#### IV. THE POSITION OF HUMAN RIGHTS IN THE BOLIVIAN LEGAL SYSTEM

As we have discussed, the Bolivian State established that the proclamation of rights contained in its constitutional text shall not be understood as a negation of other rights not enumerated in the constitution. In addition, the classification of such rights does not determine any hierarchy or superiority of some rights over others.<sup>217</sup> As a novelty in the Bolivian constitutional system, the constitution incorporates Articles 13.IV *in fine* and 256.II, which state that the rights and obligations recognized in the constitutional text shall be interpreted in agreement with international human rights treaties.

All the above-mentioned provisions are highly relevant and extremely important tools for the protection of rights. As a prevailing tendency, Latin American constitutional texts have been gradually incorporating articles that make it possible to legitimize the privileged position of international law and, therefore, put it into practice in a more effective way.<sup>218</sup> Pursuant to this tendency, the Bolivian Constituent Assembly included a number of provisions that give shape to a system of sources that make room for international human rights instruments.

In this section, we examine the position that the Bolivian system has assigned to international human rights instruments and their impact on the national system of laws. In particular, we analyze the incorporation of international human rights treaties into the "Block

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<sup>216</sup> *Id.*

<sup>217</sup> CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 13.II, 13.III (Bol.).

<sup>218</sup> See Héctor Fix-Zamudio, *El Derecho Internacional de los Derechos Humanos en las Constituciones Latinoamericanas y en la Corte Interamericana de Derechos Humanos*, 75 BOLETÍN MEXICANO DE DERECHO COMPARADO 749 (1992) (noticing this tendency in the 1990s, and remarking that, "generally speaking, the recognition of international human rights instruments as a topic was being incorporated into the Latin American constitutions in a rather cautious and biased manner").

of Constitutionality,”<sup>219</sup> as well as the provisions that might even give such treaty norms prevalence over the Bolivian constitutional text itself, including details about the effect of specific cases on domestic legislation.

*a. Block of Constitutionality*

In previous Bolivian constitutions, the position of international human rights treaties was largely relegated to a secondary place.<sup>220</sup> Not so in the new constitutional text.<sup>221</sup> The incorporation of international human rights treaties into the so-called Block of Constitutionality blazes a trail for the protection of rights.

*i. Article 410.II*

The new Bolivian constitutional text is built along a complex spectrum of gradations and hierarchies involving international law. While the constitution makes it clear that its text enjoys supremacy over any other legislation, it opens the door for certain norms of international law to be placed on par with its own hierarchical level. This landmark in the recognition and protection of international instruments would have been unthinkable in previous Bolivian constitutions.

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<sup>219</sup> In Latin American law, the term “Block of Constitutionality” is used to refer to the entire set or “block” of rules, norms, and decisions that enjoy constitutional status.

<sup>220</sup> See CONSTITUCIÓN POLÍTICA DE 1826 Nov. 19, 1826 (Bol.) (conferring limited rights to Bolivian citizens and empowering the legislature to enter into treaties); CONSTITUCIÓN POLÍTICA DE 1861 Aug. 5, 1861 (Bol.) (providing a general framework for civil rights, while separately allocating power to approve international treaties to the national legislature); CONSTITUCIÓN POLÍTICA DE 1945 Nov. 24, 1945 (Bol.) (granting civil rights to Bolivian citizens, without reference to international human rights treaties and conventions).

<sup>221</sup> ANTONIO ENRIQUE PÉREZ LUÑO, *EL DESBORDAMIENTO DE LAS FUENTES DEL DERECHO* 76 (1993). Pérez Luño points out that the displacement of instruments is due not only to the emergence of powers above the State, but also to the expansion of normative jurisdiction of intermediate entities, all of which is conducive to a pluralistic determination of judicial sources. *Id.*

According to Article 410 of the constitution, “international treaties ratified by Bolivia in matters of human rights are part of the Block of Constitutionality.”<sup>222</sup> This rule provides international human rights treaties with the highest possible rank in the internal system of laws.<sup>223</sup> For all intents and purposes, the norms contained in those treaties are standards of constitutionality for the rest of Bolivia’s domestic laws.<sup>224</sup> In this respect, international human rights law goes beyond its usual status in other legal systems as the provider of a canon of judicial interpretation, and it acquires a constitutional rank that makes it especially strong and ensures its protection by domestic legislation.

To this end, the Constituent Assembly relied on constitutional recognition of international human rights treaties to stipulate the prioritized protection of human rights. In the exercise of its power, the State shall not restrain these rights, but rather be under their control, thus acknowledging the importance of international human rights law and other universal standards with a view to enforcing them.<sup>225</sup> The acceptance of the existence and recognition of internationally agreed upon human rights is patently obvious, as is the objective obligation to prevent their violation or any diminution in their enjoyment and exercise, as an invaluable mainstay to

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<sup>222</sup> CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 410.II (Bol.).

<sup>223</sup> See, e.g., *Contradicción de Tesis 239/2011*. Suscitada entre los tribunales colegiados de circuito tercero y cuarto, ambos del centro auxiliar de la tercera región con residencia en Guadalajara, Jalisco, y el primer tribunal colegiado en materia de trabajo del tercer circuito, Segunda Sala de la Suprema Corte de Justicia de la Nación [SCJN], Agosto de 2011 (Mex.) (refusing to make a pronouncement on the hierarchy of international instruments in matters of human rights, but deciding that, pursuant to the interpretation of the constitutional reforms of June 6 and 10, 2011, the human rights norms were not hierarchically related to domestic legislation except when the constitution expressly establishes some kind of restriction regarding the exercise of human rights which are otherwise prioritized); see Ramón Ortega García, *La jerarquía de los tratados internacionales sobre derechos humanos a la luz de la reforma constitucional del 10 de junio de 2011*, 15 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 495 (2015).

<sup>224</sup> See, e.g., CONSTITUCIÓN DE LA REPUBLICA DEL PARAGUAY June 20, 1992, art. 142 (providing the international human rights treaties with constitutional status through article 142, indicating that they may only be denounced by constitutional amendment).

<sup>225</sup> See Arturo Santiago Pagliari, *Derecho Internacional y Derecho Interno. El Sistema Constitucional Argentino*, 7 ARS BONI ET AEQUI 17 (2011).

guarantee their protection within the country.<sup>226</sup> Accordingly, the Constitutional Court has recognized that international human rights instruments demand that the parties implement effective, prompt, and efficient forms of protection against any act that may violate these rights.<sup>227</sup> This, in turn, is in accordance with the constitutional rank granted to international human rights treaties, taking into account that one of the most important ways to defend them is to incorporate them into the domestic system of laws and give them constitutional status.<sup>228</sup>

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<sup>226</sup> See JUAN CARLOS VEGA, MARISA ADRIANA GRAHAM & JUAN PABLO CAFIERO, *JERARQUÍA CONSTITUCIONAL DE LOS TRATADOS INTERNACIONALES* (1996). Javier Armando Lorente points out that, in the case of Argentina, these Treaties shall only be denounced after approval of two-thirds of all the members of each House, the same majority required for a Constitutional Reform. JAVIER ARMANDO LORENTE, *CONSTITUCIÓN DE LA NACIÓN ARGENTINA Y TRATADOS INTERNACIONALES CON JERARQUÍA CONSTITUCIONAL* 77-78 (1994). In Armando Lorente's opinion, the denouncement of the international treaties will involve a *sui generis* constitutional reform with practical and judicial consequences which are likely to be very difficult to appreciate. *Id.* He also underscored that, in order to attain constitutional hierarchy, any other international treaty shall also need the vote of two thirds of all the members of each House.

<sup>227</sup> Tribunal Constitucional Plurinacional, Apr. 7, 2011, Sentencia Constitucional, No. 0375/2011-R (Bol.).

<sup>228</sup> A different conclusion has been reached, for instance, by the Constitutional Court of Chile, which stated that it is impossible to hold that the Constitution can be amended by a treaty in matters of essential rights derived from human nature. By handing down such a ruling, the Chilean court has categorically established that, if the said treaty contains norms in disagreement with the Constitution, it can only be rightfully incorporated into the domestic system of laws through a previous constitutional reform. Tribunal Constitucional [T.C.] [Constitutional Court], 8 abril 2002, "Requerimiento Formulado por Diversos Diputados con el Objeto de que el Tribunal Declare la Inconstitucionalidad del Estatuto de Roma de la Corte Penal Internacional, Adoptado en Dicha Ciudad el 17 de Julio de 1998, de Acuerdo al Artículo 82, N°2, de la Constitución Política de la República," Rol de la causa: 346 (Chile). The majority also affirmed the preeminence of the Constitution over international treaties on grounds that the latter attain the legal status required to become part of domestic legislation. It is worth mentioning that there is no consensus regarding its hierarchy. Raúl Bertelsen Repetto, *Rango Jurídico de los Tratados Internacionales en el Derecho Chileno*, 23 *REVISTA CHILENA DE DERECHO* 211, 221 (1996); Teodoro Ribera Neumann, *Los Tratados Internacionales y su Control a Posteriori por el Tribunal Constitucional*, 5 *ESTUDIOS CONSTITUCIONALES* 89, 99 (2007). Ribera Neumann says no international treaty capable of challenging constitutional supremacy has ever been approved, in accordance with Article 54.1 of the Chilean Constitution. *Id.* He has also remarked that the final part of the second item of Article 5 of the Constitution does not turn the Human Rights Treaties ratified by Chile into a "material Constitution," nor does it ensure a tacit amendment of the Constitution or its incorporation into what is understood as the Block of Constitutionality. *Id.*

In addition to giving international human rights treaties the highest possible rank at the domestic level, the Constitutional Court has established that the Block of Constitutionality includes the jurisprudence<sup>229</sup> emanating from the IACHR.<sup>230</sup> Therefore, since all the judgments issued by the IACHR shall prevail over, and be the basis of, the whole domestic system of laws, all the norms and decisions originating from the inter-American human rights system govern the interpretation and implementation of human rights.<sup>231</sup> It is difficult to imagine a more comprehensive protection at a domestic level of the judgments issued by the IACHR than the one offered by the Bolivian Constitutional Court.<sup>232</sup> Through its decision, the Constitutional Court has set in relief an integrated and essential understanding of itself as the prime defender of rights in

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<sup>229</sup> Regarding the recognition of jurisprudence, the Spanish Constitutional Court offers a highly relevant example by stating that in accordance with its Constitution's Article 10.2, not only shall the jurisprudence originating from the European Court of Human Rights be used as an interpretative criterion, it shall also take immediate effect in Spanish legislation. S.T.C., Oct. 25, 1993 (F.J., No. 303/1993, p. 8) (Spain); see also Eugeni Gay Montalvo, *El diálogo del Tribunal Constitucional Español con la doctrina de otros Tribunales*, in *DIÁLOGO JURISPRUDENCIAL EN DERECHOS HUMANOS: ENTRE TRIBUNALES CONSTITUCIONALES Y CORTES INTERNACIONALES* 243, 252-53 (Eduardo Ferrer Mac-Gregor & Alfonso Herrera García eds., 2013).

<sup>230</sup> Contradicción de Tesis 239/2011. Suscitada entre los tribunales colegiados de circuito tercero y cuarto, ambos del centro auxiliar de la tercera región con residencia en Guadalajara, Jalisco, y el primer tribunal colegiado en materia de trabajo del tercer circuito, Segunda Sala de la Suprema Corte de Justicia de la Nación [SCJN], Agosto de 2011 (Mex.). In the Mexican case, and following the denunciation in June 24, 2011, the nation's Supreme Court decided that the precedents established by the IACHR resolutions are binding, regardless of whether Mexico has been involved in the relevant conflict, because they are an extension of the international treaties being interpreted, giving full consideration to the fact that it is on the basis of these criteria that the content of the human rights stipulated by them will be determined. *Id.*

<sup>231</sup> See Tribunal Constitucional Plurinacional, May 10, 2010, Sentencia Constitucional, No. 0110/2010-R (Bol.). This judgment also establishes that constitutional interpreters have abided by IACHR jurisprudence, that is to say, because of their expansionary influence, their rulings become directly effective in the States parties, regardless of whether the said jurisprudence emanated from a case in which the said States are facing charges. *Cabrera García v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 79 (Nov. 26, 2010).

<sup>232</sup> For an analysis concerning the political implications of the supranational courts, see Mary L. Volcansek, *Supranational Courts in a Political Context*, in *LAW ABOVE NATIONS: SUPRANATIONAL COURTS AND THE LEGALIZATION OF POLITICS* 1 (1997).

the inter-American context, revealing its far-reaching vocation as protector of human rights and highlighting its progressive nature.<sup>233</sup>

The will to provide full protection for IACHR judgments becomes patently obvious with the Constitutional Court's pronouncement that one of the reasons to sustain its constitutional hierarchy at the domestic level can be explained through "the useful effect doctrine" as applied to judgments related to human rights.<sup>234</sup> Developed by the IACHR,<sup>235</sup> this doctrine stipulates that the judgments delivered upon confirmation that a human right has been violated shall generate international responsibilities for the State violator, thereby placing on that State inescapable and inexcusable duties vis-à-vis the international community.<sup>236</sup> Through this "useful effect doctrine," IACHR jurisprudence is fulfilled and receives full recognition at the domestic level.<sup>237</sup>

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<sup>233</sup> In this regard, some authors point out that national courts' cooperation with an international tribunal can play a critical role in developing review powers vis-à-vis the executive operating at the level of an international organization. They also hold that these courts have undertaken collective action as a response to the prevailing international needs. Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT'L L. 59, 61-62 (2009); Tom Ginsburg, *National Courts, Domestic Democracy, and the Evolution of International Law: A Reply to Eyal Benvenisti and George Downs*, 20 EUR. J. INT'L L. 1021, 1021-26 (2010).

<sup>234</sup> Rafael Bustos Gisbert, *XV Propositiones Generales para una Teoría de los Diálogos Judiciales*, 95 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 13, 39-40 (2012) ("[I]f the decisions of other courts are appropriated by a nation for incorporation into its own constitutional rule, we can talk about comprehensive summaries, which takes place when dialogue leads to the inclusion of *external case law on rights in the domestic case law*.").

<sup>235</sup> See *Dismissed Congressional Employees v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 158, ¶ 128 (Nov. 24, 2006); *Heliodoro Portugal v. Panama*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 186, ¶ 180 (Aug. 12, 2008).

<sup>236</sup> Tribunal Constitucional Plurinacional, July 14, 2011, Voto Disidente, Sentencia Constitucional, No. 0406/2011-R (Bol.).

<sup>237</sup> The recognition of IACHR jurisprudence as part of the Block of Constitutionality is extremely important. States have usually been reluctant to recognize the binding character of the jurisprudence established by supranational courts, even in cases that those States themselves have been party to. It has happened with the United States, which stated in the famous case, *Medellín v. Texas*, 552 U.S. 491 (2008), that, in order to reject the court's decision, "[n]othing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the" judgments of an international tribunal should be given a higher status than that enjoyed by the country's most fundamental constitutional

Regardless of whether Bolivia is party to a legal proceeding before the IACHR, its Constitutional Court incorporates the arguments of IACHR judgments into the Block of Constitutionality.<sup>238</sup> The Constitutional Court has pointed out that the norms originating from international constitutional systems are fully integrated into the Bolivian Block of Constitutionality, and thus has endorsed the “constitutionalization” and dissemination of axiomatic and dogmatic guarantees-based international legal instruments.<sup>239</sup> This is an open and comprehensive interpretation, with the Constitutional Court offering innovative solutions in harmony with the principle of a State that is subject to the rule of law and seeks maximum protection of human rights.<sup>240</sup>

Article 410.II of the Bolivian Constitution is not limited to creating a closed catalogue of international instruments with constitutional rank. On the contrary, it leaves it open to all international human rights treaties already ratified or that may be ratified by the Plurinational State of Bolivia in the future. On the basis of this article, new types and concepts of rights never before enumerated as such have been qualified and introduced into the new constitutional text. In this manner, for example, Bolivian constitutional law incorporates international human rights law, the right to peace, international humanitarian law, the right to integration, and other international norms designed to protect human rights, both as a fundamental part of the national

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protections. LOUIS HENKIN, SARAH H. CLEVELAND, LAURENCE R. HELFER, GERALD L. NEUMAN & DIANE F. ORENTLICHER, *HUMAN RIGHTS* 944-45 (2d ed. 2009).

<sup>238</sup> Tribunal Constitucional Plurinacional, Sept. 20, 2012, Sentencia Constitucional, No. 1250/2012 (Bol.).

<sup>239</sup> Tribunal Constitucional Plurinacional, Aug. 17, 2010, Sentencia Constitucional, No. 0980/2010-R (Bol.).

<sup>240</sup> Héctor Masnatta, *Argentina: verso una Costituzione «integrazionista»*, in *IL COSTITUZIONALISMO «PARALLELO» DELLE NUOVE DEMOCRAZIE: AFRICA E AMERICA LATINA* 191 (1999). One of the international sources geographically closest to this regulation has been included in Argentina's Constitution of 1994. Argentina's constitutional debate has led to the implementation of Article 75.22 about the hierarchical level of international treaties and concordats in general, both of which have been granted suprallegal hierarchy. However, this Article takes things further and makes particular reference to certain international human rights instruments. This decision is based upon the understanding that the international instruments contained in this regulation complement the rights and guarantees recognized in Argentina's National Constitution. *Id.*

constitutional system and as a secondary source.<sup>241</sup> By giving special judicial recognition to rights contained in different international instruments but not enumerated in the Bolivian catalogue of constitutional rights, Article 410.II prevents any right not yet recognized by the Bolivian constitutional norm from being granted lower status than a right already proclaimed in the constitutional text. To this end, subsequent judicial decisions have emphasized that the rights that are not recognized in the constitution but are included in international treaties ratified by Bolivia shall be considered part of constitutional norms.<sup>242</sup> All of the above makes it possible to develop new rights in addition to those already enumerated in the constitution, as stipulated by the “open-clause formula,” as well as to keep the catalogue of constitutional rights permanently open and in constant evolution. In this connection, it is possible to use international human rights treaties to incorporate new rights having constitutional merits. These new rights are then protected by the same mechanisms of protection as those specifically designed for the rights enumerated in the constitutional text.

*ii. Implications*

The recognition of international human rights law in the constitution’s text is beyond question, as is its usefulness as a platform to ensure full respect for its contents through constitutional provisions. The importance attached to international law became manifest in the debates and discussions held throughout the deliberations of the Constituent Assembly, in which various commissions stated their willingness to reach and respect international agreements on the protection of certain rights and undertake a number of actions to guarantee their effectiveness.

The constitution has developed a new structure of constitutional rights distinguished by the recognition of a wide range of rights considered to be “inviolable, universal, interdependent, indivisible and progressive” and which, moreover, goes hand in hand with the

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<sup>241</sup> Tribunal Constitucional Plurinacional, Sept. 20, 2012, Sentencia Constitucional, No. 1250/2012, at III.2 (Bol.).

<sup>242</sup> Código Procesal Constitucional [Constitutional Procedural Code], art. 2(II)(2) (Bol.).

Bolivian State's obligation to "promote, protect and respect" those rights.<sup>243</sup> For this reason, all Bolivian constitutional rights are deemed to be fundamental rights<sup>244</sup> in practice,<sup>245</sup> taking into account that the treatment they receive has identical connotations both in the case of rights referred to as fundamental in the constitutional text itself and with regard to any other kind of right incorporated into it.<sup>246</sup> In this connection, the rights enunciated in international sources can have full protection, since the

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<sup>243</sup> CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 13.I (Bol.).

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The fundamental character of the rights enshrined in the Constitution is contingent on the Constituent Assembly's perspective. Consequently, some rights will be established as fundamental and others will not, depending on the intended type of society. The rights are classified as fundamental when they contribute to the Constitution's own fundamental nature. It is by virtue of the Constitution itself that they can become readily available to their holder and unavailable and defensible to the legislator.

Francisco J. Bastida, *¿Son los derechos sociales derechos fundamentales? Por una concepción normativa de la fundamentalidad de los derechos*, in ESTUDIOS SOBRE LA CONSTITUCIÓN 1083, 1096 (2008); see also RICCARDO GUASTINI, *TEORÍA E IDEOLOGÍA DE LA INTERPRETACIÓN CONSTITUCIONAL* 97-98 (Miguel Carbonell & Pedro Salazar trans., 2008) (explaining the difference between rights created by the constitution and those that preceded its creation).

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When it comes to the formal conception of fundamental rights, the most important aspect is not their content but the rank in which they are recognized. Only those rights enshrined in constitutional or, at least, supralegal norms can be considered as fundamental rights from the viewpoint of their formal definition, because what makes them truly characteristic is their resistance to the law. In other words, they bring together all public authorities, including the democratic legislator. The formal conception of fundamental rights can only become feasible through inflexible constitutional provisions and mechanisms to control the constitutionality of the laws.

Only on these terms can any right be invoked before the legislator. See DÍEZ-PICAZO, *supra* note 78, at 37.

<sup>246</sup> Rodolfo Arango, *Constitucionalismo social latinoamericano y derecho a la salud*, in INTERAMERICANIZACIÓN DEL DERECHO A LA SALUD PERSPECTIVAS A LA LUZ DEL CASO POBLETE DE LA CORTE IDH 27, 29-31 (Mariela Morales Antoniazzi & Laura Clérico eds., 2019). An extension of fundamental rights is clearly noticeable in the Latin American constitutions. Social and cultural rights, as any other kind of rights, appear in the Latin American constitutions as potentially fundamental rights. *Id.* The recognition of social and collective rights in another kind of society is rather of a minimalist nature and marked by restrictions in their jurisdictional function when it comes to providing social benefits stipulated by the law. *Id.*

constitutional supremacy that international human rights treaties enjoy over domestic legislation places the rights recognized in those treaties on the same level as the constitutional rights enumerated in the constitution.<sup>247</sup> Taking into account that the harmony between the rights consecrated in international norms and constitutional rights is specifically stated in the constitution, as well as the fact that both of these rights are considered to be fundamental in practice, they can all be protected by the legal instruments designed to defend the rights enshrined in the nation's "organic law."

The incorporation of rights contained in internationally recognized instruments, customary international law, and the judgments of the IAHCR in the Block of Constitutionality brings with it the assumption that any law that is lower in rank, and at variance with such rights, is in fact unconstitutional and therefore inapplicable in the domestic legal system.<sup>248</sup> Through the incorporation of the Inter-American Court's jurisprudence into the Block of Constitutionality, not only that court's case law but also its methods of interpretation become part of the Bolivian domestic legal system with constitutional status. Hence, the Bolivian domestic system embraces an evolutionary, dynamic, *pro personae*, progressive and weighted form of interpretation that gives extraordinary impetus to its law-making power and promotes a highly desirable and necessary cooperation and coordination between domestic and international judges.<sup>249</sup>

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<sup>247</sup> A strong impact of international human rights law can be observed in Latin America, where it is locally supported by the principles of constitutional law as part of a process of nationalization of universal rights. See Arminda Balbuena, Alexéi Julio & Gerardo Pisarello, *Estado de Derecho y crisis de la soberanía en América Latina: algunas notas entre la pesadilla y la esperanza*, in CONSTITUCIONALISMO, MUNDIALIZACIÓN Y CRISIS DEL CONCEPTO DE SOBERANÍA: ALGUNOS EFECTOS EN AMÉRICA LATINA Y EN EUROPA 65, 68-69 (Antonio del Cabo & Gerardo Pisarello eds., 2000).

<sup>248</sup> See *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶¶ 145, 146, 151 (Sept. 26, 2006); *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶ 223 (Feb. 24, 2011); *La Cantuta v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 162(a)-(b) (Nov. 29, 2006); *Palamara-Iribarne v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 135 ¶ 228 (Nov. 22, 2005);

<sup>249</sup> Humberto Nogueira Alcalá, *El Control de Convencionalidad y el Diálogo Interjurisdiccional entre Tribunales Nacionales y Corte Interamericana de Derechos Humanos*, 19 REVISTA DE DERECHO CONSTITUCIONAL EUROPEO 221, 234 (2013).

The constitution's "direct applicability" clause<sup>250</sup> is closely related to the previously discussed "open clause" of rights. They are both essential to the enforcement of rights springing from international sources. In this respect, the direct applicability of rights enshrined in international human rights treaties is totally consistent—if not redundant—with the inclusion of international human rights treaties in the Block of Constitutionality, since such a hierarchy bestows immediate protection on them. Nevertheless, much like with the rest of the constitutional rights enunciated in the constitution, their immediate enforcement depends on the existence of suitable means for their protection.<sup>251</sup>

As far as the guarantee of constitutional rights is concerned,<sup>252</sup> the constitution establishes that all the rights stipulated in the constitutional text are directly applicable and enjoy equal guarantees for their protection.<sup>253</sup> In this connection, it is more than obvious that all rights receive similar fundamental status, taking into account that their defense and protection enjoy equal rights

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<sup>250</sup> Wen-Chen Chang and Jiunn-Rong Yeh point out that recent constitutional texts such as the Constitution of South Africa and others in Central and Eastern Europe have incorporated chapters of rights in compliance with international human rights law, including the introduction of one or two articles related to the direct applicability and hierarchy of the rights contained in international instruments, as evidenced by Article 39.1 of the Constitution of South Africa, Article 9.1 of the Constitution of the Republic of Hungary, and Article 6.1 of the Constitution of South Korea. Chang & Yeh, *supra* note 142, at 1168.

<sup>251</sup> RICCARDO GUASTINI, *DISTINGUIENDO: ESTUDIOS DE TEORÍA Y METATEORÍA DEL DERECHO* 185-89 (1999) ("The problem here lies in how to make a distinction between fundamental rights and their guarantees, taking into account that the existence of the latter is what makes it possible to distinguish the former from the so-called 'rights that exist only on paper.' Given that more is needed to guarantee a right than just its conferment, suitable means must be established with a view to its protection, being understood that the said guarantee cannot be enunciated in the same norm that stipulates the right. This guarantee can only be ensured by means of a secondary norm that includes provisions designed to prevent the violation of a right or, at any rate, seek redress for the violation in question. The content of the written right must be precise and capable of being exercised or claimed before a subject. Consequently, true rights are those that can be protected by the law and exercised or claimed before a given subject, and their content entails the obligation to practice a certain code of conduct.").

<sup>252</sup> See, e.g., DÍEZ-PICAZO, *supra* note 78, at 74-76 (discussing the protection of fundamental rights against the legislator).

<sup>253</sup> CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 109 (Bol.).

under due process of law.<sup>254</sup> The eagerness to guarantee an effective protection of rights, which was the Constituent Assembly's primary incentive, led to the establishment of equal guarantees for all rights enshrined in the constitution, no matter what their original source might be. Regarding the protection of rights, there is complete equivalence between the rights that stem from international law and those rights specifically mentioned in the constitutional text.<sup>255</sup>

The extension of the catalogue of constitutional rights comprises both the constitutional rights enumerated in the constitutional text and the rights recognized by international human rights treaties. The recognition of the importance of international human rights law in domestic legislation is evidenced by their inclusion in the Bolivian constitutional text, not just through the mere stipulation of this integration of rights into the Bolivian constitutional catalogue. The guarantee of protection of these rights is also ensured by the observance provided in the constitutional instruments, which means that they can enjoy the maximum possible protection within the framework of the domestic legal system.<sup>256</sup>

Along these lines, the articles of the constitution provide that "[t]he State guarantees every person and all collectives, without discrimination, the free and effective exercise of the rights established in this Constitution, the laws and international human

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<sup>254</sup> See generally *id.* (stating the constitutional provisions of Bolivia); Código Procesal Constitucional [Constitutional Procedural Code] (Bol.) (detailing procedure for undertaking such actions).

<sup>255</sup> See CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 128 (Bol.); Jorge Rodríguez Zapata, *Tutela interna e internacional de derechos fundamentales: ¿Cabe recurso de amparo por la vulneración de derechos dimanantes de convenios internacionales?*, 42 REVISTA ESPAÑOLA DE DERECHO DEL TRABAJO 373, 373-76 (1990). It is worth remarking that Spanish jurisprudence has drawn a different line by deciding to not give the rights emanated from international instruments the same treatment as those enunciated in the Spanish constitutional rule, pointing out that the international normative must be based on the constitutional provision related to the relevant violated right, which has a precedent in S.T.C., Dec. 14, 1982 (R.G.D., No. 13) (Spain) and, accordingly, an appeal on the grounds of unconstitutionality would be inapplicable in the case of these rights. *Id.*

<sup>256</sup> Anja Seibert-Fohr, *The Potentials of the Vienna Convention on the Law of Treaties with Respect to Reservations to Human Rights Treaties*, in RESERVATIONS TO HUMAN RIGHTS TREATIES AND THE VIENNA CONVENTION REGIME: CONFLICT, HARMONY OR RECONCILIATION 183, 210 (Ineta Ziemele ed., 2004) ("[H]uman rights do not only concern the relationship between States and individuals but also the relationship among the States parties. International human rights treaties entail obligations *erga omnes*.").

rights treaties.”<sup>257</sup> Furthermore, this guarantee goes beyond its simple enunciation, inasmuch as it is not just laid down in the constitution as a desirable goal bound to be reached at some point. Its incorporation into the Block of Constitutionality together with the rest of the provisions discussed here involves the inclusion of standards designed to ensure the full integration of rights derived from international human rights instruments on equal terms with the rights established in the constitutional text.

The Bolivian Constitution provides for a complex normative structure that allows for a full-scale structuring of international law in the system of domestic legal instruments. The hierarchical position of international human rights treaties in the constitution is settled through their inclusion in the Block of Constitutionality. Nonetheless, the Constitutional Court has even gone beyond this provision by incorporating other non-formal international human rights instruments into the Block of Constitutionality, thus expanding the constitutional spectrum of norms intended to protect people’s rights and guarantees. Similarly, the problem of rights not specifically enumerated in the constitution but recognized in international treaties ratified by the country is solved through the definition of the Block of Constitutionality, despite the fact that the “open-clause” formula also could have been used to this end.

What is more, the Block of Constitutionality allows for the incorporation into the Bolivian constitutional text not only of international human rights treaties in their formal conception and with a status on a level with the constitution, but also the whole set of international norms that have emerged from those treaties’ interpretation, even if they have not been conceived as formally binding on domestic legislation. The sole requirement to be met for this inclusion is the assumption of an effective reinforcement of constitutional rights based on the interpretations of the Constitutional Court. Upon their assumption by international and domestic courts alike, all these solutions become part of the Block of Constitutionality and, at the same time, a potential source to create new rights bound to be validly included in the Bolivian catalogue.<sup>258</sup>

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<sup>257</sup> CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 14.III (Bol.).

<sup>258</sup> Tribunal Constitucional Plurinacional, Sept. 20, 2012, Sentencia Constitucional, No. 1250/2012, at III.2 (Bol.).

Since coming into force in 1978, the IACHR and its norms have been gradually seeping into the normative fabric of the individual legal systems of many Latin American countries. A part of the process through which this has happened has been the development of “conventionality control.” “Conventionality control” is the practice by which domestic courts in states that have ratified the IACHR assess whether a particular domestic law or administrative procedure complies with the IACHR’s norms. In situations where the law or procedure in question is found to be in violation of the IACHR, the relevant court often will issue a finding to that effect, declaring it to be in violation of existing law. The “conventionality control” doctrine has been an effective tool for the realization of rights, and an indispensable instrument for the slow building of an inter-American<sup>259</sup> *jus commune*,<sup>260</sup> a Latin American common law centered on human rights, the rule of law, and democracy.

In the case of Bolivia, we are witnessing the merging at the domestic level of both “constitutionality control” and “conventionality control.”<sup>261</sup> The Bolivian constitutional text incorporates “conventionality control”<sup>262</sup> as part of

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The two characteristics that Maurizio Fioravanti ascribes to European constitutionalism, from which the supranational dimension of modern-day constitutionalism has emerged, are precisely the ability to define boundaries and guarantees vis-à-vis sovereign power on the internal level and the capacity to participate in the development of that power through the instrument of consensus that gives rise to the vocation of universality and the creation of rights as *prius*, which shows an obvious twofold tendency: one of resistance and one of participation.

MAURIZIO FIORAVANTI, *CONSTITUCIONALISMO: EXPERIENCIAS HISTÓRICAS Y TENDENCIAS ACTUALES* 142-44 (2014).

<sup>260</sup> Néstor Pedro Sagüés, *Obligaciones Internacionales y Control de Convencionalidad*, 8 ESTUDIOS CONSTITUCIONALES 117, 118-19 (2010).

<sup>261</sup> INSTITUTO DE DERECHO PARLAMENTARIO, UNIVERSIDAD COMPLUTENSE DE MADRID, *PAUTAS PARA UNA REFORMA DE LA CONSTITUCIÓN: UN INFORME PARA EL DEBATE* 33-36 (Javier García Roca ed., 2014).

<sup>262</sup> The conventionality control doctrine appears for the first time in the IACHR jurisprudence in the case of *Almonacid-Arellano et al v. Chile*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 124 (Sept. 26, 2006), through which its main provisions are defined. Previously, however, and based on the cases of *Myrna Mack v. Guatemala*, Case 10.636, Report No. 10/96, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.91 doc. 9 (1996) and *Tibi v. Ecuador*, Preliminary Objections, Merits, Reparations, and Costs,

“constitutionality control”<sup>263</sup> through recognition of the attributes and guarantees of convention-based rights as part of the Block of Constitutionality.<sup>264</sup> Upon its incorporation into “constitutionality control,” “conventionality control” is efficiently configured as a guarantee intended to facilitate the enforcement of current rights in accordance with domestic and international sources.<sup>265</sup> Unlike “constitutionality” control, “conventionality” control also can be exercised at the international level. Nonetheless, there is widespread recognition that domestic judges<sup>266</sup> are the natural judges of the American Convention on Human Rights, since they are the ones in charge of forwarding and implementing the

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Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114 (Sept. 7 2004), Judge Sergio Ramírez made a conceptual approach to the said doctrine. Regarding conventionality control, the IACHR decided in the case of *Ibsen Cárdenas v. Bolivia* that the parameter governing the diffuse conventionality control doctrine is found not only in the ACHR itself but also in its protocols and other instruments forming part of its *corpus iuris*, thus clarifying the elements of the said kind of control. *Ibsen Cárdenas v. Bolivia*, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 217, ¶ 202 (Sept. 1, 2010). The inter-American jurisprudence has held that the IACHR is the ultimate interpreter of the American Convention on Human Rights. *Atala Riffo v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 282, 284 (Feb. 24, 2012).

<sup>263</sup> The IACHR also explains that domestic judicial bodies should exercise constitutionality control in conjunction with conventionality control. *Boyce et al. v. Barbados*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 169, ¶ 77-80 (Nov. 20, 2007).

<sup>264</sup> See Humberto Nogueira Alcalá, *Los desafíos del control de convencionalidad del corpus iuris interamericano para los tribunales nacionales, en especial, para los tribunales constitucionales*, 45 BOLETÍN MEXICANO DE DERECHO COMPARADO 1167, 1183-84, 1205-17 (2012).

<sup>265</sup> Susana Albanese, *La internacionalización del derecho constitucional y la constitucionalización del derecho internacional*, in *EL CONTROL DE CONVENCIONALIDAD* 13, 15 (Susana Albanese ed., 2008).

<sup>266</sup> The IACHR emphasizes that all judges and organs involved in the administration of justice at all levels are obliged to exercise conventionality control. *Cabrera García v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 225 (Nov. 26, 2010). See also *Liakat Ali Alibux v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 276, ¶ 151 (Jan. 30, 2014); *Expelled Dominicans and Haitians v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶ 311 (Aug. 28, 2014); *Gudiel Álvarez et al. v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 253, ¶ 330 (Nov. 20, 2012) (stressing that the conventionality control doctrine extends to other international human rights treaties).

interpretations<sup>267</sup> on which the IACHR finds support for its own judgments, through permanent dialogue<sup>268</sup> and what we might describe as “loyal cooperation.”<sup>269</sup>

*b. Supraconstitutionality*

The rights enumerated in international instruments take a position within the Block of Constitutionality, a fact that, as we have seen, has significant impact on domestic legislation. The Bolivian Constituent Assembly, however, has gone beyond this solution by recognizing the crucial importance of the protection of rights regardless of their original sources, and managing to give the norms capable of providing the best protection priority even over constitutional norms. At this point we will discuss another set of articles that make it possible to give preference to international human rights law over the constitutional text, as well as what this means for the Bolivian domestic legal system.

*i. Articles 13.IV ab initio and 256.I*

There is no doubt that the supraconstitutional nature of the rights contained in international treaties already accounts for the

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<sup>267</sup> In this regard, it is established that the IACHR does not impose a given model of conventionality control. *Liakat Ali Alibux v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 276, ¶ 124 (Jan. 30, 2014).

<sup>268</sup> Javier García Roca remarks that

the idea of a legal dialogue as judicial fiction sometimes imposed by the law proves useful to explain how rights are developed worldwide through a persuasive interpretation based on the written judgments of various courts that take on a dialogue-oriented, rather than an isolationist and nationalistic, stance as they cooperate in the context of a network of subjects that seek solutions to problems considered to be of a similar nature.

Javier García Roca, *El diálogo entre el Tribunal de Derechos Humanos, los Tribunales Constitucionales y otros órganos jurisdiccionales en el espacio convencional europeo*, in *DIÁLOGO JURISPRUDENCIAL EN DERECHOS HUMANOS ENTRE TRIBUNALES CONSTITUCIONALES Y CORTES INTERNACIONALES* 219, 228 (Eduardo Ferrer MacGregor & Alfonso Herrera García eds., 2013).

<sup>269</sup> See Alcalá, *supra* note 249, at 233.

highest degree of protection that any constitutional text could provide to international human rights law. Throughout history, national constituent assemblies all over the world have shown reluctance to grant supraconstitutional hierarchy to international instruments. Over time, however, Latin America has witnessed a trend towards the creation of modern-day constitutional texts capable of ensuring greater and more effective human rights protection.<sup>270</sup> The new Bolivian constitutional text addresses this issue, creating what turns out to be a sophisticated and useful framework for giving international human rights treaties priority over the constitution.

It is important in this regard to pay particular attention to Article 13.IV *ab initio*: “International treaties and conventions ratified by the Pluri-National Legislative Assembly (Asamblea Legislativa), which recognize human rights and prohibit their limitation in States of Emergency, shall prevail over internal law.”<sup>271</sup> With this declaration, the Bolivian State does not shy away from the express proclamation of the supremacy of international human rights law over domestic legislation.<sup>272</sup> Equally significant, this statement<sup>273</sup>

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<sup>270</sup> See CLAUDIA ESCOBAR GARCÍA, *TRANSCONSTITUCIONALISMO Y DIÁLOGO JURÍDICO* 61 (2011) (stating that Article 424 of the Constitution of the Republic of Ecuador includes a guideline with a similar structure, which stipulates that the Constitution and international human rights treaties ratified by the Ecuadorian State that recognize rights that are more favorable than those enshrined in the Constitution shall prevail over any other legal regulatory system or action by public power and that this interpretation is left to the discretion of the Ecuadorian constitutional interpreter).

<sup>271</sup> CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 13.IV (Bol.).

<sup>272</sup> According to Antonio Remiro Brotons, “seldom do constitutional texts stipulate the preeminence of international treaties in cases of contradiction, since they take the Constitution’s supremacy for granted.” Antonio Remiro Brotons, *Controles Preventivos y Reparadores de la Constitucionalidad Intrínseca de los Tratados Internacionales*, 16 *REVISTA DE DERECHO POLÍTICO* 109, 110 (1982-1983).

<sup>273</sup> The Constitutional Court of Colombia, for example, has understood by “domestic legislation” not only the normative scope of the laws but also that of the Constitution itself, thus allowing its supranational implementation. The Colombian constitutional text has given the enforcement of international human rights treaties priority over domestic provisions as far as its judicial opinions are concerned, which has made it possible to provide superb protection of rights. See, e.g., Corte Constitucional, October 23, 1995, Sentencia No. T-477/95, *Gaceta de la Corte Constitucional* (Colom.).

paves the way for the recognition of the supraconstitutional hierarchy of international human rights treaties.<sup>274</sup>

Judging by the above, the Constitutional Court could apply international human rights law above its own constitutional norms.<sup>275</sup> This situation would be entirely in agreement with both the spirit of the new constitutional text and the line followed by the Constitutional Court, since it aims at providing a maximum level of human rights protection. What is more, the Constitutional Court has to bear in mind that the declaration of supraconstitutionality of international human rights treaties is not uncommon in other Latin American constitutional systems.<sup>276</sup> Indeed, it is on the basis of

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<sup>274</sup> Judgment C-401/05 of April 14, 2005 of the Constitutional Court of Colombia, for example, establishes that the incorporation of an instrument into the Block of Constitutionality has its rationale in the Constitution, pointing out that it is precisely the same procedure adopted in the case of international human rights treaties, which, for constitutional purposes, were expressly incorporated into the Block of Constitutionality on grounds that its norms have domestic priority. Corte Constitucional, Apr. 14, 2005, Sentencia No. C-401/05, Gaceta de la Corte Constitucional (Colom.); *see also* Brewer-Carías, *supra* note 120; LEÓN BASTOS, *supra* note 121, at 231-33.

<sup>275</sup> *See, e.g.*, Sala Constitucional, Nov. 11, 1992, Sentencia No. 0343 (Costa Rica) (noting that, despite the recognition of the constitutional hierarchy of international human rights instruments in Costa Rica, the Constitutional Chamber in that country had recourse to Article 48 of its Constitution to recognize not only that the human rights instruments currently in force have a similar status as the Constitution, but also that, as they accord people more rights or guarantees, they are in a position of supremacy with regard to the Constitution). The Constitutional Court has stated that its rulings cover not only the violation of constitutional rights but also the whole universe of fundamental rights contained in international human rights instruments ratified by the country. Sala Constitucional, Nov. 10, 1993, Sentencia de Clarificación No. 5759 (Costa Rica). The aforementioned Costa Rican Article was modified through Act 7128 and, therefore, it also incorporates now the instruction to recognize fundamental rights, including those enunciated in the relevant international instruments. Following the enactment of this legislation and the subsequent promulgation of the Law of Constitutional Jurisdiction of 1989, the international human rights treaties ratified by the country achieved supranational status, including not only international treaties duly authorized by the Legislative Assembly but also those yet to be authorized by it, which entails a significant extension of the catalogue of fundamental rights. Hence, the rights emanated from international treaties shall have the same effect, scope, and guarantees as the fundamental rights contained in the Costa Rican Constitution, and only the way of incorporating them into the domestic legislation will change. *See* LEÓN BASTOS, *supra* note 121, at 231-33.

<sup>276</sup> *See, e.g.*, CONSTITUCIÓN POLÍTICA DE LA REPUBLICA DE GUATEMALA May 31, 1985, art. 46 (establishing in matters of human rights the principle of “preeminence” in favor of international human rights treaties, indicating that the latter have precedence over domestic laws).

similar interpretations that some Latin American systems have managed to include in their domestic legal order new rights drawn from international law.<sup>277</sup> Even if it is true that such interpretations have not been free of problems,<sup>278</sup> in almost every case these problems are solved through the recognition of the constitutional status of international human rights instruments.<sup>279</sup>

From the above, we can infer that the potential scope of Article 13.IV *ab initio* is contingent on the way in which the Constitutional Court will interpret its content.<sup>280</sup> Considering that, in line with the standards governing the interpretation of constitutional rights, the Court has tried to make Bolivia's domestic law as open as possible in order to facilitate the illumination of international human rights law, it is not preposterous to say that the Constitutional Court can

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<sup>277</sup> See, e.g., Corte de Constitucionalidad, May 27, 1997, Expediente No. 1281-96, Gaceta Jurisprudencial no. 44 (Guat.) (ruling on the basis of Article 45 of the American Convention on Human Rights with the aim of protecting rights not expressly enumerated in its constitutional text).

<sup>278</sup> Article 4.II of the Constitution of the Brazil, for example, stipulates that its international relations shall be governed by the prevalence of human rights. Constituição Federal [C.F.] [Constitution] art. 4.II (Braz.). Starting from this premise, a supranational protection of human rights can also be inferred. Nevertheless, in its interpretations, the Brazilian Court of Justice has been reluctant to even grant constitutional rank to the rights emanating from international treaties. In this respect, it has been argued that the recognition of this position is not a determining factor for the proper fulfillment of Brazil's international obligations, since the most important is the interpretation of rights on the basis of international canons. See Antonio Moreira Maués, *Supralegalidad de los Tratados Internacionales de Derechos Humanos e Interpretación Constitucional*, 18 SUR-REVISTA INTERNACIONAL DE DERECHOS HUMANOS 217, 230-31 (2013).

<sup>279</sup> See Pablo Luis Manili, *La Recepción del Derecho Internacional de los Derechos Humanos por el Derecho Constitucional Iberoamericano*, in DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS 371, 381 (Ricardo Méndez Silva ed., 2002).

<sup>280</sup> See Francisco José Eguiguren Praeli, *Aplicación de los Tratados Internacionales Sobre Derechos Humanos en la Jurisprudencia Constitucional Peruana*, 9 REVISTA IUS ET PRAXIS 157 (2003) ("It has been suggested that the fourth of the Final and Transitory Provisions of the Peruvian Constitution of 1993, for example, might pave the way for an interpretation conducive to the granting of constitutional status to international human rights treaties, inasmuch as they are thus conferred a function as a parameter or a limitation regarding the content of the rights and their interpretation. None of this would be possible if the said norms were lower in rank than the Constitution. It has even been said that these articles could raise the international human rights norms to a supraconstitutional level. This interpretation has not been literally expressed by the Peruvian Constitutional Tribunal, which has nevertheless drawn sustenance from International human rights law in order to establish criteria and define the content and scope of these rights.").

deliver its judgments by granting international human rights law supraconstitutional hierarchy.

On the other hand, Article 256.I of the constitution stipulates: “[I]nternational treaties and instruments in matters of human rights that have been signed and ratified, or those that have been joined by the State, which declare rights more favorable than those contained in the Constitution, shall have preferential application over those in this Constitution.”<sup>281</sup> Here, one notices a much more specific provision about the supraconstitutional character of the norms contained in international treaties. Although the first part of Article 13.IV of the constitution may be interpreted in a restrictive manner by the Court, on the assumption that the application of domestic law might be exclusively making reference to regulations having lesser rank than the constitution,<sup>282</sup> Article 256.I leaves no room for doubt, explicitly stating the possibility of preeminence over the Bolivian constitutional text.<sup>283</sup>

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<sup>281</sup> CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 256.I. (Bol.).

<sup>282</sup> The Supreme Court of Justice of Argentina concluded, in the case of *Ekmekdjian v. Sofovich*, that the Vienna Convention on the Law of Treaties grants an International Treaty right of way in cases of conflict with any domestic law, including the Constitution. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/7/1992, “Ekmekdjian, Miguel Angel c. Sofovich, Gerardo y otros,” Fallos (1992-315-1492) (Arg.). Later on, however, in the *Fibraca* case, the Supreme Court changed the precedent and stated that the said priority depends on its degree of compliance with the Constitution. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/7/1993, “Fibraca Constructora S.C.A. c. Comisión Técnica Mixta de Salto Grande,” Fallos (1993-316-1669) (Arg.). For a discussion of the Court’s interpretation of the above cases, see Néstor Pedro Sagües, *Mecanismos de Incorporación de los Tratados Internacionales Sobre Derechos Humanos, al Derecho Interno*, 61 DERECHOS HUMANOS: ÓRGANO INFORMATIVO DE LA COMISIÓN DE DERECHOS HUMANOS DEL ESTADO DE MÉXICO 45, 46-47 (2003).

<sup>283</sup> In contrast, this stipulation, suggesting the existence of a more favorable universal law, has not taken hold in the practical reality of the States. Notably, each time that the United States has ratified a major human rights treaty, it has included a package of conditions known as “RUDs” (Reservations, Understandings and Declarations). The intention is to decline to agree to treaty provisions to the extent that they violate individual rights provisions of the constitution or to certain other provisions on policy grounds. These RUDs also announce that they purport to interpret some provisions that are undefined in the treaties and the text in general in a manner consistent with its federal system of government and declare as well that the terms of the international treaties are not self-executing. See BRADLEY, *supra* note 195, at 36-38. For more on RUDs, see HENKIN, CLEVELAND, HELFER, NEUMAN & ORENTLICHER., *supra* note 237, at 784-87. However, customary international law is indeed directly applicable to the States. See CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 605-22 (4th ed. 2011).

While the preferential observance of human rights is always subject to the recognition and application of domestic laws that ensure the effective integration of those rights' characteristics, this rule cannot be argued as a pretext to restrict internationally proclaimed human rights. No restriction or alteration of the rights contained in international treaties can be allowed if that turns out to entail an inadequate protection of human rights.<sup>284</sup> Some legal

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<sup>284</sup> Article 23 of the Constitution of the Bolivarian Republic of Venezuela stipulates that the international instruments relating human rights which have been executed and ratified by Venezuela have a constitutional rank and prevail over internal legislation, insofar as they contain provisions concerning the enjoyment and exercise of such rights that are more favorable than those established by the Constitution and the laws of the Republic and shall be immediately and directly applied by the courts and other organs of the public power. CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA Dec. 1999, art. 23. This rule allows for the direct application of international human rights treaties, to the point of granting them supranational status when they provide more favorable norms, just like in the new Bolivian constitutional text. However, the Constitutional Court of the Supreme Tribunal of Justice of Venezuela has interpreted the aforementioned Article in a clearly restrictive manner, stating that it makes reference to rights-making instruments rather than to the judgments delivered by institutions or bodies prescribed in international treaties. See Sala Constitucional, July 15, 2003, Judgment No. 1942 (Venez.). It also found that the interpretation of this constitutional rule only concerns human rights-making norms, stating that prevalence is limited to the norms of international treaties in matters of human rights, without including the reports and opinions issued by international bodies intended to interpret the scope of the international instruments. *Id.* The court continues its interpretation saying that the constitutional hierarchy of international treaties is related to those standards which, once they are incorporated into the constitution, have as their sole interpreter—with a view to their adjustment to the Venezuelan Internal Legislation—the Venezuelan constitutional judge and, particularly, the Constitutional Court. *Id.* The Venezuelan Constitutional Court has emphasized its exclusive competence to determine which international instruments in matters of human rights will prevail at internal level as well as which human rights not enumerated in those international instruments have legal effect in Venezuela. *Id.* The Court safeguards its competence by stipulating that these powers cannot be diminished by objective standards contained in international human rights instruments ratified by the country that make it possible for the States parties to consult international bodies about their interpretation, highlighting the fact that, should such consults be allowed, the outcome would be a form of constitutional reform without the proper arrangements for it. *Id.* The competence of the Constitutional Court would be undermined and the supranational organs would be entrusted with such competence as to make binding interpretations. *Id.* At a later date, following Sala Constitucional, Dec. 18, 2008, Judgment No. 1939 (Venez.), this tendency was confirmed, to the extent that the judgment of the IACHR of August 5, 2008 became non-enforceable and a denouncement was filed with the IACHR. See Carlos Ayala Corao, *La Doctrina de la "Inejecución" de las Sentencias*

scholars have argued that, despite the existence of different provisions in other regional constitutional systems which seem to favor the thesis of supraconstitutionality, such status has been “diminished by a corrective and, at times, ‘denaturalizing’ kind of jurisprudence on the part of national courts.”<sup>285</sup> Even in the experience of some supranational courts, there have been attempts from a protectionist and nationalistic perspective<sup>286</sup> to put obstacles in the way of international rights-protective instruments,<sup>287</sup> resulting in violations of disadvantaged groups’ rights. “For this reason alone, democratic legitimacy should not be used as a justification to evade international human rights protections.”<sup>288</sup> In this respect, and despite the extent to which the constitutional norms are open to international human rights law, the interpretations to be made by the Constitutional Court are of paramount importance to ensure an effective protection of human rights. Just as certain constitutional formulas can be used to ensure an effective openness to international law, so too can they cause serious problems regarding the protection of rights based on a staunch defense of

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*Internacionales en la Jurisprudencia Constitucional de Venezuela (1999-2009)*, in *Diálogo jurisprudencial en derechos humanos entre tribunales constitucionales y cortes internacionales* 503, 568 (2013).

<sup>285</sup> Néstor Pedro Sagües, *El “control de convencionalidad” en el sistema interamericano, y sus anticipos en el ámbito de los derechos económico-sociales*, in *DIÁLOGO JURISPRUDENCIAL EN DERECHOS HUMANOS ENTRE TRIBUNALES CONSTITUCIONALES Y CORTES INTERNACIONALES* 993, 1003 (Eduardo Ferrer Mac-Gregor & Alfonso Herrera García eds., 2013).

<sup>286</sup> A nationalistic discourse and a lack of identity are still present in the process of European integration construction. See JÜRGEN HABERMAS, *LA INCLUSIÓN DEL OTRO* (1999); CAS MUDDE, *POPULIST RADICAL RIGHT PARTIES IN EUROPE* (2007) (discussing the impact of radical right parties on democracies in Europe); Margarita Gómez-Reino & Iván Llamazares, *The Populist Radical Right and European Integration: A Comparative Analysis of Party-Voter Links*, 36 *WEST EUR. POL.* 789 (2013).

<sup>287</sup> It has also been stated that domestic judges sometimes use international law to protect the national interests from external pressures. Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 *AM. J. INT’L L.* 241, 245 (2008).

<sup>288</sup> Javier García Roca, Humberto Nogueira Alcalá & Rafael Bustos Gisbert, *La comunicación entre ambos sistemas y las características del diálogo*, in *EL DIÁLOGO ENTRE LOS SISTEMAS EUROPEO Y AMERICANO DE DERECHOS HUMANOS* 65, 69-70 (Javier García Roca et al. eds., 2012).

national sovereignty,<sup>289</sup> leading to flagrant violations of international law.<sup>290</sup>

International human rights law gives a high status to the principles of favorability and *pro homine* as judicial standards for courts to interpret and enforce rights so as best to favor the individual, his freedom, and his rights.<sup>291</sup> Favorability refers to giving preference to the expansion of human rights. *Pro homine* is the emphasis on outcomes that promote the dignity and welfare of human beings. The Bolivian constitutional text recognizes both of these principles by establishing the preferred application of whatever norm is most favorable to human rights. Under this framework, judgments based on international human rights treaties can have supraconstitutional status,<sup>292</sup> taking into account the express provision in the constitution that such a judgment can prevail even over the constitutional text itself. Accordingly, the Constitutional Court can rely on significant support to make an interpretation that places an international human rights treaty above a narrower constitutional norm, as far as that treaty's enforcement is concerned.<sup>293</sup>

The Bolivian Constituent Assembly managed to set up a system of mutual improvement between international human rights law

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<sup>289</sup> Kathryn Sikkink argues that sovereignty is a long way from disappearing, since the sovereign State is still the prevailing force to protect, as well as violate, human rights. Kathryn Sikkink, *Reconceptualizing Sovereignty in the Americas: Historical Precursors and Current Practices* 19 HOUS. J. INT'L L. 705, 706 (1997).

<sup>290</sup> See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 874 (1990).

<sup>291</sup> Tribunal Constitucional Plurinacional, Dec. 20, 2011, Voto Disidente, Sentencia Constitucional, No. 1360/2011-R (Bol.).

<sup>292</sup> MICHEL TROPER, ENSAYOS DE TEORÍA CONSTITUCIONAL 84 (2004) (pointing out that a provision cannot be considered supraconstitutional if it is enshrined in the Constitution, except when it is thought to be exempt from any form of constitutional review). Indeed, by peremptory constitutional decision, human rights contained in international instruments are part of the Block of Constitutionality, but they are not subject to the same constitutional review to which the constitutional norms themselves are submitted, their scope and meaning cannot be altered through a constitutional reform, and their content is international law matter. *Id.*

<sup>293</sup> Roca, Alcalá & Gisbert, *supra* note 288, at 68 (“[E]ven if they are not expressly enunciated in the Constitution, there is an identical mandate in force. These authors hold that the constitutional clauses open to International human rights law are an exceptional resource of constitutional pedagogy for the interpreters that is deemed to be very useful and convenient from many points of view, but in no case are they unailing.”).

and the country's new constitutional text. The solution suggested, and required, for this end focuses on giving priority to the system that is capable of providing the best possible protection for ultimately conflicting rights, regardless of whether those rights have their source in the domestic or the international legal system.<sup>294</sup> This measure turns out to be an effective solution and a guarantee of human rights protection in a general sense, making the new Bolivian constitutional standard an advanced legal text in line with the need to protect human rights.<sup>295</sup>

The new Bolivian Constitution gives to international human rights instruments sufficient hierarchy—of a potentially supraconstitutional nature—to ensure their observance, thus catapulting the Bolivian constitutional system into international human rights law with a view to an effective protection of rights. The Constitutional Court has declared itself explicitly to be in favor of the supraconstitutional character of international human rights treaties.<sup>296</sup> The line that its judgments have followed starts an interpretation in the direction of supraconstitutionality, as befits its tendency to grant human rights the highest possible protection.

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<sup>294</sup> Bustos Gisbert, *supra* note 234, at 187 (“[A] dialogue requires not only formal recognition by judicial organs but also realization that the actor involved has something to say from the viewpoint of his/her competence about a matter that another court is claiming for itself; therefore, the key is that both courts agree that they each have a role to play in the relevant matter.”) The author stresses that the degree of recognition by the other court depends on the intensity of the said dialogue. *Id.*

<sup>295</sup> Jure Vidmar, *Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?*, in *HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS* 13, 16 (Erika De Wet & Jure Vidmar eds., 2012) (stating that from the preamble of the United Nations Charter itself we can infer the recognition that all human beings share interests and values that transcend the interests of sovereign States).

<sup>296</sup> Tribunal Constitucional Plurinacional, Nov. 28, 2017, Declaración Plurinacional, No. 0084/2017 (Bol.) (claiming the preferred application of Article 23 of the American Convention on Human Rights over the Bolivian Constitution, which entailed the inapplicability of constitutional articles that reduce the number of requirements to be elected for government positions by popular vote and declared as unconstitutional those articles and laws containing the aforesaid limitation, thus allowing for the possibility of indefinite reelection.) This judgment, as controversial as it was, could be implemented to improve the scope of the rights of vulnerable groups.

*ii. Implications*

The constituent process carried out in Bolivia laid the foundations for the recognition and protection of basic principles of international law. The old conceptions of sovereignty have been forced to yield to the search for new constitutional solutions to the problems of building human rights-protecting projects.

The expansion of expectations attached to the quest for human rights has gradually weakened the hopes of "jurisdictional exclusivity," especially in view of the opening of constitutional standards to international law, which allow for the development of new possibilities regarding both the defense and the consecration of human rights in various constitutional texts.<sup>297</sup>

The constitutional hierarchy of domestic law regarding the applicability of international human rights law remains an issue of heated debate. Nevertheless, when it comes to international human rights law, it is noteworthy that a number of norms have been gradually recognized and even interpreted as having higher status, which is conducive to a privileged status that contributes to the solution of conflicts among competing rights or powers. The recognition of obligations owed between States under international law also reveals a change; previously, this law only recognized norms to which States had explicitly consented. Nowadays, however, many scholars and even policymakers recognize the existence and validity of inviolable standards irrespective of State consent, as in the case of *jus cogens* norms.<sup>298</sup> In this respect, these

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<sup>297</sup> Antonio del Cabo, *Introducción*, in *CONSTITUCIONALISMO, MUNDIALIZACIÓN Y CRISIS DEL CONCEPTO DE SOBERANÍA: ALGUNOS EFECTOS EN AMÉRICA LATINA Y EN EUROPA* 17, 19 (Antonio del Cabo & Gerardo Pisarello eds., 2000).

<sup>298</sup> Erika de Wet & Jure Vidmar, *Introduction*, in *HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS* 1, 3 (Erika De Wet & Jure Vidmar eds., 2012). *Jus cogens*, according to Article 53 of the Vienna Convention on the Law of Treaties, is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.* In fact, *jus cogens* is frequently invoked as hierarchically preeminent by the parties to judicial processes, but the courts have been reluctant to accept an extended interpretation of the hierarchical prevalence of this kind of norm. Nevertheless,

latter norms can be considered to have supraconstitutional status, because they undermine the States' sovereign capacity to choose whether to be bound by certain fundamental international legal obligations.<sup>299</sup>

Universal human rights treaties that recognize internationally accepted rights have *erga omnes* effect.<sup>300</sup> The obligations and rights created by those treaties are owed to all. This is because the importance of the rights protected through such instruments gives rise to a legal interest in their protection, an obligation applicable to all States.<sup>301</sup> Not only are these norms applicable to international legal systems, but they also engage domestic judges at the local and

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there is an obvious intention to defend the superiority of these norms even over international law. LISA YARWOOD, *STATES ACCOUNTABILITY UNDER INTERNATIONAL LAW: HOLDING STATES ACCOUNTABLE FOR A BREACH OF JUS COGENS NORMS* 67 (Routledge, 2011). Still, some also say that there is no solid evidence whatsoever of accountability regarding the failure to fulfill the *jus cogens* and, therefore, it is possible to say that in fact there is no such obligation, that there is universal State practice contrary to that obligation, or that there is some limitation that exists in relation to exercising the obligation. See Stefan Kadelbach, *Jus Cogens, Obligations Erga Omnes and Other Rules – The Identification of Fundamental Norms*, in *THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER* 21 (Cristian Tomuschat & Jean-Marc Thouvenin eds., 2006) (discussing the disagreement on the content make up of *jus cogens*). It is worth pointing out that when a State makes a reservation to an international treaty, and the reservation is in conflict with a norm of *jus cogens*, the said reservation will not have effect. Ulf Linderfalk, *Reservations to Treaties and Norms of Jus Cogens – A Comment on Human Rights Committee General Comment N°24*, in *RESERVATIONS TO HUMAN RIGHTS TREATIES AND THE VIENNA CONVENTION REGIME* 213, 216 (Ineta Ziemele ed., 2004). See generally Władysław Czapliński, *Jus Cogens and the Law of Treaties*, in *THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER* 83, 87-93 (Cristian Tomuschat & Jean-Marc Thouvenin eds., 2006) (discussing the criticism of the concept of peremptory norms and its indetermination).

<sup>299</sup> See Vidmar, *supra* note 295, at 28-29 (stating that these limitations are construed on the respect of the customary obligations laid down in Article 53 of the Vienna Convention).

<sup>300</sup> *Id.* 293, at 23-25 (stating that the *erga omnes* obligations reveal the existence of core values shared by the international community of States). Even if, according to theory, these obligations can extend beyond *jus cogens*, their entire scope is still unclear and, as they overlap with *jus cogens* norms, they may be seen as mechanism to apply the said norms. It is worth pointing out that, as a rule, the *erga omnes* obligations are not accepted as an expression of the normative hierarchy of International law, as it happens in the case of *jus cogens*.

<sup>301</sup> See *id.* at 23.

national level.<sup>302</sup> Domestic courts are State organs, so their performance counts as State practice, and, consequently, these courts become relevant to customary international law.<sup>303</sup> In the absence of a centralized international law, courts at both the domestic and regional level are playing a gradually increasing role in the interpretation and implementation of international legal obligations.<sup>304</sup>

It is perhaps easy to think of constitutional acceptance as being restricted to international instruments in matters of human rights-protection only, and any implications derived strictly therefrom. But the Bolivian fundamental standard may yet be capable of expressly proclaiming the supremacy of international human rights law even over the country's own constitutional text. From the Constitutional Court's practice thus far, we can infer Bolivia's constitutional vocation to take its constitutional system to a maximum level of rights protection,<sup>305</sup> irrespective of the source of the relevant instruments of protection.<sup>306</sup>

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<sup>302</sup> See Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38 (2003). The resolution of conflicting standards in a decentralized international legal system is not an exclusive prerogative of the international tribunals, since the domestic courts are capable of solving these problems. In fact, Article 38.1.d of the Statute of the International Court of Justice is held to imply that the judicial decisions are subsidiary means for the determination of rules of law, leaving this configuration open to the judgments delivered by domestic courts. For a discussion on subsidiarity in international human rights law, see *Id.*

<sup>303</sup> See André Nollkaemper, *Inside or Out: Two Types of International Legal Pluralism*, in *NORMATIVE PLURALISM AND INTERNATIONAL LAW: EXPLORING GLOBAL GOVERNANCE* 94, 96 (Jan Klabbers & Touko Piiparinen eds., 2013) (noting that many legal systems deal with their international obligations by giving priority to those values and rights of their legislation deemed to be incompatible with international law, which sets in relief the fact that there may be a form of pluralism that would not do justice to legitimate political and social differences between States and communities within States).

<sup>304</sup> See Vidmar, *supra* note 295, at 4.

<sup>305</sup> This vocation fits perfectly into the proclamation of the Bolivian Plurinational Constitutional Court, recognizing that, since the country has IACHR Member State status, it cannot let its domestic law become an obstacle to the fulfillment of its international obligations. Tribunal Constitucional Plurinacional, May 10, 2010, Sentencia Constitucional, No. 0110/2010-R, at 11, 13 (Bol.).

<sup>306</sup> See LAURENCE BURGORGUE-LARSEN, *EL DIÁLOGO JUDICIAL: MÁXIMO DESAFÍO DE LOS TIEMPOS JURÍDICOS MODERNOS* 211-17 (2013). In this respect, it is particularly interesting to mention that the process of internationalization in Latin America is notable for being extremely protective of human rights. For a discussion about this internationalization that takes shape through a humanization process, see *id.*

Given that universally valid human rights instruments enjoy a special rank within the domestic legal system, they become translated into direct individual rights in cases in which the content of their mandate is defined in sufficient detail, that is, in a precise, integral, and unconditional manner.<sup>307</sup> These rights rise above constitutional standards once the State consents to fulfill its obligations. The recognition of this condition in the Bolivian Constitution merely reinforces a form of protection already stipulated in international human rights law. Aware of this fact, the Constituent Assembly went beyond its intentions of incorporating constitutional provisions to govern the interpretation of Bolivian constitutional rights in compliance with the norms contained in different international human rights instruments. The Assembly decided to go a step further and give strong support to international human rights law by issuing criteria at once immovable and impossible to be reduced to the individual interpreter's opinion. To this end, the Assembly laid down a system in an attempt to facilitate the full integration of the rights recognized by international instruments,<sup>308</sup> and to give practical effect to international human rights norms in Bolivia's domestic legislation.<sup>309</sup> The Constituent Assembly found it necessary to further guarantee and observe international law in its domestic legislation. It concluded that the rights conferred upon individuals on the basis of legitimately recognized international instruments needed to be made effective

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<sup>307</sup> See Ramón Paniagua Redondo, *La recepción, publicación y rango normativo de los tratados internacionales en el ordenamiento jurídico español*, 90 *Revista Jurídica de Catalunya* 921, 925 (1991).

<sup>308</sup> CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 256 (Bol.) (asserting Bolivia will apply the rules of treaties and related international instruments it "has signed and/or ratified, or those that have been joined by the State" when those instruments "declare rights more favorable than those contained in the Constitution," and that interpretation of rights contained in the Constitution should similarly comport with more favorable treaty norms).

<sup>309</sup> See LA ASAMBLEA CONSTITUYENTE, INFORMES POR COMISIONES: LA CONSTRUCCION DEL TEXTO CONSTITUCIONAL (Tomo III). The Bolivian constitutional provisions are justified in the minutes and documents of the Constituent Assembly. The Minority Report of Commission No. 3 of the Constituent Assembly remarks that neither the State's situation nor its root causes can remain aloof from the universal principles that justify the existence the international constitutional doctrine in its midst. *Id.* The actuality that the international treaties entail is thereby recognized. Likewise, this Commission points out that instruments issued from both the United Nations and the OAS provide for the said international recognition. *Id.*

immediately at all levels of the Bolivian legal system, in the same manner as the rights recognized in the new constitutional text itself, without depending on particular jurisdictional or jurisprudential constructions.<sup>310</sup> That is how the Assembly established that the supremacy of international law in matters of human rights must be on a par with the fundamental rights and values contained in the national legislation.<sup>311</sup>

With this inclusion of norms drawn from international human rights law, the domestic court or interpreting body must evaluate and put into practice the principles that grant the protection of rights a higher regulatory role. In this context, the openness afforded by the Constitutional Court serves the country's purpose of guaranteeing such protection. However, it must be kept in mind that the Constitutional Court is not the only organ expected to implement the higher standard, for any other domestic judge or tribunal is also empowered to choose the highest jurisdictional or regulatory norm, as provided for in the new Bolivian constitutional text.<sup>312</sup>

The primacy rule stipulated in Article 13.IV *ab initio* and Article 256.I have different implications from those of articles 13.IV *in fine* and 256.II. Articles 13.IV *ab initio* and 256.I also complement the purpose of incorporating international human rights treaties into the Block of Constitutionality. In cases where Article 13.IV *in fine* and Article 256.II apply, their interpretation is governed by international standards. This entails an interpretation exercise in accordance with the internationally recognized principle of "conforming interpretation." Nevertheless, such an exercise proves to be impossible in situations of unsolvable contradictions. When a contradiction cannot be settled by means of a "conforming

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<sup>310</sup> CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 14.III. (Bol.) ("The State guarantees to all people and communities, without any discrimination, the free and effective exercise of the rights established in this Constitution, the laws and international human rights treaties.").

<sup>311</sup> ANTONIO LA PÉRGOLA, PODER EXTERIOR Y ESTADO DE DERECHO 29 (1987) ("The treaty . . . is always subordinate to the principles sanctioned in the fundamental text; that is to say, to the inalienable and non-derogable values of the constitutional order.").

<sup>312</sup> See, e.g., Tribunal Constitucional Plurinacional, Aug. 16, 2011, Sentencia Constitucional, No. 1109/2011-R, at 8 (Bol.) (noting various international instruments' provisions against curtailing the human rights contained in member States' laws).

interpretation,” Article 13.IV *ab initio* and Article 256.I authorize judges to give international law priority over the constitution itself.<sup>313</sup>

One must remember that validly concluded international treaties must undergo constitutional control successfully in accordance with the constitution’s requirements before becoming part of the Block of Constitutionality.<sup>314</sup> Nevertheless, there are occasions in which, subsequent to this process, a serious contradiction may become apparent between the treaty in question and the constitutional text. In such cases, the Court is obligated to exercise what is known as *a posteriori* constitutional control, which could lead to the serious consequence of the treaty being denounced as violating the constitution. Precisely because a situation of *a posteriori* constitutional control could arise, with all of the serious risks that this entails, the judge has an obligation to harmonize the international treaty with the constitutional text if at all possible. The judge must search through all possible means for a way to find a reconciliation between the constitutional text and the treaty, including by looking at the treaty text and its underlying rationale, in order to find a constitutional interpretation compatible with, rather than opposed to, the treaty. If, ultimately, the treaty and the domestic norm prove to be incompatible, then the constitutional rule that gives primacy to international treaties prevails.<sup>315</sup>

The main difference between Articles 13.IV *in fine* and 256.II, on one hand, and Articles 13.IV *ab initio* and 256.I on the other, lies in

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<sup>313</sup> See BARRY E. CARTER & ALLEN S. WEINER, INTERNATIONAL LAW 154-63 (6th ed. 2011). In the case of the United States, even if both the Constitution and the international treaties comprise the supreme law of the land, it has become clear that in cases of contradictions between both norms, the high courts have chosen not to apply international law, recognizing that the Constitution prevails over it as far as its applicability is concerned. *Id.* Thus, it is held that an international treaty cannot be validated if it is in violation of the Constitution. See, e.g., *Missouri v. Holland*, 252 U.S. 416, 432 (1920) (upholding international treaty protecting migratory birds because it did not “contravene any prohibitory words to be found in the Constitution,” nor violate the Tenth Amendment); *Reid v. Covert*, 354 U.S. 1, 16-17 (1957) (finding, with respect to the U.S. Constitution’s Article VI, “[t]here is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution.”).

<sup>314</sup> CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 259 (Bol.).

<sup>315</sup> See Pedro Sagües, *supra* note 282, at 49 (referring to the “increasingly preferred rule in contemporary doctrine” that dictates, between a constitution and a conflicting treaty, priority is given to that which “better protects the personal right in question.”).

their judicial consequences. While the first set of articles mandates “conforming interpretations,” the second set might declare the norm in the constitutional text inapplicable. It must be emphasized that, in cases of inapplicability, we are talking about norms that are totally conflicting, and not about norms that could be reconciled. The legal consequence of inapplicability can only come into force in cases of insuperable contradictions. Taking into account the seriousness of the resulting effect, that is, a finding that the constitutional text is inapplicable and at odds with the international treaty, the judge always must leave the door open to the possibility of harmonization.

Now, as to the exercise of judicial oversight over supraconstitutional rights, once their standing in the constitutional instrument is understood, there are two possible scenarios. In the first of them, the domestic judge is the one who could resort to supraconstitutional norms to exercise oversight over the constitutional norms. In the second scenario, the national laws in disagreement with the supraconstitutional norms can be reviewed by international judges who have been declared competent to do so.<sup>316</sup> The judicial outcome in domestic law would be identical in both cases.

In line with these standards, supraconstitutionality means that international human rights instruments enjoy a higher legal status than the rest of the national laws, including the constitutional text, leading to the conclusion that international human rights law can be opposed to the constitution itself and even require the latter’s reform.<sup>317</sup> This is the greatest and most serious consequence that the constitutional text may have to endure. In cases where, as a consequence of the constitutional status given to the norms of international human rights law, a provision in the constitutional text may be inapplicable, the best solution to this contradiction becomes a revision or reform of the constitutional text itself.

While in cases of contradiction nothing prevents the constitutional norms from being modified, we must take into

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<sup>316</sup> See, e.g., Louis Favoreu, *El problema de la supraconstitucionalidad en Francia y Europa*, in PROBLEMAS ACTUALES DEL DERECHO CONSTITUCIONAL: ESTUDIOS EN HOMENAJE A JORGE CARPIZO 107, 114-15 (1994) (revisiting the *Open Door* case as an example in which tension arises between two fundamental rights, and where, without any statement on the merits, the European Court of Human Rights gave conventional law priority over the constitutional rule).

<sup>317</sup> See Pedro Sagües, *supra* note 282, at 46.

account that those norms related to human rights demand a more complex process of modification.<sup>318</sup> The provisions having to do with the basic or essential content of these norms – their intangible part – cannot be changed. Any constitutional regulation in violation of these norms would be inadmissible, and the norm of international law that stands above such a regulation would offer better protection. Thus, the necessity of limits and boundaries to national interpretation or judicial construction, as well as the need to adapt such limits and boundaries, on the basis of strategies provided by comparative law, become plain to see.<sup>319</sup>

This outcome, which is a matter of great seriousness to domestic law, proves to be an extremely important element in efforts to protect global legal goods. The success of such a project is made possible by the role played by domestic judges in conjunction with international law. Taking into account the great impact that international human rights law has made on the Bolivian constitution, it is imperative to hold a permanent dialogue that favors a two-way continual improvement between domestic constitutional rights and the rights contained in the instruments of international human rights law.<sup>320</sup>

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<sup>318</sup> See JAMES BRYCE, *CONSTITUCIONES FLEXIBLES Y CONSTITUCIONES RÍGIDAS* 31-100 (1988) (considering it “a mistake to accuse flexible Constitutions of being unstable, since stability is a distinctive merit claimed for them, insofar as they can be extended or adapted according to the circumstances without detriment to its structure and, therefore, a well-drawn rigid Constitution will confine itself to essentials, and leave many details to be filled in subsequently by ordinary legislation and by usage”).

<sup>319</sup> See Favoreu, *supra* note 316, at 116.

<sup>320</sup> See Bustos Gisbert, *supra* note 234, at 23-27

The communication between courts of law is a consequence of both the search for solutions to similar problems occurring within identical decision-making processes and the need to guarantee the coexistence of dissimilar legal codes, which involves, among other measures, the actions to achieve integration on the basis of human rights with a view to using the judgments delivered by different judicial organs to avoid obstructions brought forth by total inconsistency. In this context, however, it is necessary to distinguish the kind of communication that is so typical of the field of comparative law and takes place between high courts of justice and the one that is sufficiently intense to compel the courts to make decisions more in keeping with those delivered by external judicial organs. The latter form of communication matches what constitutes a dialogue proper.

*Id.*

In these cases, “the search for consensus among courts of law which are intent on protecting human rights but whose interpretations contradict one another translates into a constitutional demand, because the creation of scenarios based on constitutional pluralism can be carried through precisely by the constitutional norms themselves.”<sup>321</sup> This is the reason that constitutional dialogue is the only possible way to find suitable solutions in a plural constitutional setting that works on various levels—domestic, regional, and international.<sup>322</sup> It is worth mentioning in this regard that the articles of the Bolivian Constitution stand out plainly as an exceptional source of international law.<sup>323</sup> The impact of international human rights law on it is reinforced through the opening of unrestricted cooperation between national and international jurisdictions,<sup>324</sup> which is particularly convenient at the present time, when the supranational

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<sup>321</sup> See Miguel Poiates Maduro, *Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism*, in *RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE* 356, 371 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009)

There is nothing fundamentally new about constitutional pluralism: pluralism is inherent in constitutionalism because its ideals authorize, if not promote, equally normatively valid and competing constitutional claims. There can be no monopoly for constitutional claims, and often competing constitutional claims are expressed by different institutions all empowered to give meaning to the Constitution. *Id.* What the current forms of constitutional pluralism have done is multiply these institutions, notably, courts from competing jurisdictions and different sites of power, even within a State.

*Id.*

<sup>322</sup> See, e.g., Bustos Gisbert, *supra* note 234, at 54 (suggesting that while not always possible, if “solutions of synthesis” are to be reached, they will be reached through judicial dialogue).

<sup>323</sup> See generally Gonzalo M. Quintero Saravia, *Las Relaciones entre el Derecho Internacional y el Derecho Interno: El Caso de la Constitución. La Constitución Como Fuente de Derecho Internacional*, 45 *REVISTA DE DERECHO POLÍTICO* 69 (1999) (discussing constitutions as a source of rights and obligations not only for their own State but also for other States within the international community).

<sup>324</sup> Nevertheless, it must be mentioned that there has been some friction with international bodies. Consequently, following the complaints of Bolivia, Ecuador, Venezuela, Colombia, and El Salvador about the severity of the precautionary measures dictated by the IACHR, the Permanent Council of the OAS established a Working and Reflection Group in 2011, which in May of 2013 issued a reform of the Commission’s Rules of Procedure and in March of 2013 issued a report aiming to strengthen the inter-American human rights system. A.G. Res. 1/13 (XLIV-E/13), Inter-Am Comm’n H.R., OEA/Ser.P. (Mar. 22, 2013).

and domestic constitutional courts need flexibility and resilience for the benefit of the maximum protection of rights.<sup>325</sup>

## V. CONCLUSIONS

### *a. The Bolivian Catalogue of Rights Inevitably Requires the Minimum Standards of International Law*

Although the new Bolivian Constitution contains an expanded catalogue of rights, it should be kept in mind that, given the limited resources available to the State, most of the rights and guarantees set forth in the constitution are “orientative” or “guiding” purposes to which the government should direct public policy. This means that the Bolivian catalogue of rights needs to be complemented and configured based on compliance with the minimum standards provided by international human rights law and institutions. Even though the configuration of such human rights responds to the need to provide symbolic arguments for the fight against inequality and discrimination, it is recognized that it is international law that should serve as a guide to the legislator through its standards. International law also establishes the ultimate legal bases that enable claimholders to seek redress in cases of violations. In this sense, no matter how developed rights are in the constitution, the keys to their interpretation, especially in relation to the positive actions which the State is obligated to carry out to enforce rights, must be found in international norms and institutions.

The immediate consequence of all this is to emphasize the value and importance of the inter-American human rights system. Its main challenge has been precisely to generate the capacity to guide the actions of its member States through common standards and principles, both for the determination of the processes of formulating public policy, as well as for overseeing the effective establishment of minimum standards of mandatory compliance for all member States. The use of international standards to give meaning to constitutional rights is especially necessary in the case of

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<sup>325</sup> Roca, Alcalá & Gisbert, *supra* note 288, at 70 (noting that judicial understanding of fundamental rights constantly changes in response to contemporary circumstances and cultural and social norms).

the rights of indigenous peoples, in which international human rights law plays a leading role to build limits and amalgams between the rights of indigenous peoples and the rest of the body of constitutional rights. For this purpose, it is fundamental that jurisdictional dialogues should take place at multiple levels and be structured through relations of continuity and reciprocal effect among different legal decision-makers, from local judges and courts to regional and international ones.

*b. When Interpreting the Constitution, the Relevant Court is Obligated to Justify its Use of Whatever Interpretative Canon to which it Resorts*

The Bolivian Constitution contains the obligation to go beyond the national protection barrier, to allow the interpretation of rights based on international normative frameworks protecting human rights. Interpretation from international sources is especially important because of the extensive nature of the constitution's catalogue of rights, which is susceptible to possible collisions or conflicts, requiring the definition of clear standards of compliance. On the basis of Articles 13.IV *in fine* and 256.II, the constitution opens the way to the interpretation of constitutional rights through the norms established in ratified human rights treaties. However, the Constitutional Court has gone beyond these provisions and has included as an interpretative canon those norms and practices developed by international human rights bodies, thus recognizing that the corpus juris of international human rights law must be understood in an integral manner. In this way, not only the rights proclaimed by international instruments such as treaties, but also the decisions and interpretations made by international courts, are of special relevance in the process of expanding the internationalization and domestic application of human rights.

Article 256.II, however, also serves as a limit, determining that the interpretative opening to international human rights law is not unrestricted or unconditional. This formulation creates an important bridge for the interpretation of rights in a pluralistic way, since it facilitates that interpretative canon which ensures the best protection of human rights, regardless of where the standard comes from. In this way, on the one hand, the interpretation of

constitutional rights is mandated in terms of international human rights law and, on the other hand, the interpretation of international human rights law in terms of constitutional rights is also available, allowing for the application of that norm which gives better protection to the rights in question.

Articles 13.IV *in fine* and 256.II are configured as clauses to which the Constitutional Court must make mandatory resort for the interpretation of constitutional rights. At this point, it is important to emphasize emphatically that the Constitutional Court invariably must resort to these articles. These articles are not merely optional to use; they obligate the Constitutional Court, as well as all domestic judges, to interpret the content of constitutional rights in accordance with the norms that integrate human rights treaties and the rights guaranteed in the Constitution. Because of the fundamental importance of this activity, its expression as judicially binding is irrefutable.

Under this understanding, judges cannot ignore the legal interpretation based on international law simply when it seems appropriate or timely. The application and interpretation of international law must be explicitly included in the decisions, substantiating the specific standard or standards used for the protection of rights. Only from its expression in a legal opinion is it possible to establish the legitimacy of the court's use of one standard over another one. Therefore, although the expression in a legal opinion of such an assessment is not a *sine qua non* requirement, it is highly desirable in order to achieve a better understanding and application of the interpretative canons, ensuring that the important constitutionalization of these clauses has a real effect. In fact, were the court not to resort to Articles 13.IV and 256 in its analysis or legal opinion, this would amount to "an interpretation prejudicial to one's rights," also known as an *interpretatio in peius*.

*c. The New Bolivian Constitution is Directed Towards a Pluralistic System of Rights*

The constitution establishes a "Block of Constitutionality" that is constructed by Article 410.II, integrating all human rights treaties duly ratified. The article is very broad, since it does not limit itself to stating a traditionally closed catalogue of international

instruments. This clause, being open, is capable of including all the human rights instruments ratified by the State.

However, the Constitutional Court has included both the judgements of the Inter American Court of Human Rights and its methods of interpretation, as well as some non-formal human rights instruments. This has made it possible to incorporate new rights from international sources into the domestic catalogue of human rights. These new rights are incorporated with constitutional value and, therefore, offer the same protection as those recognized textually as constitutional rights. This brings with it an important effect: infra-constitutional norms that are in contradiction with the international instruments that make up the Block of Constitutionality are themselves unconstitutional.

A very important characteristic of this framework is that, as mentioned earlier, it facilitates the fusion, in the domestic system, of "conventionality control" (the review of a norm to insure its compliance with an international treaty or convention) with "constitutionality control" (the review of a norm to insure its compliance with the constitutional text). This fusion is an effective tool for the realization of rights, as well as an ideal instrument for the construction of an inter-American *jus commune* or regional common law of human rights. In this process, "constitutionality control" subsumes or includes "conventionality control" in the domestic system, the only difference being that "conventionality control" can also be exercised by international courts. This effect constitutes an unquestionable requirement for constant cooperation and loyal dialogue between national and international judges. Articles 13.IV *ab initio* and 256.I complete the Bolivian constitutional regulation on human rights, since they do not limit rights from international sources to a question of hierarchy but establish that rights from international sources may apply over the constitution itself when they produce better protection of rights than that set forth in the constitutional text.

The indicated relation, apart from supposing, in terms of hierarchy, a "supraconstitutionality" in the application of rights, implies the highest possible level of sophistication in the Bolivian constitutional system. The system facilitates the application of norms that offer better protection of rights regardless of the constitutional or jurisprudential source from which they come, whether national or international. This effect is in accordance with

the guaranteeing will of the Bolivian constitutional text. It forms a pluralistic scenario for the protection of rights in which the last answer is not found in only one constitutional place, nor based only in one constitutional rule, but instead recognizes different constitutional spaces or “places” to find the answer under various constitutional standards for better and more consistent protection of rights.

The Bolivian constitutional system allows us to think also of different solutions, according to every specific case, without fearing that the international norm will be applied over the constitutional norm itself. In cases in which international law is applied in preference to the constitutional norm, the latter remains inapplicable only in that specific case. Such case-specific application does not necessarily affect reform of the constitutional text but brings about a transformation derived from the conjugation of constitutional sources from different traditions and national as well as transnational legal systems.

These dynamics of constitutional interpretation reflect the existence of an effective plurality embracing both international and constitutional norms. The latter norms are no longer intended to solve all the problems raised in a specific case but seek to do so through a coordinated exercise of constitutional and jurisdictional dialogue, in which both the domestic and international systems claim the highest decision authority. There is no ultimate authority in the Bolivian constitutional system. On the contrary, the Bolivian Constitution recognizes the existence of a network of ultimate authorities and, in turn, a network of ultimate standards.