

WHEN SOCIAL HISTORY BECOMES A CONSTITUTION: THE BOLIVIAN POST- LIBERAL EXPERIMENT AND THE CENTRAL ROLE OF HISTORY AND INTENT IN CONSTITUTIONAL ADJUDICATION

Jorge Farinacci-Fernós*

I. INTRODUCTION

For many years, comparative constitutional law was almost exclusively fixated on matters of text and doctrine. Very little attention was given to issues of interpretive methodology, ideological content, and how courts in different constitutional systems applied their particular constitutional texts. Recently, led by an increasing body of literature focused on comparative originalism, there has been a greater emphasis on the combination between content and method as critical elements in the creation of constitutional doctrine.¹

This creates an important opportunity: to study systems that (1) adopt intent-based methods of constitutional interpretation, thus challenging the

* B.A., M.A. (Univ. of Puerto Rico), J.D. (Univ. of Puerto Rico Law School), LL.M. (Harvard Law School), S.J.D. (Georgetown University Law Center). Associate Professor of Law, Inter American University of Puerto Rico School of Law. This Article is based on a chapter of the author's S.J.D. dissertation, *Original Explication and Post-Liberal Constitutionalism: The Role of Intent and History in the Judicial Enforcement of Teleological Constitutions* (2016).

1. See generally Jorge M. Farinacci-Fernós, *Originalism in Puerto Rico: Original Explication and its Relation with Clear Text, Broad Purpose and Progressive Policy*, 85 REV. JUR. U.P.R. 203 (2016); Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. TRANSNAT'L L. 780, 782-83 (2014); Sujit Choudhry, *Living Originalism in India? "Our Law" and Comparative Constitutional Law*, 25 YALE J. L. & HUMAN. 1 (2013); CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE (Diana Kapiszewski et al. eds., 2013); Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT'L L. 1239 (2011); Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1 (2009); INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY (Jeff Goldsworthy ed., 2006); Michael Schwaiger, *Understanding the Unoriginal: Indeterminant Originalism and Independent Interpretation of the Alaska Constitution*, 22 ALASKA L. REV. 293 (2005).

assertion that, unlike the United States, the rest of the world universally practices an objective teleological method of interpretation, and (2) incorporate constitutional provisions that address issues of substantive policy, particularly of a post-liberal bent. When combining the two, this also allows us to re-examine mainstream views about the proper role of courts in constitutional systems.

Most of the comparative literature has focused on liberal democratic constitutional systems.² This is due to several factors. First, cultural familiarity, whether it be related to common language or legal history. Second, the notion that liberal democratic constitutional systems are, by definition, the superior articulation of constitutionalism. As a result, countries that have adopted post-liberal constitutional structures are mostly ignored. This is a mistake.

First, liberal democratic constitutionalism is not the only type out there. Neither is it inherently superior to other models. All constitutional models should be examined, particularly since there has been a recent wave of post-liberal constitutional-making processes that must be taken into account, particularly in Latin America.

Second, and most importantly, it makes little sense to continue to study systems that are so similar. This normally produces the same results over and over again, creating the false view that their shared experiences are universal truths. A wider view is needed.

Recent comparative originalist literature has identified two important factors. First, that intent and history based methods of constitutional interpretation are much more ubiquitous than previously thought.³ Second, that originalism is not inherently conservative.⁴ On the contrary, what has emerged is the proposition that, in many systems, originalism can actually generate progressive, and even radical, outcomes.⁵ In this Article, I wish to examine the recent experiences in Bolivia, as part of that ever growing body of comparative constitutionalism—and comparative originalism—that focuses on modern constitutional models that combine radical policy provisions in the constitutional text and an intent and history based method of interpretation.

2. See generally Farinacci-Fernós, *supra* note 1; Tew, *supra* note 1, at 782-83; Choudhry, *supra* note 1; CONSEQUENTIAL COURTS, *supra* note 1; Varol, *supra* note 1, at 44; Greene, *supra* note 1; INTERPRETING CONSTITUTIONS, *supra* note 1; Schwaiger, *supra* note 1, at 293.

3. See Tew, *supra* note 1, at 797, 815, 828, 841, 844 (discussing Malaysia); Varol, *supra* note 1, at 1246 (discussing Turkey).

4. See Tew, *supra* note 1, at 797, 815, 828, 841, 844 (discussing Malaysia); Varol, *supra* note 1, at 1246 (discussing Turkey).

5. See Farinacci-Fernós, *supra* note 1, at 211, 213, 219, 222, 235, 242 (discussing Puerto Rico).

This interesting combination also challenges mainstream views about the role of courts in constitutional democracies. As we are about to see, when you combine post-liberal constitutions that were the result of a highly democratic and popular process of creation with an originalist interpretive methodology, not only are progressive results generated, but courts are required to both *intervene more* and, at the same time, *restrain themselves*. This seeming contradiction is explained by the fact that modern constitutions, by adopting explicit substantive public policy provisions in the constitutional text, require courts to intervene in policy disputes. Yet, this intervention does not equal independent judicial lawmaking power since courts become the instruments of the constitutional legislator's will. As a result, constitutional courts are more active in terms of involvement in policy matters, yet become more restrained as to policy choices.

In that sense, Bolivia represents a triple opportunity: (1) it has adopted a post-liberal constitution that incorporates many substantive policy provisions and was the result of a highly democratic, popular, and participatory process of creation; (2) by constitutional command, its courts have adopted an originalist method of interpretation and enforcement; and (3) because of the substantive nature of the constitution, courts are much more involved in policy matters enforcing the constitutional legislator's wishes.

Bolivia's current constitutional system is relatively new, not only in terms of time – it was adopted in 2009 – but, more importantly, as to its content and underlying premises. The Bolivian Constitution of 2009 is the result of a perfect storm of different elements, including social struggle, ideological re-orientation, historical grievances, intent-driven creation, and radical substance. It is the stuff of post-liberal teleological constitutions.⁶

In this Article, I wish to analyze how the Tribunal Constitucional Plurinacional (“Plurinational Constitutional Court”), the nation's highest judicial body when it comes to constitutional adjudication, has implemented the 2009 Constitution.⁷ In particular, I will focus on method and its uses of text, history, and intent. This analysis is supplemented by the ideological

6. By teleological constitutions, I refer to constitutions that adopt a substantive blueprint for society. In other words, they include explicit policy provisions as to issues such as economic organization and other social issues. Their counterpoints are framework constitutions, which merely establish the structure of government, as well as individual political rights that ensure the proper operation of said structure, but are mostly “neutral” as to policy matters. Finally, post-liberal constitutions are a subset of the teleological type that, while adopting some tenets of the liberal model, such as individual political rights, break from classic liberal views such as individualism, market economies and other logics of the liberal capitalist system, and instead embrace progressive, collective and communitarian principles.

7. The Court's cases are published in Spanish. For purposes of this Article, all translations were made by the author.

components of the Bolivian Constitution, which is expressly post-liberal and socially-oriented with clear redistributive and communitarian goals. Finally, I will address the issue of how courts in these types of systems have re-defined their own roles in order to adequately implement the constitutional provisions they are charged with putting into practice. Post-liberal constitutions require courts to keep up with their pace.

This Article is divided into the following parts: (1) the ideological components of the Bolivian Constitution, with emphasis on its transformative goals and post-liberal ideology; (2) the process of creation and social context; (3) the Court's interpretive methods, with emphasis on text and intent; (4) the role of history in adjudication; (5) its specific substantive content; and (6) issues pertaining to judicial procedure.

II. CONSTITUTIONAL IDEOLOGY

Bolivia's 2009 Constitution is overtly ideological in nature.⁸ Its main trait is post-liberalism. Far from being a purely symbolic or rhetorical device, that ideological component has played a significant role in constitutional adjudication.⁹ Ideology has been transformed into enforceable legal concepts and norms.

Bolivia's constitutional experiment is not an isolated event in recent Latin American history. On the contrary, it is part of a wider process of social and structural transformation that includes the recent constitutional processes in Venezuela and Ecuador. As Phoebe King explains, these "three constitutions are highly radical documents that pull each state further left than any constitution's recent predecessor has done."¹⁰ In that sense, the Bolivian Constitution "is the product of culminating radicalism."¹¹ We shall return to the issue of the *social* process of constitutional *creation* in these types of experiences later on in Part III.

8. See Phoebe King, *Neo-Bolivarian Constitutional Design: Comparing the 1999 Venezuelan, 2008 Ecuadorian, and 2009 Bolivian Constitutions*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 366, 387 (Dennis Galligan & Mila Versteeg eds., 2013).

9. In that sense, what Phoebe King calls the Constitution's "unprecedented levels of aspirational and ideological content tied to specific experiences and grievances, [which is] more radical than [its] recent predecessor[.]" has transcended the aspirational realm and found its way into actual judicial practice. *Id.* at 367.

10. *Id.* King has dubbed this Neo-Bolivarian design. *Id.* While I do not necessarily contest this characterization, it should be noted that, in current Latin American parlance, Bolivarianism is more descriptive of the Venezuelan process. The concept of Bolivarian is inherent to Venezuela, since Bolivar was Venezuelan. In Ecuador, the constitutional process is called the Citizen's Revolution. The constitutional process of the 2000s was part of President Correa's "Citizen's Revolution."

11. *Id.* at 386.

Probably because previous progressive constitutional experiments adopted symbolic and non-enforceable language, some believe that the new Bolivian Constitution is an “intentionally aspirational document.”¹² But in fact, because the Plurinational Constitutional Court has expressly held that such substantive language is enforceable, it would be wrong to simply categorize it as aspirational. This type of language is articulated as an enforceable substantive provision that sheds off the characterization as mere aspiration.

In that sense, the new constitutional provisions “communicate broad policy aims” that require judicial implementation.¹³ As King explains, the ideological content of the Bolivian Constitution “is not confined to the preamble and, indeed, permeates the whole document.”¹⁴ Rights and socio-economic organization are at the heart of this new ideological content. We shall discuss them in more detail in Part VI.

Crucial to the process of transforming seemingly aspirational language into applicable law is the role of courts. In the Bolivian context, the Plurinational Constitutional Court has not shied away from addressing the explicitly ideological content of the Constitution and has given it direct legal effect. Constitutionalized ideology has been transformed into enforceable law.

A. *Transformative Constitutionalism*

But before diving into the specific content of the constitutionalized ideology, it is worthwhile to examine the Court’s own acknowledgment of the *transformative* design, intent and effect of the 2009 Constitution. Teleological constitutions are meant to *change* society. With the help of a willing Court, the Bolivian Constitution has started to employ its substantive content in the service of social transformation.¹⁵

For example, the Plurinational Constitutional Court has made constant reference to the Constitution’s explicit mention of its own transformative

12. *Id.* at 387.

13. *Id.*

14. *Id.*; Tribunal Constitucional Plurinacional [T.C.P.] [Plurinational Constitutional Tribunal], 25 Febrero 2015, Declaración Plurinacional 12/2015, at 10 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(orbitpxsepe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(orbitpxsepe542eolyx4rcw2))/WfrResoluciones1.aspx).

15. See Dennis J. Galligan & Mila Versteeg, *Theoretical Perspectives on the Social and Political Foundations of Constitutions*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 5, (Cambridge Univ. Press 2013).

nature.¹⁶ The Bolivian Constitution of 2009 was designed to effectuate profound change, in favor of the “construction of a new institutionalism and, of course, in the judicial realm, of a new Rule of Law, but above all to the creation of a strong and progressive State.”¹⁷ This has a direct impact as to the articulation of constitutionalism itself. Accordingly,

the Bolivian Constitution treks through the path of the project of decolonization, affirming our plurinationality, legal pluralism, the equal dignity of all peoples and cultures . . . [all] within the framework of a new social paradigm, different from developmentalism . . . This constitutionalism, which is also called emancipatory, has an anticolonial inspiration that breaks with the legacy of mono-cultural constitutionalism, which was born on the backs of the indigenous peoples . . .¹⁸

As a result, the new constitutional order constitutes a “break with classic western constitutionalism as conceived by the political elites; [the new approach] expresses the will of the indigenous peoples and other popular forces, thus creating a new institutionalism . . .”¹⁹

This approach to constitutional adjudication has permeated the decisions of the Plurinational Constitutional Court. As the Court has pointed out, “[i]n the case of our country, the constitutional process that started in 2006, and culminated in 2009, had an unequivocal original character, with a direct genesis from the people’s democratic will,”²⁰ which established a new form of social relationship “different from the pre-existing [structure].”²¹ In that sense, the 2009 Constitution heralds a “new political-legal era premised on the re-foundation of the State within the framework of pluralism, cultural interaction and decolonization, which serve as the fundamental axis of the new model of the State.”²² As if this was not enough, the Court has quoted

16. In particular, the Court has made reference to the Preamble, which “signals the essential aspects of the profound transformations which the Bolivian State has endured . . .” T.C.P., 17 Mayo 2010, Sentencia Constitucional 130/2010-R, at 8 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

17. T.C.P., 18 Junio 2012, Sentencia Constitucional 30/2012, at 20 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

18. T.C.P., 12 Mayo 2014, Aclaración de Voto, Declaración Constitucional 20/2014, at 2 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

19. *Id.* at 3; *see also* T.C.P., 25 Febrero 2014, Sentencia Constitucional 487/2014, at 9 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

20. T.C.P., 9 Junio 2014, Sentencia Constitucional 1038/2014, at 8 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

21. T.C.P., 9 Junio 2014, Sentencia Constitucional 1038/2014, at 8 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

22. *Id.*

from the framers themselves who stated that new Constitution attempts to carry out “profound change, not half-way changes.”²³

B. *Ideological Constitutionalism: The Central Role of Post-Liberalism*

The 2009 text best fits with the teleological constitutional type, particularly the ideological and post-liberal articulation. Let us take a closer look, particularly on how the Plurinational Constitutional Court has characterized the ideology adopted by the Constitution.

At its most basic level, the new legal structure that emerges from the 2009 Constitution has been characterized as the Democratic and Social Rule of Law State.²⁴ This is seen as an improvement of the welfare state,²⁵ and it includes the adoption of constitutional principles such as solidarity, justice, the indigenous notion of *vivir bien*,²⁶ redistribution,²⁷ as well as equality, dignity, inclusion, reciprocity, respect, social and gender equity, the common good, and social justice.²⁸ The Democratic and Social Rule of Law State is premised on a socially-sensitive version of democracy that adopts “indispensable tools to assure that [democracy] is not used solely as a mechanism that gives formal legitimacy to economically powerful groups.”²⁹ This concept permeates the entire constitutional text.³⁰

But the main ideological component of the Bolivian Constitution is a break from neo-liberalism. As such, it adopts a post-liberal approach to constitutionalism which includes, for example, an “explicit break with known comparative constitutional models . . . [which] distances itself from an exclusive individualist view of constitutional protection, building instead a

23. T.C.P., 28 Mayo 2014, Declaración Constitucional 30/2014, at 10 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx).

24. T.C.P., 17 Mayo 2010, Sentencia Constitucional 130/2010-R, at 4 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx).

25. T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 6-8 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx).

26. Its closest translation is “well-being.” I will dive into the specific meaning of this concept later on in Part II of this Article when discussing the specific ideological components of the 2009 Constitution. Because some of the meaning of the original term maybe lost in translation given that there are two levels of translation at play, I will make reference throughout the Article to the concept in its Spanish version: “*vivir bien*” or “*buen vivir*.”

27. T.C.P., 17 Mayo 2010, Sentencia Constitucional 130/2010-R, at 8.

28. T.C.P., 18 Junio 2012, Sentencia Constitucional 300/2012, at 18 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx).

This also includes “distribution and redistribution of social goods and products.” T.C.P., 17 Mayo 2010, Sentencia Constitucional 130/2010-R at 8.

29. T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 8.

30. *Id.*

whole new constitutional structure which guarantees fundamental rights, not in an isolated way, but in a more collective fashion.”³¹ In the end,

the new constitutional order’s goal is the construction of a new State, where pluralism serves as the bedrock for a new social, political and legal structure where rights, both individual and collective, are protected by the State, which commits itself to put into practice that which is established by the constitutional text.³²

The new constitutional ideology has as its goal the “construction of a just and harmonious society, founded on decolonization, free of discrimination and exploitation, with full social justice, in order to strengthen plurinational identities and to guarantee the people’s access to education, healthcare and work.”³³ According to the Plurinational Constitutional Court, the new Constitutions of Bolivia and Ecuador are part of an emerging Latin American constitutionalism “with very particular characteristics which are different from other, more traditional forms of constitutionalism, as well as from newer constitutional trends of European origin.”³⁴ This new constitutionalism, of a clear post-liberal bent, is somewhat different from the post-World War II European social model.³⁵ In particular, the Court has said, while the modern European constitutional model does, in fact, create room for a legal and cultural pluralism that attempts to renew state institutions, in the end, this model does not allow for a more popular driven form of constitutionalism, which has emerged in Latin America.³⁶ As such, the Plurinational Constitutional Court has gone as far as to state that Bolivia’s constitutional experiment constitutes a “constitutionalism that has no precedent.”³⁷

This new post-liberal constitutionalism has a direct impact on all aspects of “social, political, economic and cultural life.”³⁸ As a result, the 2009 constitutional project’s goal is to “transcend the liberal State model . . .

31. T.C.P., 18 Junio 2012, Sentencia Constitucional 300/2012, at 21. As we will see in Part II, this has a direct impact on the issue of rights protection. This includes a broader view of rights, including non-political rights. *Id.* at 18.

32. *Id.* at 18.

33. T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 9.

34. T.C.P., 28 Mayo 2014, Declaración Constitucional 30/2014, at 8 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

35. *Id.* at 10.

36. *Id.* at 10-11.

37. T.C.P., 25 Febrero 2015, Sentencia Constitucional 487/2014, at 8 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx); see also T.C.P., 16 Enero 2015, Declaración Constitucional 12/2015, at 6-7 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

38. T.C.P., 28 Mayo 2014, Declaración Constitucional 30/2014, at 9.

premised on the individual citizen.”³⁹ As an alternative, a more communitarian approach to constitutionalism is adopted.⁴⁰ In Part VII, I will return to the issue of the rejection of the liberal State when discussing the role of history in constitutional adjudication in Bolivia. Here, I focus on the ideological content of the post-liberal model of constitutionalism.

We should not confuse post-liberalism with being illiberal. The Bolivian Constitution *does* include the classic legal features, many of which trace back to the core elements of modern constitutionalism.⁴¹ But, at the same time, it sees the state as a *positive* force that can carry out the constitutional project’s stated substantive policy goals.⁴²

The transition from neo-liberalism to post-liberalism is an explicit feature of the 2009 Constitution and has been repeatedly acknowledged by the Plurinational Constitutional Court. For example, in an employment-rights case, the Court referenced the fact that, under the previous constitutional regime:

wealth was accumulated in only a few hands. This is one of the features that more clearly characterizes neo-liberalism, and which generated abysmal economic differences between Bolivians, thus according to [current] constitutional commands, the State has to be reformed, in order to achieve a balance between its members and to bridge the gap created, not only by neo-liberalism, but by exploitation, corruption and mismanagement of public goods which only made a few people rich and left the great majority in misery.⁴³

As such, the Bolivian Constitution institutionalizes a “radical constitutional ideology . . . [which] brings *power closer to the people*.”⁴⁴

The Bolivian revolutionary constitutional experiment is of an explicit teleological type, since the Constitution “not only addresses the structure and functional operation of the State but, according to the new model, regulates the economic and territorial organization and structure of the State”⁴⁵ In that sense, the 2009 Constitution establishes the social goals of the State and

39. T.C.P., 5 Septiembre 2014, Declaración Constitucional 45/2014, at 3-4. Curiously enough, this characterization was not made by the Court itself, but by the Majority Report of the *Visión País* (“Nation Project”) Commission of the Constitutional Assembly.

40. T.C.P., 12 Febrero 2014, Sentencia Constitucional 260/2014, at 20 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

41. King, *supra* note 8, at 391.

42. *Id.* at 392.

43. T.C.P., 17 Mayo 2010, Sentencia Constitucional 130/2010-R, at 8-9 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

44. King, *supra* note 8, at 391 (emphasis added).

45. T.C.P., 5 Septiembre 2014, Declaración Constitucional 45/2014, at 5 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

the substantive shape society is to take.⁴⁶ It also is characterized by its substantive principles and values,⁴⁷ which are, as King states, “not always hollow.”⁴⁸ On the contrary, and as we are about to see, they are wholly enforceable and enforced.

In this context, the Plurinational Constitutional Court has recognized the need to “generate new forms of ‘constitutional interpretation from below,’ which allows us to enter into a dialogue with the new and decolonizing paradigms, practices and experiences.”⁴⁹ I shall return to this point later on in Parts IV and VI when discussing the role of courts in this new constitutional model. For now, the point is that the ideological characteristics of the constitutional text and structure have a direct impact on constitutional adjudication, *both as to the choice of method of interpretation and construction, and as to the substantive results that are generated through the adjudicative process.*

C. Communitarianism and Indigenous Ideological Values

The Plurinational Constitutional Court has held that

the communitarian character of the State, which adopts as a principle, value and goal the [indigenous concept] of the *suma qamaña* [buen vivir], results in criticism of the *individualistic foundation of society and of social norms . . .* which weakens community links and solidarity; ignores the communitarian organization of the *indígena originario campesino* nations and peoples, and, as a result, denies the community’s role in the formation of individual identity.⁵⁰

This communitarian approach states that “a person is not an isolated being, independent of the community, but instead is a contextualized being within a determined cultural group with social circumstances that condition

46. T.C.P., 16 Enero 2015, Declaración Constitucional 12/2015, at 6-7 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx); T.C.P., 26 Septiembre 2011, Voto Disidente, Sentencia Constitucional 547/2011-R, at 4 (Burgoa Ordóñez) (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgxc))/WfrResoluciones1.aspx).

47. T.C.P., 25 Febrero 2014, Sentencia Constitucional 487/2014, at 8, 11 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx); T.C.P., 16 Enero 2015, Declaración Constitucional 12/2015, at 14.

48. King, *supra* note 8, at 388.

49. T.C.P., 12 Febrero 2014, Declaración Constitucional 30/2014, at 14 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx).

50. T.C.P., 12 Febrero 2014, Sentencia Constitucional 260/2014, at 23 (Bol.) (emphasis added), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx).

her identity.”⁵¹ This clashes with the view “about the individual which liberalism entails.”⁵² In particular, with the decontextualized *formal equality* of liberalism that ignores an individual’s cultural, economic and social conditions. As the Court has stated, the communitarian character of the State rejects the premise of a false, “blind equality” that ignores material inequality.⁵³

Because of the indigenous roots of the 2009 Constitution, the new constitutional order is premised on the historic and culturally-specific concept of *vivir bien*. According to the Court, this concept takes shape as a constitutional principle and, more importantly, “as the fundamental core value, which constitutes the axiological foundation of the [Constitution].”⁵⁴ Among the many practical meanings of this concept, the notion of *vivir bien* requires that “all economic activities, all planning both in the public and private spheres must be guided by due respect to nature and the search for balance between the different beings that inhabit it, attempting to find those measures and actions that have the least impact on our natural environment.”⁵⁵ But this concept also has a direct impact on the economic structure, and serves as an “alternative to capitalism, neo-liberalism and any other system that attempts to turn life into a commodity.”⁵⁶

The concept of *vivir bien* or *suma qamaña* serves as a principle, value and goal.⁵⁷ As the core constitutional principle, it influences the entire legal structure.⁵⁸ As a constitutional value, it serves as guidance and as an enforceable standard.⁵⁹ Finally, as a constitutional goal, it constitutes “the ultimate end of the State.”⁶⁰

Another ideological concept that gains constitutional status and is linked with the indigenous roots of the Bolivian constitutional project is the notion of the *indígena originario campesino* (very loosely translated as original or

51. *Id.*

52. *Id.* at 24.

53. *Id.*

54. T.C.P., 18 Junio 2012, Sentencia Constitucional 300/2012, at 21 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

55. *Id.* at 19.

56. T.C.P., 28 Mayo 2014, Sentencia Constitucional 30/2014, at 12 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

57. T.C.P., 12 Febrero 2014, Sentencia Constitucional 260/2014, at 24, 33 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

58. T.C.P., 12 Febrero 2014, Sentencia Constitucional 260/2014, at 24-25, 33 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

59. *Id.* at 25, 33.

60. *Id.* at 24-25.

native indigenous peasant). This applies both to the individual subject and to group entities. This term is

linked to the plural composition of the Bolivian people whose history highlights, as articulated in the Preamble, the struggles of the past, the anticolonial indigenous uprisings, our independence, the different popular liberation struggles, the social, labor and indigenous mobilizations, the October water wars, and the struggles for land, *whose ideals were transferred into the constitutional assembly . . .*⁶¹

In Part IV, I will return to this concept in the context of semantic interpretation.

Finally, another important ideological constitutional principle adopted by the 2009 text is the concept of the Plurinational Communitarian State. This ideal is the result of a “pact among peoples, different from the distanced State that merely ‘recognizes rights’ to the indigenous peoples, but where instead the indigenous peoples become constituent entities, defining the new model of the State and the relations between the peoples that compose it.”⁶² The concept of “plurinationality” is linked to the notion of statehood itself and is premised on the diverse peoples and nations that make up the Bolivian state. More precisely, this constitutional concept states that it is the different indigenous peoples of Bolivia that recognize and constitute the State, “and not the other way around.”⁶³

Plurinationality has, among others, institutional, legal, political and economic connotations and effects.⁶⁴ In its institutional context, it recognizes the pluralist characteristics of the different structures of the state. In its legal articulation, the “strengthening of plurinational constitutionalism within the framework of egalitarian legal pluralism” is found.⁶⁵ In its political dimension, plurinationality acknowledges the central role of “communitarian democracy.”⁶⁶ Finally, as to the economic connotations of the concept of plurinationality, it recognizes the central role of communitarian economic organization models which, in turn, “must be followed, protected and

61. T.C.P., 5 Septiembre 2014, Declaración Constitucional 45/2014, at 3 (Bol.) (emphasis added), [https://buscador.tcpbolivia.bo/_buscador/\(S\(orbitpxscep542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(orbitpxscep542eolyx4rcw2))/WfrResoluciones1.aspx).

62. T.C.P., 12 Mayo 2014, Aclaración de Voto, Declaración Constitucional 20/2014, at 2 (Cusi Mamani) (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(orbitpxscep542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(orbitpxscep542eolyx4rcw2))/WfrResoluciones1.aspx).

63. *Id.* at 1-2; T.C.P., 5 Septiembre 2014, Declaración Constitucional 45/2014, at 3.

64. T.C.P., 12 Febrero 2014, Sentencia Constitucional 260/2014, at 17-18.

65. *Id.* at 17.

66. *Id.* at 18.

promoted, and encompass the modes of production and reproduction of social life.”⁶⁷

D. *Economic Structure and Policy*

The Bolivian Constitution of 2009 is not neutral as to economic policy and structure. As with its Ecuadorian and Venezuelan counterparts, “these constitutions. . . enshrine economic policies that ensure subsistence and egalitarian distribution of resources.”⁶⁸ In that case, “the economic structure detailed in the constitution unveils a radical agenda.”⁶⁹ As to its specific content, the constitutional economic policy “is therefore not designed to uphold liberal individual rights, but rather is explicitly designed to augment social welfare, economic subsistence, and the egalitarian distribution of wealth.”⁷⁰

As we shall see in Part V, ideology is not the only driving factor behind this; history plays a crucial part as well, particularly Bolivia’s history of economic exploitation of its indigenous majority.⁷¹ As such, it is the *constitutional duty* of the Bolivian State to correct those past wrongs.⁷² As King observes, “the constitution dictates that the economic organization of Bolivia should promote the reduction of inequality of access to productive resources.”⁷³ In turn, that duty is present in constitutional adjudication, where those historical circumstances play a direct role in the process of constitutional interpretation and construction.⁷⁴

Economic policy comes in many shapes and forms, such as establishing greater protections for public-owned land which, *by constitutional command*, is immutable, cannot be attached, seized or expropriated, as well as characterizing natural resources as strategic.⁷⁵ This results in a bigger and broader public and social space.⁷⁶ On the other hand, excessive private

67. *Id.*

68. King, *supra* note 8, at 369.

69. *Id.* at 389.

70. *Id.* at 390.

71. T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 8-9, 13 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

72. *See id.* at 10; CONSTITUCIÓN POLÍTICA DEL ESTADO [CPE] [STATE POLITICAL CONSTITUTION], Feb. 7, 2009, art. 313 (Bol.).

73. King, *supra* note 8, at 389.

74. T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 8-9.

75. T.C.P., 29 Octubre 2013, Sentencia Constitucional 1850/2013, at 38 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx).

76. T.C.P., 25 Febrero 2015, Declaración Constitucional 36/2015, at 127-128 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx).

ownership of land is received with constitutional skepticism.⁷⁷ For example, the Bolivian Constitution “limits private ownership of land to 5,000 hectares.”⁷⁸ I will return to this issue when discussing property rights and the constitutional preference for collective ownership of land.⁷⁹

Also, as we shall see in Part VI in the context of water as a fundamental right, some public services cannot be privatized and can only be offered through some form of social enterprise, whether it is state property or mixed entities that are socially-oriented. Finally, even more rhetorical language adopted by the Constitution can serve as guidance, particularly when it is of an explicit ideological nature.⁸⁰

III. CONSTITUTIONAL CREATION

A. *The Central Role of the Constitutional Assembly*

Bolivia’s constitutional creation process lasted for almost three years. The Constitutional Assembly that finally adopted the 2009 text was the culmination of a broader social phenomenon which was committed to a comprehensive overhaul of the structures of the State and of society as a whole. In Part IV, I will analyze the specific issue of how the Plurinational Constitutional Court uses the deliberations of the Assembly in the adjudication of constitutional cases. For now, I wish to discuss how the Court has characterized the process of constitutional creation in general and the significance of the Assembly in particular.

According to the Court, the Constitution’s binding power “is derived from the constitutional process, as exercised by the sovereign Constitutional Assembly, which was legitimized by the democratic election of its members, who, once they drafted the new constitutional text, sent it to the Bolivian people for their ratification.”⁸¹ Moreover, the crucial participation of the country’s indigenous majority during the drafting process has carried enormous weight: “The decolonizing force of the indigenous peoples in the Constitutional Assembly was decisive as to the constitutional design . . .

77. T.C.P., 16 Enero 2015, Declaración Constitucional 12/2015, at 84 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

78. King, *supra* note 8, at 389-390.

79. *Id.* at 387.

80. See T.C.P., 17 Mayo 2010, Sentencia Constitucional 130/2010-R, at 8-9 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx) (referencing the Preamble’s allusion to the indigenous peoples, peasants, and workers who were victims of the previous political and economic systems).

81. T.C.P., 12 Octubre 2012, Sentencia Constitucional 1922/2012, at 14 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx).

[D]uring the Constitutional Assembly, it was shown that it is the indigenous peoples who hold ‘power’ and who designed the new model for the State.”⁸²

As to the process of adoption, the Court’s narration is very insightful: “[The Constitution] was *approved* by the Constitutional Assembly in 2007, *made compatible* by the National Congress in 2008, *approved* by National Referendum on January 25, 2009 and promulgated on February 7, of the same year.”⁸³ Notice that the Court makes reference to what seems to have been a multi-stage process. Add to that the *other antecedent and contemporary events* that form part of the larger chain of events.

Yet, as we shall see when diving into method, it is the *will of the constitutional legislator* that wields binding power. Of course, and as relevant here, the process and *context* of creation and adoption *also* play a decisive role in constitutional adjudication. For example, the Plurinational Constitutional Court has made reference to the fact that the Constitutional Assembly was the *product and culmination* of a larger historical process which included substantial social struggle and clashes.⁸⁴ As a result, many of the issues that were part of the broader social conversation “were moved to the Constitutional Assembly.”⁸⁵

B. *The Social Context of the Adoption Process*

Many post-liberal teleological constitutions, particularly those that are overtly ideological, are the product of highly transcendental social processes characterized by robust popular participation. Historical factors tend to have

82. T.C.P., 8 Agosto 2013, Aclaración de Voto, Declaración Constitucional 13/2013, at 2 (Camacho Quiroga) (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx); *see also* T.C.P., 12 Mayo 2014, Aclaración de Voto, Declaración Constitucional 20/2014, at 1-2 (Cusi Mamani) (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx) (emphasizing the decolonizing force of the indigenous peoples at the Constitutional Assembly, defining a new model of State).

83. T.C.P., 4 Noviembre 2013, Sentencia Constitucional 1936/2013, at 6 (Bol.) (emphasis added), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx); *see also* T.C.P., 9 Junio 2014, Sentencia Constitucional 1038/2014, at 8 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx) (making reference to the 2006-2009 constitutional process).

84. T.C.P., 21 Abril 2014, Sentencia Constitucional 785/2014, at 4 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx); T.C.P., 13 Junio 2014, Declaración Constitucional 34/2014, at 2-3 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx).

85. *See* T.C.P., 5 Septiembre 2014, Declaración Constitucional 45/2014, at 3 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx); *see also* T.C.P., 14 Enero 2015, Declaración Constitucional 6/2015, at 78 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx).

a substantial impact on the constitutional creation process. Bolivia fits neatly within this category.

In particular, the 2009 Constitution is the result of the political organization, mobilization and participation of the majority indigenous population and the leading role played by labor and land workers' unions.⁸⁶ As a result, these social organizations play constitutionally assigned roles.⁸⁷ Those contextual features have not been lost on the Plurinational Constitutional Court.⁸⁸ For example, the Court has stated that “[t]he abrogated Constitution did not take into account our ancestral peoples in terms of the development of the State . . . however, during the last constitutional process, the ancestral nations and peoples had an active participation, for the first time, in the creation of the Constitution.”⁸⁹

In the end, the goal is to turn the Constitution into a tool of self-government that creates a strong social cohesion behind it which cannot be thwarted by ordinary politics.⁹⁰

IV. METHODOLOGY: THE PRIMACY OF TEXT AND INTENT AND THE USE OF OTHER COMPLEMENTARY TOOLS

The Bolivian Constitution of 2009 does not give *carte blanche* to the Plurinational Constitutional Court on how to interpret it. On the contrary, there is an express textual provision that deals with issues of interpretation, construction and adjudication. These textual commands have been adopted wholeheartedly by the Court.⁹¹ Specifically, the Constitution makes reference to *text* and *intent* as the primary interpretive tools. As a result,

employing [different] methods of interpretation is not just a matter of what is the interpreter's choice [as to methods,] instead what is at stake is compliance with democratic principles, given the relevance constitutional interpretation has over a country's institutional order. In that respect, *the*

86. T.C.P., 5 Septiembre 2014, Declaración Constitucional 45/2014, at 3.

87. T.C.P., 25 Febrero 2015, Declaración Constitucional 36/2015, at 42-43 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx).

88. See T.C.P., 12 Febrero 2014, Declaración Constitucional 6/2014, at 24 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx); T.C.P., 5 Septiembre 2014, Declaración Constitucional 45/2014, at 3; T.C.P., 13 Noviembre 2014, Declaración Constitucional Plurinacional 71/2014, at 164 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx).

89. T.C.P., 8 Diciembre 2014, Declaración Constitucional 79/2014, at 43 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx).

90. See T.C.P., 5 Febrero 2014, Sentencia Constitucional 206/2014, at 17-18 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx).

91. See T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 9-10 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx).

*Bolivian framers have opted to establish [interpretive] constitutional rules by way of Article 196.II.*⁹²

In other words, which method of interpretation to employ is not a decision left up to the Court, but, instead, was previously made by the framers.

An analysis of the decisions of the Bolivian Plurinational Constitutional Court reveals that intent and text are the *main methodological sources* of interpretation and construction. In that sense, constitutional adjudication in Bolivia is both textualist and intentionalist *because the Constitution says so* and the Court has followed that command. However, it is *history*, in its many forms, which serves as the *over-arching and driving conceptual force* behind constitutional adjudication. This is so because history is the main source of content and the primary inspiration *for the constitutional project itself*.⁹³ I will start with the more discrete issue of method, focusing on intent, and then dive into the more transcendental role history plays in constitutional adjudication.

As previewed, the Bolivian Constitution includes an express provision directing the Plurinational Constitutional Court on *how* to go about its process of interpretation and adjudication. Article 196.II states: “In its interpretive function, the Plurinational Constitutional Court shall use, with preference, as its interpretive tool, *the will of the framers [constituyente], in accordance with the documents, minutes and resolutions, as well as the literal sense of the text.*”⁹⁴ In other words, “[i]n the current constitutional system, two interpretive criteria stand out, the will of the framers, to be applied with preference, and the literal sense of the text.”⁹⁵ Let us break this down.

As we can appreciate, there is reference to only *two* sources of interpretation: *text* and *will*, which can be, for our purposes, seen as *intent*.⁹⁶ The focus on text can have *three* different effects. First, an analysis of text can require a teleological approach *even from a textualist point view*, for example, in cases of introductory clauses or express textual reference to

92. *Id.* (emphasis added).

93. T.C.P., 5 Septiembre 2014, Declaración Constitucional 45/2014, at 3 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx); T.C.P., 14 Enero 2015, Declaración Constitucional 6/2015, at 77-78 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx).

94. CONSTITUCIÓN POLÍTICA DEL ESTADO [CPE], Feb. 7, 2009, art. 196.II (Bol.) (emphasis added).

95. T.C.P., 29 Noviembre 2013, Voto Disidente (dissenting vote), Declaración Constitucional 28/2013, at 14 (Choque Capuma) (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx).

96. T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 10.

purposes or values. An expressly purposive text can force an interpreter to take purpose into account when conducting a textualist analysis. Second, we must note that the objective teleological approach is *text-based*, which eliminates the tension between textualism and purposivism. And third, even in situations of purpose-free analysis, *the text in substantive constitutions, because of its inherent content, can produce purpose-sensitive results.*

Then we have the focus on intent, stated as the will of the framers. This requires us to distinguish between three intent-based models of interpretation: (1) the subjective teleological model, (2) the original explication model, and (3) the original intent approach. As most relevant here, the first model searches for the original *purpose* that inspired the framers, the second one focuses on what the framers *said about what they were doing*, and the last one searches for what the framers *wanted to do*.⁹⁷

From the *text* of Article 196.II of the Bolivian Constitution, it would appear that original explication has been adopted in Bolivia.⁹⁸ This is so, because that provision states that the *sources* for ascertaining the will of the framers are the documents, minutes and resolutions *used during the constitutional creation process*.⁹⁹ In other words, public and official documents directly linked to their work *as framers*. As such, their *personal, non-public opinions are not as relevant or authoritative*. This puts some distance between the Bolivian situation and both the original intent and original public meaning models. As to the first model, the difference is that intent has to be articulated outward. The inner thought process is deemed irrelevant. What was the *actual* intent has no bearing. As to the second model, there is a sharp divide between the publicly articulated opinions of the framers as opposed to private sources that allow us to ascertain the publicly-held semantic meaning of his words.

This leaves the subjective teleological and original explication models. While these are very similar, there is a crucial difference between them. The first one *only* focuses on the purpose that drove or inspired the framers, whether as to *why* they did what they did or as to *what* they were trying to achieve. The original explication model includes this *but also treats as authoritative other non-purpose related preferences of the framers*. In other words, the will of the framer is not limited to her purposes, but also to her arguments, explanations and elaborations; thus, explication.

Having addressed these initial conceptual matters, I now turn to the following issues: (1) the use of intent; (2) the search for semantic meaning

97. For a lengthier discussion on original explication, *see generally* Farinacci-Fernós, *supra* note 1.

98. T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 10.

99. CONSTITUCIÓN POLÍTICA DEL ESTADO [CPE] Feb. 7, 2009, art. 196.II (Bol.).

and its relation with text and intent; (3) the interaction between text and intent; and (4) some comments on other supplemental tools utilized by the Court.

A. *Intent*

The original intent of the framers, as expressed during the constitutional creation process, has played a significant and decisive role in constitutional adjudication in Bolivia. Although the main reference by the Court is to the “will of the founder,”¹⁰⁰ there have been occasions when the Court characterizes it as “*originalist interpretation*.”¹⁰¹ In terms of the practice of the Plurinational Constitutional Court as to this matter, I focus on two manifestations of this phenomenon. First, when the Court *says* that the will of the framers is outcome-determinative, which occurs in situations where the Court is explaining the general methodological rules applicable to constitutional adjudication.¹⁰² Second, when the Court *uses* the aforementioned sources of the framers’ intent in a particular case.¹⁰³

References to Article 196.II’s command to ascertain the will of the framers fill the decisions of the Plurinational Constitutional Court: “[I]t is vital that we consider the framers’ will as the preferred method of constitutional interpretation.”¹⁰⁴ Other examples abound.¹⁰⁵

In other cases, the Court makes no direct reference to Article 196.II, but nonetheless uses the framers’ explications or actions as authoritative and determinative sources.¹⁰⁶ For example, Justice Camacho Quiroga,

100. T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 10.

101. *Id.* (emphasis added).

102. *Id.* at 9-10.

103. T.C.P., 17 Mayo 2010, Sentencia Constitucional 130/2010-R, at 8.

104. T.C.P., 28 Mayo 2014, Declaración Constitucional 30/2014, at 13-14 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

105. *See* T.C.P., 17 Mayo 2010, Sentencia Constitucional 130/2010-R, at 8 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx) (“[W]e must interpret the will of the Framers . . .”); T.C.P., 29 Noviembre 2013, Voto Particular Disidente, Declaración Constitucional 1/2013, at 15 (Velásquez Castaños) (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx); T.C.P., 27 Junio 2013, Sentencia Constitucional 1011/2013, at 5 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx).

106. *See* T.C.P., 29 Octubre 2013, Sentencia Constitucional 1850/2013, at 18 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx); T.C.P., 29 Marzo 2013, Voto Particular Disidente, Declaración Constitucional 1/2013 at 20 (Velásquez Castaño) (emphasis added) (“However, the [constitutional rule under analysis] is thwarted, *not only* because of its relation with the rest of the system of autonomy established in the [Constitution], but also, *and above all, because the will of the Framers,*” quoting from the relevant Constitutional Assembly Commission Report (emphasis added)); T.C.P., 28 Mayo 2014,

referencing the Constitution's promise of empowering the indigenous communities, states that this idea "can be ascertained from the Report of the *Visión País* Commission of the Constitutional Assembly, which was comprised by sixteen delegates, of which eleven self-identified as *indígena originario campesinos* and only five as *mestizos* [mixed]."¹⁰⁷ In other cases, the Court quotes directly from the Framers and the original sources of the Constitutional Assembly, treating them as authoritative.¹⁰⁸ Of particular interest have been the Reports by the Constitutional Assembly's internal commissions, which are treated as authoritative sources of constitutional meaning.¹⁰⁹

This approach to intent-based interpretation is not isolated and requires taking into consideration several contributing factors. That means that "when searching for the sense or logical-juridical meaning of a constitutional provision and its application in a concrete case, we must give preference to the will of the framers as ascertained from the documents, minutes and resolutions of the Constitutional Assembly, *which requires an understanding of the political, social and historical conditions which gave birth to the particular norm that is the object of interpretation and which were present*

Declaración Constitucional 30/2014, at 9; T.C.P., 13 Junio 2014, Declaración Constitucional 34/2014, at 47 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx); T.C.P., 5 Septiembre 2014, Declaración Constitucional 45/2014, at 10 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx); T.C.P., 13 Noviembre 2014, Declaración Constitucional 71/2014, at 105 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx).

107. T.C.P., 8 Agosto 2013, Aclaración de Voto (clarifying vote), Declaración Constitucional 13/2013, at 3 (Camacho Quiroga) (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx).

108. T.C.P., 5 Febrero 2014, Sentencia Constitucional 206/2014, at 16-18 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx).

109. See T.C.P., 28 Mayo 2014, Declaración Constitucional 30/2014, at 9, 13-14 ("If we research the minutes and documents of the Constitutional Assembly by way of its *Visión País* Commission . . ."); T.C.P., 12 Marzo 2013, Voto Particular Disidente, Declaración Constitucional 1/2013, at 19 (Velásquez Castaño) (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx) (referring to the reports by the Commission of Indigenous, Municipal, Provincial and Departamental Autonomy and Territorial Organization where *both the majority and minority reports agreed on a particular issue*); T.C.P., 12 Mayo 2014, Aclaración de Voto, Declaración Constitucional 20/2014, at 3 (Cusi Mamani) (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx); T.C.P., 12 Febrero 2014, Sentencia Constitucional 260/2014, at 19 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx); T.C.P., 25 Febrero 2014, Sentencia Constitucional 487/2014, at 9 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx); T.C.P., 10 Marzo 2014, Sentencia Constitucional 572/2014, at 16 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx).

during its disquisition.”¹¹⁰ Moreover, the will of the framers must be ascertained *objectively and not subjectively*, which further signals Bolivia’s preference of the original explication model over the subjective teleological approach or the classic original intent model.¹¹¹

And precisely because of the ideologically-charged nature of the constitutional-making process, the original explication of the framers can have overt ideological connotations that have direct legal impact. For example, while attempting to characterize the substantive and post-liberal nature of the Bolivian Constitution of 2009, the Court quoted directly from the Framers, who stated things such as: “[W]e have to smash the colonial State;”¹¹² “[t]hat is why we demand profound change, not just half-hearted change;”¹¹³ “[t]his plurinational and decolonizing constitutionalism was born out of the aspirations, demands and State project of the nations, groups and organizations that were excluded by the national State; in that sense, outgrowing liberal constitutionalism;”¹¹⁴ as well as other references to the colonial past and the history of economic exploitation and plundering by imperial powers.¹¹⁵ In another instance, the Court quoted from the *Visión País* Commission Report which stated that “we the *indígena originario campesinos* nations and peoples have the defying challenge of re-founding Bolivia by building a new country that treats these peoples as collective entities thus leading us to the Plurinational State, which transcends the mono-cultural and liberal State model premised on the individual citizen.”¹¹⁶

B. Ascertaining Meaning: Where Interpretation and Construction Meet History and Intent

There are two main ways in which the framers’ authoritative explications interact with the constitutional text. First, as some sort of overriding addendum to the constitution that supplies the *definitive meaning and scope* of the text, even when there is a contradiction between the explication and the plain meaning of the text. Second, as the primary source of contextual

110. T.C.P., 29 Noviembre 2013, Voto Disidente, Declaración Constitucional 28/2013, at 14 (Choque Capuma) (Bol.) (emphasis added), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx).

111. *Id.* (“[I]n order to discover, not the subjective, but the objective will of the framers in accordance with reality.”).

112. T.C.P., 28 Mayo 2014, Declaración Constitucional 30/2014, at 10.

113. *Id.*

114. *Id.*

115. *Id.* at 13-14.

116. T.C.P., 20 Enero 2014, Sentencia Constitucional 173/2014, at 16 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx).

enrichment that (a) gives fuller meaning to the text so as to resolve its vagueness and ambiguities, and (b) reveals the purposes and expectations of the framers that will greatly influence, if not control, the process of constitutional construction. Of course, sometime text is just enough.¹¹⁷

The Bolivian case seems to tilt slightly to the latter approach, although there are practices that seem to fall within the former. An analysis of the Plurinational Constitutional Court's practices when it combines text and intent, as well as the opinions of individual justices, support this conclusion. Let us take a look at a few examples.

According to Justice Burgoa Ordóñez, when the textualist method fails to provide sufficient meaning so as to dispose of the case, in other words, it is under-determinate, "then we should use the 'subjective textual' method, that is we must extract the scope of the constitutional norm in accordance with the will of the framers, *as expressly detailed in their work papers*."¹¹⁸ In other cases, adoption history, more than plain meaning or expressed intent, will provide the answer.¹¹⁹

In one case, the Plurinational Constitutional Court had to provide a definition for the concept of "peasant" as used in the constitutional text.¹²⁰ In particular, the Court focused on the *different uses given during the constitutional creation process*.¹²¹ In another case, the Court had to interpret the concept of "self-determination."¹²² In his separate opinion, Justice Cuso Mamani used both the dictionary definition as well as a more historical approach: "This ancestral concept was reintroduced in the Constitutional Assembly . . . *It is through the will of the framers that we can lay the groundwork and the foundations of what is 'self-determination'*. . . ." and

117. T.C.P., 25 Febrero 2015, Declaración Constitucional 36/2015, at 2 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx).

118. T.C.P., 26 Septiembre 2011, Voto Disidente, Sentencia Constitucional 547/2011-R, at 3 (Burgoa Ordóñez) (Bol.) (emphasis added), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx).

119. See T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 8-9 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(ean2tdy0iefvizil33lhgzxc\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(ean2tdy0iefvizil33lhgzxc))/WfrResoluciones1.aspx) (defining what the Constitution meant by the "social state").

120. T.C.P., 12 Febrero 2014, Declaración Constitucional 6/2014 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResolucion.esl.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResolucion.esl.aspx).

121. *Id.* at 25-28; see also T.C.P., 5 Septiembre 2014, Declaración Constitucional 45/2014, at 5 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx) (as to the concept of *indígena originario campesino*); see also T.C.P., 13 Noviembre 2014, Declaración Constitucional 71/2014, at 115 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx).

122. T.C.P., 12 Mayo 2014, Aclaración de Voto, Declaración Constitucional 20/2014 (Cusi Mamani) (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx).

then goes on to quote from the official report by one of the Constitutional Assembly's commissions.¹²³ The will of the framers was also decisive in giving definition to the concept of "plurinationality,"¹²⁴ and the concept of "decolonization" as a constitutional principle.¹²⁵

C. *The Interaction Between Text and Intent*

The relation between text and intent is not wholly clear in the Bolivian context. As we saw, Article 196.II of the Constitution instructs courts to give preference to the literal meaning of the text (plain meaning) *and* the will of the framers. But, there seems to be some disagreement and confusion as to what happens when text and will *collide*, or, stated another way, if there is a hierarchy between them. Some appear to believe that a plain meaning approach will be attempted first and only when its semantic meaning is under-determinate for the particular legal issue before the Court, then recourse will be made to the will of the framers.¹²⁶

D. *Methodology in General and Supplemental Tools*

Sometimes text and intent, even in combination, are under-determinate.¹²⁷ This happens as a result of the "complexity of carrying out our interpretive charge . . . because the constitutional text is intrinsically abstract . . . which means its content is not designed for every practical situation [As such], attempting to extract its commands is a complicated task, above all because, as with the [new Constitution], it includes

123. *Id.* at 9 (emphasis added).

124. T.C.P., 28 Mayo 2014, Declaración Constitucional 30/2014, at 9-11 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx); T.C.P., 21 Abril 2014, Sentencia Constitucional 785/2014, at 3-4 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx); T.C.P., 5 Febrero 2014, Sentencia Constitucional 30/2014, at 17-18 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx). For example, in its Sentencia Constitucional Plurinacional 30/2014, the Court refused to use dictionary sources to define the concept of "plurinationality." *Id.*

125. T.C.P., 10 Marzo 2014, Sentencia Constitucional 572/2014, at 14-15 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

126. T.C.P., 26 Septiembre 2011, Voto Disidente, Sentencia Constitucional 547/2011-R, at 3 (Borgua Ordoñez) (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx); T.C.P., 12 Marzo 2013, Voto Disidente Particular, Declaración Constitucional 1/2013, at 16 (Velásquez Castaños) (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

127. T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 10 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

constitutional novelties.”¹²⁸ The same thing happens with ascertaining and interpreting intent, which has been described as a “substantially more complex task” than textual interpretation.¹²⁹ In the Bolivian context, even though the text is considerably comprehensive and precise, the Court is quick to acknowledge the inherent limits of text and the low probability that the semantic meaning of text alone will provide adequate legal answers.¹³⁰

The Court has held that Article’s 196.II command requiring the use of text and intent as the primary methods of constitutional interpretation does not prohibit the use of *other* methodological devices.¹³¹ As the Court has said, text and intent “are the preferred methods of constitutional interpretation . . . as opposed to others, however, it is necessary to develop new hermeneutic mechanisms, coherent with the constitutional changes [made by the new system].”¹³²

Of course, these additional tools are seen as *supplemental* to text and intent. In that sense, Article 196.II requires that Courts *first* look to text and intent, which can sometimes produce a more purposivist result *because the Constitution itself, given its substantive and ideological nature, was designed to achieve certain ends which, in turn, must be taken into account during the process of interpretation.*¹³³

But the Plurinational Constitutional Court has also employed *separate methodological tools outside of text and intent*, although, as we said, only after exhausting them. What are some of these tools?

Among the options available to the Court are grammatical, systemic, teleological, historical, functional and sociological models of interpretation, among others.¹³⁴ This can result in a “more eclectic” approach to constitutional interpretation.¹³⁵ The decision to adopt one or more of these may depend on their practical compatibility, functional conformity and

128. T.C.P., 12 Marzo 2013, Voto Disidente Particular, Declaracion Constitucional 1/2013, at 14-15 (Velásquez Castaños).

129. *Id.*

130. T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 9 (stating the plain meaning of the text “will never be enough”); T.C.P., 27 Junio 2013, Sentencia Constitucional 1011/2013, at 5 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx).

131. T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 9-10.

132. T.C.P., 28 Mayo 2014, Declaración Constitucional 30/2014, at 13-14 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx).

133. T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 10.

134. T.C.P., 26 Septiembre 2011, Voto Disidente, Sentencia Constitucional 547/2011-R, at 2 (Borgua Ordoñez) (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx).

135. T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 10.

integrative efficiency with the broader constitutional regime.¹³⁶ These approaches include guiding principles and practical tools, such as goal-oriented teleological interpretation, broad understanding of rights, ordinary plain meaning of words, harmonious instead of isolated interpretation, and an expansive reading of constitutional provisions in preference to more narrow ones.¹³⁷ Of all of these, the teleological, goal-oriented approach is the most favored by the Court, *when text and intent are under-determinate*.

Teleological interpretation is a constant in Bolivian constitutional adjudication.¹³⁸ Since this is carried out *after* an analysis of the framers' intent has been done, we can only conclude that this teleological analysis is of the *objective* kind. It is a text-based teleological approach.¹³⁹ *Yet, the Court has also linked teleological interpretation with the original-intent-model of the 'will of the framers', suggesting a hybrid objective-subjective combination of the teleological approaches:* "Thus, the framers [in Article 196.II] determined that constitutional interpreters should look, in first instance, to the 'will of the framers,' a view that seems to conclude that the Constitution requires an originalist interpretation but that, at the same time, suggests that said will *should be analyzed in the context of a goal-oriented approach of the Constitution itself.*"¹⁴⁰ It would appear that the objective teleological model, the subjective teleological model, original intent and original explication can find common-ground when applied to substantive teleological constitutions.

The Plurinational Constitutional Court has particularly used the teleological method *when addressing constitutional provisions that have explicit and obvious ideological or substantive content.*¹⁴¹ While there is no *inherent* connection between teleological constitutions and teleological interpretation, when a court opts for using this methodology, there is an easier fit. Also, because the Constitution itself is goal-oriented, judicial interpretation should also take into account the goals of the specific

136. T.C.P., 26 Septiembre 2011, Voto Disidente, Sentencia Constitucional 547/2011-R, at 2 (Burgoa Ordoñez).

137. *Id.* at 3.

138. T.C.P., 14 Mayo 2014, Sentencia Constitucional 176/2012, at 9 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx); T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 10; T.C.P., 3 Febrero 2015, Sentencia Constitucional 56/2015-S2, at 10 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx).

139. T.C.P., 14 Mayo 2012, Sentencia Constitucional 176/2012, at 9.

140. T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 10 (emphasis added).

141. *See* T.C.P., 18 Junio 2012, Sentencia Constitucional 300/2012, at 20 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx) (discussing the constitutional principles of solidarity and harmony); T.C.P., 3 Febrero 2015, Sentencia Constitucional 56/2015-S2, at 10 (addressing the right of access to water).

provisions and of the Constitution as a whole when carrying out its adjudicative function.¹⁴²

Another important aspect of constitutional interpretation in Bolivia is what has been characterized as pluralist interpretation.¹⁴³ The plural nature of this approach *does not* relate to the existence of different methodological tools or the eclectic products that can be made out of them; it refers to the plural nature of *Bolivian society*. It is a culturally sensitive approach to interpretation that takes into account the different historical experiences and legal pluralisms of the different component of Bolivian society, including their principles, values and norms.¹⁴⁴

Finally, it should be noted that the Court also takes into account non-methodological elements of a “cultural, economic, social, normative and legal nature . . . consistent with the spirit of the Constitution, which the text attempted to reflect.”¹⁴⁵ This is related to the idea that courts should take into account the political, historical and social conditions that were present during the constitutional creation process.¹⁴⁶ As such, not only are “words and concepts” the object of interpretation, but also a myriad of social and life “experiences.”¹⁴⁷ Constitutional interpretation, the Court has said, is not an abstract exercise, it must take into account material reality.¹⁴⁸

V. THE MULTIPLE FUNCTIONS OF HISTORY: USING THE STRUGGLES OF THE PAST TO SHAPE THE FUTURE

In the Bolivian context, there is no *one* single historical experience. On the contrary, we can identify different discrete historical narratives that are separate yet interact with each other and that are relevant to the process of constitutional adjudication. In particular, we will analyze the different uses

142. T.C.P., 12 Marzo 2013, Voto Disidente Particular, Declaración Constitucional 1/2013, at 15 (Velásquez Castaños) (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

143. T.C.P., 28 Mayo 2014, Declaración Constitucional 30/2014, at 13 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

144. *Id.* at 12-13; *see also* T.C.P., 10 Marzo 2014, Sentencia Constitucional 572/2014, at 21 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx); T.C.P., 21 Abril 2014, Sentencia Constitucional 785/2014, at 3 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

145. T.C.P., 10 Mayo 2010, Sentencia Constitucional 130/2010-R, at 8 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

146. T.C.P., 29 Noviembre 2013, Voto Disidente, Declaración Constitucional 28/2013, at 14-15 (Coque Capuma), (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

147. T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 9-10 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

148. *Id.*

of history, whether it pertains to the original indigenous peoples of Bolivia, as well as to the colonial experience, post-independence liberal statehood and the history of the different social struggles that culminated in the constitutional process of 2006-2009. This latter point can also be considered part of the adoption history of the Constitution. Even the history of constitutionalism itself makes its way into the decisions of the Plurinational Constitutional Court.¹⁴⁹

Bolivian history permeates both the 2009 Constitution and the decisions of the Plurinational Constitutional Court.¹⁵⁰ In that sense, the role of history is not merely symbolic, but is the main driving force behind the constitutional text and design. History was present at the Constitutional Assembly, which saw itself as the culmination of a historical process.¹⁵¹ As King explains, the Preamble “consciously identifies the constitution as a document *that emerged from social struggles*.”¹⁵² Let us take a quick look at the Court’s references to indigenous history, as well as to the colonial and modern liberal-state periods, and more recent social struggles and processes.

Bolivia’s social majority identifies itself as members of the different indigenous peoples and nations that have inhabited the land for centuries. As to their historical experience since the days of Spanish colonization, they have felt—and in fact have been—deprived from playing a leading role in the social and political life of the country. The constitutional process that culminated in the Constitution of 2009 was the product of a mobilized social majority of indigenous peoples. As the Court has observed:

During the battles of the so-called gas wars (2003), social organizations, holding high the honor of the *ponchos huayrurus*, had a leading role at the head of the *Agraris Karhuiza y Huancuyo* unions. The principal demands of the mobilizations were the nationalization of hydrocarbons, a binding referendum *and the calling of a Constitutional Assembly*¹⁵³

The impact of the indigenous peoples on the constitutional text is undeniable.

As we saw above, many of the more ideological and content-heavy constitutional concepts and principles incorporated into the 2009 text stem

149. T.C.P., 28 Mayo 2014, Declaración Constitucional 30/2014, at 8-11 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(orbitpxs542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(orbitpxs542eolyx4rcw2))/WfrResoluciones1.aspx).

150. T.C.P., 5 Septiembre 2014, Declaración Constitucional 45/2014, at 3-4 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(orbitpxs542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(orbitpxs542eolyx4rcw2))/WfrResoluciones1.aspx); T.C.P., 6 Febrero 2015, Declaración Constitucional 6/2015 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(orbitpxs542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(orbitpxs542eolyx4rcw2))/WfrResoluciones1.aspx).

151. T.C.P., 5 Septiembre 2014, Declaración Constitucional 45/2014, at 4.

152. King, *supra* note 8, at 387 (emphasis added).

153. T.C.P., 13 Junio 2014, Declaración Constitucional 34/2014, at 2 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(orbitpxs542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(orbitpxs542eolyx4rcw2))/WfrResoluciones1.aspx) (emphasis added).

from indigenous culture and history, such as *vivir bien*,¹⁵⁴ plurinationality,¹⁵⁵ self-determination, communitarian democracy,¹⁵⁶ communitarianism,¹⁵⁷ and decolonization.¹⁵⁸ According to the Plurinational Constitutional Court, “Article 1 of the [Constitution] gathers the *historical will of the indigenous peoples and nations* to build a communitarian State that transcends the liberal and mono-cultural State, *as can be appreciated from the Majority Report of the Visión País Commission of the Constitutional Assembly.*”¹⁵⁹

Bolivia’s Constitution is both a break with the past and a roadmap for the future. One of the most important major historical grievances of Bolivia’s social majority was the exploitative structure of the colonial past. As such, references to colonial history as part of the discarded past are ever present in the decisions of the Plurinational Constitutional Court. For example, the Court has stated that the 2009 document constitutes “a break with the neo-liberal and republican colonial past, whereby we must necessarily reference the fact that, during the period of the Colonial State, communities and people, especially the *indígenas originarios campesinos*, workers and laborers, who were victims of republican and colonial exploitation.”¹⁶⁰ Anti-colonialism becomes an enforceable legal principle.¹⁶¹ One of its main products is the constitutional goal of “eliminating subordinate relations.”¹⁶²

As a result, the previous legal regime that allowed for systematic discrimination against the indigenous peoples gave way to the new constitutional order. This includes the invalidation of laws that were based

154. T.C.P., 18 Junio 2012, Sentencia Constitucional 300/2012, at 18 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

155. T.C.P., 28 Mayo 2014, Declaración Constitucional 30/2014, at 9-11 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

156. T.C.P., 18 Junio 2012, Sentencia Constitucional 300/2012, at 19.

157. T.C.P., 20 Enero 2014, Sentencia Constitucional 173/2014, at 16-18 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx); T.C.P., 2 Febrero 2014, Sentencia Constitucional 260/2014, at 19-21 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

158. T.C.P., 8 Agosto 2013, Aclaración de Voto, Declaración Constitucional 13/2013, at 3-4 (Camacho Quiroga), (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx); T.C.P., 28 Mayo 2014, Declaración Constitucional, 30/2014, at 10; T.C.P., 2 Febrero 2014, Sentencia Constitucional 260/2014, at 16-17; T.C.P., 10 Marzo 2014, Sentencia Constitucional 572/2014, at 14 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

159. T.C.P., 2 Febrero 2014, Sentencia Constitucional 260/2014, at 16 (emphasis added).

160. T.C.P., 17 Mayo 2014, Sentencia Constitucional 130/2010-R, at 8 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

161. T.C.P., 28 Mayo 2014, Declaración Constitucional 30/2014, at 11-12; T.C.P., 20 Enero 2014, Sentencia Constitucional 173/2014; T.C.P., 25 Febrero 2014, Sentencia Constitucional 487/2014 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

162. T.C.P., 2 Febrero 2014, Sentencia Constitucional 260/2014, at 18.

on stereotypes and that were designed to benefit the minority elite.¹⁶³ It also sets out a roadmap into the future that places the indigenous social majority as its central feature:

In the present, these principles, now constitutionalized, are part of a complex historical process of ‘restitution’ and ‘reconstruction’ of the *indígena originario campesinos* nations and peoples, not only as to their values, but also as to their language, science, justice, economy and territory, as part of the process of decolonizing the State, whose starting moment has been the Constitutional Assembly.¹⁶⁴

That is, this transformative process put into effect by the Plurinational Constitutional Court has had as its source the *will of the framers*: “The sense of what is decolonization can be found in the report issued by the *Visión País* Commission of the Constitutional Assembly, which states that decolonization has a liberating effect, which means the reparation and compensation of the wrongs caused by the Colonial State.”¹⁶⁵

The colonial past is inherently linked with the period dominated by the modern liberal state that was created after Bolivia obtained its national independence from Spain and lasted until the new Constitution took effect. In that sense, it is both a distant and a recent past which, according to the current constitutional order, forms part of a sequential history of exploitation and subordination of the social majority. As such, the rejection of the liberal and republican constitutional system is very much a key feature of the new one.¹⁶⁶

This rejection includes a frontal attack on the economic system that was in place in Bolivia shortly before the new Constitution was adopted, in particular, the neoliberal economic system. This ideological stance adopted by the Constitution has not gone unnoticed by the Plurinational Constitutional Court:

This is one of the features that more clearly characterizes neo-liberalism, and which generated abysmal economic differences between Bolivians, thus according to [current] constitutional command, the State has to be reformed, in order to achieve a balance between its members and to bridge the gap created, not only by neo-liberalism, but by exploitation, corruption

163. *Id.* at 37.

164. T.C.P., 21 Abril 2014, Sentencia Constitucional 785/2014, at 4 (Bol.) (emphasis added), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

165. T.C.P., 25 Febrero 2014, Sentencia Constitucional 487/2014, at 9.

166. T.C.P., 17 Mayo 2014, Sentencia Constitucional 130/2010-R, at 8-9 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

and mismanagement of public goods which only made a few people rich and left the great majority in misery.¹⁶⁷

The Court goes on, stating that, before 2009, the economic system:

allowed and even encouraged an effortless accumulation of profits by way of the exploitation of the labor force, particularly workers, peasants and indigenous people. The main characteristic of the capitalist economy is the appropriation of labor as part of its system of production, turning labor into the fundamental element for the accumulation of surplus wealth, which benefited a few to the detriment of the majority.¹⁶⁸

As we saw, the Bolivian Constitution of 2009 is one “that emerged from social struggles.”¹⁶⁹ Bolivia’s social and economic history is one of exploitation and division; a fact that has become part of the constitutional system as the new order attempts to change course from that rejected past. This social history, then, has two interconnected effects.

First, it is the source of many of the textual provisions of the Constitution. In other words, social demands and historical grievances have been addressed by the enactment of particular constitutional provisions, as well as by the over-arching structure and content of the entire document. As a result, constitutional adjudication turns into reality this process of transformation from social and historical demands to operative legal norms.

Second, history also becomes a source of constitutional argument that enriches the process of interpretation and adjudication. When discussing legal concepts like work-relations or land-relations, for example, the social history behind those concepts plays a pivotal role in its prospective development and in concrete adjudication in individual cases.¹⁷⁰ As a result, constitutional adjudication is inherently linked with Bolivia’s historical social struggles, movements and processes.¹⁷¹

167. *Id.* at 8-9.

168. *Id.* at 9.

169. King, *supra* note 8, at 387.

170. See T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 11-12 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx) (discussing the historical experience as to the working conditions of peasants and the legal regime that oversaw their relation with the landowners); see also T.C.P., 12 Febrero 2014, Declaración Constitucional 36/2014, at 27-28 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx) (discussing the plight of peasants and their vindication in the constitutional process).

171. See T.C.P., 13 Junio 2014, Declaración Constitucional 34/2014, at 3 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx) (discussing the immediate social antecedents of the Constitutional Assembly); see also T.C.P., 5 Septiembre 2014, Declaración Constitucional 45/2014, at 3 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx) (discussing the direct impact on the constitutional process of the different social, labor and indigenous organizations); see also T.C.P., 25 Febrero 2015, Declaración Constitucional 36/2015,

VI. DIVING INTO CONTENT: SUBSTANTIVE RIGHTS AND POLICY

One of the main byproducts of the liberal democratic framework constitutional model that was adopted, to some extent, by the substantive constitutional types is the focus on *rights* as the main articulation of substantive policy content. While the Bolivian Constitution of 2009 includes numerous policy provisions that are not articulated as rights, it is undeniable that rights were one of the main focuses of the new constitutional project, particularly in a process meant to empower previously excluded social forces, classes and groups. As such, it is worth taking a closer look at the issue of rights in the context of the Bolivian Constitution of 2009 and the decisions of the Plurinational Constitutional Court. In particular, I will focus on the notion of rights in general and socio-economic and collective rights in particular, as well the scope given to these rights. Also, I will analyze individual rights dealing with issues related with labor, water and property.

Fundamental rights are protected under the 2009 Constitution. In particular, the Court has adopted the Constitution's promise that the rights it recognizes "are inviolable, universal, interdependent, indivisible and progressive. The State has the duty to promote, protect and respect" these rights.¹⁷² One of the key innovations of the new document is the *horizontal effect of constitutional rights*.¹⁷³ This is due to the operation of constitutional supremacy, which transcends individual-government relations.¹⁷⁴ That, in itself, is a revolutionary approach to constitutional rights protection.

Instead of the classic *individualistic* view of rights, the new approach in Bolivia stresses a "protection of fundamental rights that leaves behind the exclusivist individualistic protectionist view, which is built on a constitutional structure that guarantees fundamental rights which, instead of doing it in an isolated way, is done through collective construction."¹⁷⁵ This collective approach to rights, for example, avoids establishing a hierarchy of constitutional rights that distinguishes between the more classic political

at 7-8 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx).

172. T.C.P., 25 Febrero 2015, Declaración Constitucional 36/2015, at 35; CONSTITUCIÓN POLÍTICA DEL ESTADO [CPE] Feb. 7, 2009, art. 13.I (Bol.).

173. T.C.P., 3 Febrero 2015, Sentencia Constitucional 56/2015-S2, at 8 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx).

174. *Id.* at 10; *cf.* T.C.P., 16 Abril 2012, Sentencia Constitucional 85/2015, at 13 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx).

175. T.C.P., 18 Junio 2012, Sentencia Constitucional 300/2012 at 21 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx).

rights and the new generation ones.¹⁷⁶ It also incorporates the notion of constitutional duties.¹⁷⁷

While not ignoring the individual manifestation of fundamental rights that requires judicial protection, there is a greater emphasis on collective rights. One of the results is that rights that were once thought of as *only* applying individually now have an added collective dimension.¹⁷⁸ According to the Plurinational Constitutional Court, “our understanding of rights, duties and guarantees cannot be made from the perspective of liberal constitutionalism,” but, instead, a broader collective approach must be employed, which leads to the conclusion that “rights, in general, are the rights of groups that are exercised individually, socially and/or collectively, *yet this does not deny the operation of individual rights and guarantees.*”¹⁷⁹

There are three types of group rights under the new constitutional structure in Bolivia. First are rights that are *strictly collective*, which means they belong to and are exercised by group, such as the rights of the indigenous nations and peoples as a collective entity.¹⁸⁰ Second are so-called *diffuse* rights, which are held by a group of people whose membership is difficult to pinpoint, such as consumers of a particular product.¹⁸¹ And third, there are *homogenous individual* rights that are separate but share a common interest or set of facts that, for efficiency purposes, are normally bundled up in the same legal action.¹⁸² Among these collective rights are those that protect indigenous nations and peoples, particularly as to self-government and communitarian democracy.¹⁸³

176. *Id.* at 22.

177. T.C.P., 27 Junio 2013, Sentencia Constitucional 1011/2013, at 5 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx).

178. T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 9 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx), at 7 (discussing the collective manifestation of dignity).

179. T.C.P., 25 Febrero 2014, Sentencia Constitucional 487/2014, at 8 (Bol.) (emphasis added), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx); *cf.* T.C.P., 20 Agosto 2012, Sentencia Constitucional 790/2012, at 4 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxspe542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxspe542eolyx4rcw2))/WfrResoluciones1.aspx).

180. T.C.P., 14 Mayo 2012, Sentencia Constitucional Plurinacional 176/2012, at 10 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

181. *Id.*

182. *Id.* at 10-11.

183. T.C.P., 29 Noviembre 2013, Declaración Constitucional 28/2013 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx); T.C.P., 18 Junio 2012, Sentencia Constitucional 300/2012 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx); T.C.P., 12 Mayo 2014, Aclaración de Voto, Declaración Constitucional 20/2014 (Cusi Mamani) (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

Another result of the new approach to rights in Bolivia is an *expansive and broad interpretation of individual rights*. Add to that the inclusion of very specific rights-protecting provisions. For example, Article 14 of the Constitution prohibits discrimination on account of:

sex, color, age, sexual orientation, gender identity, origin, culture, nationality, citizenship, language, religious creed, ideology, political affiliation or philosophy, civil status, social or economic condition, occupation, education level, disability, pregnancy or any other [classification] that is designed or has the effect of denying or impairing the recognition, enjoyment or exercise, on equal terms, the rights of every person.¹⁸⁴

Political and material equality are at the core of the Constitution's approach to rights.¹⁸⁵

A quick look at some of the individual rights cases decided by the Plurinational Constitutional Court sheds some light as to its general approach to rights and their expansive nature.¹⁸⁶ In some cases, the Court has made explicit reference to this broad approach to rights protection, stating that due to the "emerging constitutional changes made by the Bolivian constitutional process, the scope of liberty actions are broadened and fortified . . . with the goal of giving full force to the actionable rights established in the constitutional text."¹⁸⁷ In that sense,

the establishment of the new constitutional order by no means intends to ignore fundamental rights, on the contrary, in the Bolivian experience, it's goal is the deepening of their protection, which is why the framers themselves have *exponentially broadened the list of fundamental rights*, resulting in an exemplar normative model that recognizes the essential principles that make up human dignity.¹⁸⁸

So far, we have pointed out the horizontal and expansive nature of rights in Bolivia. We also analyzed their collective character. Two additional

184. CONSTITUCIÓN POLÍTICA DEL ESTADO [CPE], Feb. 7, 2009, art. 14.II (Bol.); T.C.P., 25 Febrero 2015, Sentencia Constitucional 36/2015, at 34 (Bol.) (emphasis added), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

185. T.C.P., 3 Febrero 2015, Sentencia Constitucional 56/2015-S2, at 8 (Bol.) [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

186. See T.C.P., 12 Febrero 2014, Sentencia Constitucional 260/2014 (Bol.) [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx). (dealing with requirements to become a police officer, which was found to discriminate against indigenous people); T.C.P., 30 Junio 2015, Sentencia Constitucional 56/2015 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

187. T.C.P., 28 Mayo 2014, Sentencia Constitucional 986/2014, at 4 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

188. T.C.P., 9 Junio 2014, Sentencia Constitucional 1038/2014, at 8 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

features highlight the rights regime in Bolivia. First, is their positive effect in situations, like water rights, where “the will of the framers went beyond mere recognition by establishing positive actions that the State must carry out. . . .”¹⁸⁹ Second is the notion that not only *explicit rights* are given constitutional protection. In that sense, the Plurinational Constitutional Court has identified three sources of rights: (1) explicit rights; (2) implied rights that are of the same nature as the explicit ones (in certain situations); and (3) related rights that are necessary to put the first two into action.¹⁹⁰

Another element is the new system’s criticism of “liberalism’s political conception of the person”, which only focuses on formal political equality and ignores material injustice.¹⁹¹ This leads us into the issue of social and economic rights. The new constitutional system recognizes social and economic rights, particularly in the *private* sphere. In other words, they have direct horizontal effect. This is related to the goal of addressing many of the country’s social ills by way of enforceable constitutional provisions.¹⁹² For example, the Court has made reference to certain constitutional rights in the context of a private dispute between landlords and tenants.¹⁹³ Also, the Court has held that these socio-economic rights, particularly labor rights, are unwaivable and are not subject to expiration.¹⁹⁴

In the following paragraphs I will discuss the development of the Bolivian Constitution’s right to water access. But before I do that, it is worth mentioning here, as part of our analysis into that document’s approach to socio-economic rights, that the Constitution extends the right to water access and also includes access to other basic services, necessities and utilities, such as electricity.¹⁹⁵ Many other socio-economic rights have constitutional status and are enforceable by courts.¹⁹⁶

Like other teleological constitutions that recognize socio-economic rights, the Bolivian Constitution directly addresses labor rights, which are

189. T.C.P., 12 Julio 2010, Sentencia Constitucional 559/2010-R, at 5 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

190. T.C.P., 14 Mayo 2012, Sentencia Constitucional 176/2012, at 9-12 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

191. T.C.P., 12 Febrero 2014, Sentencia Constitucional 260/2014, at 24.

192. T.C.P., 20 Agosto 2013, Sentencia Constitucional 1101/2013-L, at 12 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

193. T.C.P., 25 Octubre 2010, Sentencia Constitucional 1898/2010-R (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx); T.C.P., 20 Agosto 2012, Sentencia Constitucional 830/2012 (Bol.) [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

194. T.C.P., 20 Agosto 2013, Sentencia Constitucional 1101/2013-L, at 4.

195. T.C.P., 20 Agosto 2012, Sentencia Constitucional 830/2012.

196. T.C.P., 25 Febrero 2015, Declaración Constitucional 36/2015 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

wholly put into force by the Plurinational Constitutional Court and are deemed to be fundamental individual and collective rights.¹⁹⁷ Among other things, these rights are meant to correct what is considered to be a history of exploitation of Bolivia's poor majority.¹⁹⁸ For example, this includes the right to paid vacation days for Bolivia's workers,¹⁹⁹ as well as the right to work itself.²⁰⁰ As to this latter issue, Bolivia's constitutional labor policy "is fundamentally focused on protecting the country's workers against arbitrary dismissal by their employer."²⁰¹ In the end, the right to work "obtains more relevance, as it is considered to be a human right."²⁰²

One of the fundamental issues addressed by the Constitutional Assembly was the right to water access. In the years before the constitutional creation process began, there was intense social debate and tension regarding the privatization of water sources in Bolivia, which negatively impacted the country's poor, rural and indigenous populations. As a result, this issue of access to water was given constitutional status and deemed to be an enforceable fundamental human right. In particular, water was deemed "never to become the object or concession or privatization."²⁰³ The Constitution requires that water supplies can only be held by the state or other socially-oriented entities, such as cooperatives and mixed entities.²⁰⁴

The Plurinational Constitutional Court has consistently enforced this right, which it characterizes as both an individual and collective right, as well as a state duty.²⁰⁵ For example, it has repeatedly invalidated private landlords' attempts to cut off water access of their tenants or neighboring

197. See T.C.P., 25 Febrero 2015, Sentencia Constitucional 149/2015-S2 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

198. T.C.P., 17 Mayo 2010, Sentencia Constitucional 130/2010-R, at 8-9 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx); T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 8-9 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

199. T.C.P., 17 Mayo 2010, Sentencia Constitucional 130/2010-R, at 3.

200. T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 18-19.

201. T.C.P., 26 Febrero 2015, Sentencia Constitucional 190/2015-S1, at 4 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

202. *Id.* at 4.

203. King, *supra* note 8, at 387; T.C.P., 16 Enero 2015, Declaración Constitucional 12/2015, at 88 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx); CONSTITUCIÓN POLÍTICA DEL ESTADO [CPE], Feb. 7, 2009, art. 20.III (Bol.).

204. See T.C.P., 25 Febrero 2015, Declaración Constitucional 36/2015, at 74 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

205. T.C.P. 12 Julio 2010, Sentencia Constitucional 559/2010-R, at 5 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

communities.²⁰⁶ Finally, I wish to address a fundamental topic: property rights.

The first noticeable feature of Bolivia's property rights regime is its re-characterization of the right itself. Two features stand out. First, its articulation as a collective right.²⁰⁷ This includes, for example, a requirement to assign unused land to agrarian communities as well as a limitation on private land ownership to no more than 5,000 hectares.²⁰⁸ Second, property rights are qualified and their enjoyment is conditioned on the social function played by the particular property at issue. In other words, there is no general right to private property, but a right to enjoy private property that plays a productive social function. Private property cannot be used in detriment of the general welfare.²⁰⁹ In particular, the Constitution states that "[e]very person has the right to collective and individual private property, *as long as it plays a social role.*"²¹⁰

The definition of "social function of property" has been addressed by the Plurinational Constitutional Court which has emphasized the importance of the collective benefit and the social interest generated by the property at issue.²¹¹ This has a direct impact on the State's power of eminent domain,²¹² for example, where a landowner can lose his property rights if he engages in relations of servitudes with his employees.²¹³ We must not forget that the issue of land servitude was a key issue during the constitution-making process.²¹⁴

206. T.C.P. 30 Junio 2015, Sentencia Constitucional 56/2015; T.C.P., 30 Junio 2015, Declaración Constitucional 57/2015 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

207. King, *supra* note 8, at 387.

208. *Id.* at 389-90.

209. T.C.P., 25 Octubre 2010, Sentencia Constitucional 1898/2010-R, at 6.

210. CONSTITUCIÓN POLÍTICA DEL ESTADO [CPE], Feb. 7, 2009, art. 56.I (Bol.); *see also* T.C.P., 10 Octubre 2013, Sentencia Constitucional 1234/2013-L, at 9 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

211. T.C.P., 14 Diciembre 2012, Sentencia Constitucional 2529/2012, at 2 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx); T.C.P., 10 Octubre 2013, Sentencia Constitucional 1234/2013-L, at 9.

212. CONSTITUCIÓN POLÍTICA DEL ESTADO [CPE], Feb. 7, 2009, art. 401.I (Bol.); T.C.P., 10 Octubre 2013, Sentencia Constitucional 1234/2013-L, at 8.

213. T.C.P., 14 Diciembre 2012, Sentencia Constitucional 2529/2012, at 5.

214. T.C.P., 17 Junio 2013, Sentencia Constitucional 850/2013, at 11-12 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

VII. PUTTING THE CONSTITUTION TO WORK: REACH OF THE CONSTITUTION, ITS ENABLING PROCEDURES AND THE ROLE OF THE PLURINATIONAL CONSTITUTIONAL COURT

In this Part, I wish to address three issues: (1) the extent of the Constitution's reach and scope; (2) what are the procedures to vindicate constitutional rights and other policy provisions; and (3) how the Plurinational Constitutional Court sees itself and its role in democratic self-governance.

Like many other modern constitutions, the Bolivian Constitution of 2009 establishes its own supremacy. The Plurinational Constitutional Court has strengthened that proposition. In particular, the Court has stated:

the Constitution, given its legal nature as the fundamental and supreme law for the entire legal system of the State –as is the case in Bolivia- is derived from the constitutional process, as exercised by the sovereign Constitutional Assembly, which was legitimized by the democratic election of its members, who, once they drafted the new constitutional text, sent it to the Bolivian people for their ratification.²¹⁵

One of the consequences of this fact is the *retroactive* effect of the Constitution, in the sense that *statutes adopted before the enactment of the new Constitution are, nonetheless, subject to its commands*. As such, a constitutional challenge can be brought in situations where previously adopted statutes clash with constitutional provisions established in the 2009 document.²¹⁶ In Bolivia the constitutional system transcends the government-individual relationship, which results in a more universal application of constitutional rules, values and principles.²¹⁷ As we already saw, the horizontal application of individual and collective rights is one of the by-products of this effect.

In that sense, the Constitution has an omnipresent role in Bolivian society, as is characteristic of post-liberal teleological constitutions.²¹⁸ Since the Constitution has a lot to say about a whole set of issues, it is difficult to imagine an important social problem that is not covered, to some extent, by it. To that end, the Plurinational Constitutional Court has stated that

the Supreme Law establishes the fundamental pillars of the State, but not only does it address the structure and workings of the State, it also, in

215. T.C.P., 12 Octubre 2012, Sentencia Constitucional 1922/2012, at 14 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

216. *Id.* at 14-15.

217. T.C.P., 25 Febrero 2015, Declaración Constitucional 36/2015, at 19 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

218. T.C.P., 14 Diciembre 2012, Sentencia Constitucional 2529/2012, at 4-5.

accordance with the new model, regulates the economic and territorial organization and structure of the State where, in transversal fashion, it generates the need to build a system where harmony, inter-culturalism and decolonization prevail, and that reaffirms the existence and development of the *indígena originario campesino* nations and peoples.²¹⁹

Because the Constitution is supreme, “it is necessary to establish control mechanisms that can preserve the powers that the sovereign introduced in the constitutional text, especially in situations where powerful actors attempt to transgress its content, particularly in the realm of fundamental rights.”²²⁰ In other words, the Constitution’s supremacy demands that adequate procedural devices be established so as to guarantee the real-world application of that supremacy. I will briefly discuss some of those procedural devices.

With the adoption of the Constitution in 2009, individuals can petition an action of amparo (*acción amparo constitucional*) to vindicate their constitutional rights. The amparo action is one “which grants protection against the illegal or wrongful acts or omissions of public officials, as well as individual or collective persons, that restrict, suppress or threaten with restricting or suppressing a person’s fundamental rights and guarantees recognized by the Constitution.”²²¹ In other words, this action can be filed against public and private actors that “arbitrarily impair the constitutional rights of others.”²²² In essence, the amparo action “allows a person the ability to activate constitutional justice in defense of her fundamental rights or constitutional guarantees,” in the face of *ultra vires* actions.²²³ There is also a more specific writ called the liberty action similar to a *habeas corpus*.²²⁴

The amparo action has several requirements, including subsidiarity and immediacy.²²⁵ In other words, there cannot be another available mechanism to vindicate the harmed rights or provisions,²²⁶ unless the alleged harm is of

219. T.C.P., 5 Septiembre 2014, Declaración Constitucional 45/2014, at 5 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(orbitpxs542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(orbitpxs542eolyx4rcw2))/WfrResoluciones1.aspx).

220. T.C.P., 17 Mayo 2010, Sentencia Constitucional, 130/2010-R, at 5 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

221. T.C.P., 12 Julio 2010, Sentencia Constitucional 559/2010-R, at 6 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

222. T.C.P., 3 Febrero 2015, Sentencia Constitucional 56/2015-S2, at 5 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

223. T.C.P., 10 Febrero 2015, Sentencia Constitucional 57/2015-S1, at 8 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

224. T.C.P., 28 Mayo 2014, Sentencia Constitucional 986/2014 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

225. T.C.P., 29 Abril 2011, Sentencia Constitucional 547/2011-R, at 1 (Borgoa Ordóñez) (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

226. T.C.P., 10 Febrero 2015, Sentencia Constitucional 57/2015-S1, at 8.

an irreparable nature.²²⁷ It also requires the existence of a harm, a fundamental right or constitutional guarantee and the possibility of a remedy.²²⁸ Finally, as to standing, the amparo action can be filed “by the affected person, by another person in their name or by an authorized entity as recognized by the Constitution.”²²⁹

Another important procedural device is the so-called popular action (*acción popular*), which is similar to the amparo action, but here the focus are *collective rights*.²³⁰ In particular, this action can be used to vindicate the three articulations of collective rights – explicit, implied and related rights – that are either *strictly* collective or *diffusely* collective; yet is unavailable for the third articulation of collective actions, like in homogeneous individual cases, where there is no true collective right by a collection of independent individual claims.²³¹

The Plurinational Constitutional Court also has review jurisdiction over organic acts that constitute local governments to make sure they comply with the 2009 Constitution.²³² Also, the Court is able to hear so-called *consultas de autoridades indígenas*, which amounts to an advisory opinion as to the powers of indigenous governments. This latter writ is of a summary nature and it requires the presence of three elements: (1) formal recognition of the particular indigenous people or nation; (2) a statement of the facts and proposed action that give rise to the advisory opinion; and (3) the specific question of constitutional law to be decided by the Court.²³³ The action cannot be presented if there is alternative mechanism and it only has binding effect as to the appearing parties.²³⁴

Finally, the Court has the power to carry out abstract review of legislation.²³⁵ Abstract review allows the Court to verify the compatibility between the statute and the constitutional provisions, thereby including a system of the higher values, fundamental principles, and fundamental rights

227. *Id.* at 9-10.

228. T.C.P., 25 Febrero 2015, Sentencia Constitucional 149/2015-S2 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

229. T.C.P., 10 Febrero 2015, Sentencia Constitucional 57/2015-S1, at 8.

230. T.C.P., 14 Mayo 2012, Sentencia Constitucional 176/2012, at 9-11 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

231. *Id.* at 11-12.

232. T.C.P., 16 Enero 2015, Declaración Constitucional 12/2015, at 83 (exemplifying an instance of a local government charter being evaluated for constitutional compatibility by the Plurinational Constitutional Court).

233. *Id.* at 8-9.

234. T.C.P., 29 Noviembre 2013, Declaración Constitucional 28/2013, at 7-8 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

235. T.C.P., 17 Junio 2013, Sentencia Constitucional 1850/2013 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

that the Constitution enshrines.²³⁶ It should be noted that the Court has emphasized that this power of review was the product “of the will of the framers.”²³⁷ In summary, there is a wide variety of writs and actions that allow for the vindication of constitutional rights and judicial correction of constitutional violations.

Finally, I turn to the issue of what is the role of the Plurinational Constitutional Court in the new Bolivian constitutional structure. In particular, how does the Court characterize its own role.

The Plurinational Constitutional Court is the supreme interpreter of the 2009 Constitution and its decisions “are binding and mandatory and against them there can be no ordinary recourse.”²³⁸ As a result, its decisions are followed by ordinary courts and constitute binding precedent, which the Court will use as authority in future cases.²³⁹ The three main functions of the Court are: (1) normative constitutional review; (2) review of the exercise of public power; and (3) the protection of fundamental rights and constitutional guarantees.²⁴⁰ As we saw, these review powers exist before and after the enactment of legislation.²⁴¹

An analysis of the decisions of the Plurinational Constitutional Court signal the complete absence of a *political question* doctrine. While there is due deference to the legislative powers in the exercise of its constitutional powers, the notion that certain constitutional provisions are non-justiciable is foreign to Bolivia’s constitutional design.

VIII. SUMMARY

The Bolivian Constitutional experiment is still very young. But we can already tell that many of its more ideological, substantive and policy-laden provisions have been wholly applied by courts in constitutional cases. Aspiration has become legal reality. In particular, we saw the central role of text, intent, ideology and history in the process of adjudication. Yet, maybe because of the nascent nature of the Bolivian experiment, the Plurinational Constitutional Court is still in the process of developing a formal model of

236. Sentencia Constitucional Plurinacional 1850-2013, at 22.

237. *Id.* at 22.

238. CONSTITUCIÓN POLÍTICA DEL ESTADO [CPE], Feb. 7, 2009, art. 224.I (Bol.); *see also* T.C.P., 5 Febrero 2014, Sentencia Constitucional 206/2014, at 14 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(bshugxfnrdaod5c5cig0cl4\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(bshugxfnrdaod5c5cig0cl4))/WfrResoluciones1.aspx).

239. T.C.P., 16 Enero 2015, Declaración Constitucional 12/2015, at 11-12 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

240. *Id.* at 24.

241. T.C.P., 25 Febrero 2015, Declaración Constitucional 36/2015, at 74 (Bol.), [https://buscador.tcpbolivia.bo/_buscador/\(S\(oriblpxsce542eolyx4rcw2\)\)/WfrResoluciones1.aspx](https://buscador.tcpbolivia.bo/_buscador/(S(oriblpxsce542eolyx4rcw2))/WfrResoluciones1.aspx).

2017] *WHEN SOCIAL HISTORY BECOMES A CONSTITUTION* 177

interpretation and adjudication. The analysis made in this Article reveals that the development of that model has definitely started to take shape.

Bolivia's experience has a lot to teach us. First, the existence of functioning post-liberal teleological constitutional systems that transcend the classic liberal democratic framework models. It should put constitutionalists and comparativists on alert. Second, it reinforces the recent proposals that intent-based methods of interpretation are frequently used outside the United States and similar jurisdictions. Third, that when you add these two elements (post-liberal constitutionalism and intent-based interpretation), interesting results are generated, such as progressive doctrine, active—yet constitutionally restrained—courts that are tasked with aggressively enforcing the constitutional legislators' views about society. If anything, the Bolivian example teaches us to widen our horizons.