

THE VALUE OF NATIONAL PLURALITY IN THE DESIGN OF THE CONSTITUTIONAL STATE

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Abstract:

The constitutional changes that are taking place in Latin America have meant, for many of these countries, a profound *reform* (or, sometimes, *rupture*) in the "Model of Constitutional State" that sustains their democratic systems. 19th century Legislative State (*legalism* as a legal theory), whose applicability practically extended to the 20th century and beyond, is being substituted on the whole by a Constitutional State configured in the paradigm of *neo-constitutionalism*, a prototype that we modern democracies are currently operating within. This is the case for Bolivia, wherein the 2009 Constitution established a "Plurinational Constitutional State", with all of the implications that this has meant for the design of the institutional aspect of the country.

Key Words: National Plurality, Constitutional Values, Constitutional State

Introduction: Decentralization and National Plurality of the Constitutional State

One new aspect of Bolivia's Constitution of 2009 is the inclusion of national plurality as one of the most important and transcendent moral, political and legal values of the Fundamental Law (Zagrebelsky, 2003, p. 150). The constitutional relevance of national plurality is so great that we could draw the conclusion that it is included in the Constitution as the "basic founding fact" of the (new model for the) Constitutional State and even the Constitution. National plurality pervades the State's institutional design at every level of authority. To a large extent, *control over the constitutionality* of this new model for the Constitutional State must be achieved by reference to a "sheaf of fundamental rights" whose background is expressly one of national plurality. Let us examine what this means in the Political Constitution of the Plurinational State of Bolivia 2009 (hereinafter referred to as the PCS).

Firstly, it can be inferred from a perusal of the 2009 PCS that national plurality is the "core connection" between the foundation of Bolivia's Constitution and the model of State it establishes. The collective statement in the Preamble to the Constitution gives an early indication of the "core" nature of national plurality: "The Bolivian people, of plural composition since the beginning of time"; "We populated this sacred Mother Earth with different faces, and since then we have understood the current plurality of all things and our diversity as beings and cultures. That is how we defined our people, and we never understood racism until we experienced it in the terrible days of colonisation". The Bolivian people, [...] built a new State ...with respect to the economic, social, legal, political and cultural plurality of the habitants of this land." Moreover, developing the constitutional statement along the same lines, the *core transcendence* of national plurality is evident in the fact that it is placed in Part One of the PCS on the *Fundamental Bases of the State. Rights, Duties and Guarantees*; Title I (*Fundamental Bases of the State*), Section II (*Principles, Aims and Values of the State*).

Secondly, in coherence with the above, national plurality runs through the entire PCS, evidencing a "mainstreaming" that has an *impact* on every norm in Bolivia's legal system, the entire political and institutional design, and even the fundamental rights. This means that national plurality *informs* constitutional law in its entirety, *with no exception*. The Constitution is *bound* by national plurality in its "moral" base, "spirit" and "objectives"; its "institutional" and "political" base; the

"system of rights"; the "duties" and "actions" of government authorities, and relationships between individuals; and, of course, "the constitutional justice system". The expressions of national plurality in the Constitution are made extensive to all the most important institutions of the reshaped State. In fact, many Bolivian institutions added "plurinational" to their names. Such is the case of the official name of the State, the Legislative Assembly, the Constitutional Court (the Plurinational Constitutional Court, hereinafter referred to as the PCC), and so on.

The Preamble is not the only indication of the mainstreaming nature of the moral, political, legal and constitutional value of national plurality in the Constitution, however. Article 1 PCS defines national plurality as a decisive element of the model of State established by the new Fundamental Law: "Bolivia is constituted in a Social Unitary State of Plurinational Communitarian Law, [...] intercultural, decentralised and with autonomies. Bolivia is founded on plurality and on [...] legal, cultural and linguistic pluralism [among others], within the country's process of integration." Moreover, Article 98.I PCS explicitly stipulates that "Cultural diversity forms part of the essential foundation of the Plurinational Communitarian State". It also states that "Interculturality (which will respect differences and under equal conditions) is the instrument of cohesion, and harmonious and balanced coexistence among all the peoples and nations that make up Bolivia." In this sense, national plurality, as an expression of cultural diversity in Bolivia, is deemed by the Constitution as a "strength" to be made visible and not a weakness to be hidden (Article 98.II PCS), despite the problems that heterogeneity implies (Del Real Alcalá, 2005, pp. 177-195). In any case, heterogeneity causes infinitely fewer problems than the *failure to recognise* civilian society as a whole owing to marginalisation of a sector thereof.

Thirdly, the core connection of national plurality with the Constitution's foundations and the way it is mainstreamed into every political, legal, social and economic sphere at all levels of the State is no trivial matter. In fact, it means that national plurality actually "pre-dates" the State of Bolivia and the Constitution.

This pre-existence is manifested in two main ways: one, in the "empirical root" of national plurality; and two, in its "moral root". The "empirical root" of national plurality can be found in Bolivian civilian society, in the Bolivian people as a whole, and more specifically in the *constitutive* ethnic and cultural diversity that set it apart. In fact, Bolivia's heterogeneity became *national plurality* when it acquired *political* and *institutional* substance under the new Constitution.

If the empirical root of national plurality is the ethnic and cultural heterogeneity of Bolivia's civilian society, its "moral root" lies in the overarching value of the "human dignity" of individuals (*personal dignity*) and groups (*collective dignity*) (Asís Roig, 2002, pp. 153-176). This fact is highly relevant, because it helps to distinguish *prima facie* who the "holders" are of fundamental rights that are clearly rooted in national plurality, within the catalogue of rights recognised in the PCS. Outlining who are the holders of national plurality rights is not easy, however, especially with regards to collective groups.

The Constitution does not provide a clear answer to the issue of "which groups come under the PCS", for it states rather *vaguely* that they are the indigenous farmer nations and people, and the intercultural and Afro-Bolivian communities. Thus, strictly speaking, the PCS does not state clearly which are which. In the event of controversy and if there is no specific law that identifies them specifically, the vague wording would have to be decided by the Constitutional Court (Endicott, 2003, p. 179).

Fourth, if national plurality has a *core connection* to the foundations of Bolivia's Constitution and the model of State it establishes; is *mainstreamed* to every institution in the country at every level; and pre-dates the State and the Constitution owing to its *empirical root* (in the constitutive ethnic and cultural diversity of Bolivian civilian society) and *moral root* (in the overarching value of human dignity), we can only infer and conclude that national plurality is the "basic founding fact" of the Bolivian State and Constitution, given the way it is set out in the PCS of 2009.

Needless to say, national plurality, the crown jewel of Bolivia's Constitution, is the opposite value of the foundation of the preceding republican State (Quiroga, 2010, pp. 273-282). The latter, as a *one-nation State*, was born as a universal liberal State underpinned by the "*Staatsnation* doctrine" (Del Real Alcalá, 2007a, pp. 401-418) or the liberal process of nation-building. However, it soon shifted to a "*Kulturnation* doctrine" (Del Real Alcalá, 2007a, pp. 373ff.) of exclusion based on one culture and the marginalisation of diversity, although cloaked in abstract-formal guise.

Fifth, the “material content” of national plurality as the basic founding fact of the Bolivian State and Constitution is explicitly stated in the constitutional text. With regards to its moral dimension, for instance, it includes the “ethical and moral principles of plural society” recognised in the Founding Law, which the State “assumes” as its own and undertakes to “promote” (Article 8.I PCS: “ama qhilla, ama llulla, ama suwa (don't be lazy, don't be a liar, don't be a thief), suma qamaña (to live well), ñandereko (harmonious life), teko kavi (good life), ivi maraei (land without evil) and qhapaj ñan (noble life or path).” Other political principles that underpin the State and are related to the value of national plurality and its moral dimension are (Article 8.II PCS): “unity”, “inclusion”, “dignity”, “harmony”, “social equality”, “common well-being” and “social justice”. In any case, the constitutional notion of the common “good life” stands out in the moral content of national plurality as the key concept around which the Bolivian model of the social State is built, as set out in the PCS. Hence the close “structural connection” between the Plurinational State and the social State established by Bolivia's Constitution.

Naturally, the *ethical and moral* content of national plurality shows that, as a constitutional value, it is also a “driving force for equality” in Bolivia. As such, it is one of the salient *pillars* of the new “justice system” (*plurinational and intercultural*) that the PCS seeks to establish. In turn, the justice system is the main source of legitimacy of the Plurinational State that is set out in the constitutional text. This fact provides further evidence that the conceptual, institutional and constitutional design of the *plurinational* model of State erected in Bolivia can only be carried out via a *social* State.

In sixth place, lastly, national plurality is *specially protected* by the PCS as the basic founding fact that underpins the country's renewal. There are two types of protection. One is a “blanket protection” insofar as national plurality benefits from the protection of human dignity provided by the Constitution, due to its material connection to the overarching value of human dignity (Article 22 PCS: “The dignity and freedom of the person are inviolable. Respecting and protecting them is the fundamental duty of the State.”). However, it is also a “specific protection”, unique to national plurality as an essential constitutional value, according to Articles 98.III, 99.I and 100.I of the PCS.

The Value Of National Plurality And The Decentralization Of The Constitutional State

In view of the characteristics examined above, the *far-reaching* nature of national plurality in Bolivia's Constitution of 2009 is deployed throughout the entire constitutional text in the following “categories”, as:

- a “basic founding fact” of the (new model of) State and the Constitution, as we have seen in the preceding section.
- a “moral value” that *motivated* the constituent authority to draft a new Constitution.
- a “political value” assumed by the constituent (political) authority, and which the latter used to design the State institutions in the current Constitution. National plurality configures and *conditions* the manner in which the State has been organised at each of the institutional levels envisaged.
- a “higher legal value” that *pervades* the heterogeneous configuration of Bolivia's entire legal system and also the constitutional justice system set out in the Constitution (Peces-Barba, 1987a). The fact that national plurality is a *higher legal value* in Bolivia's legal system allows it to generate a *sheaf* of fundamental rights that are integrated by the Fundamental Law (Rojas Tudela, 2010, pp. 284-291; Ansuátegui, 2005). The main feature of the fundamental rights is that they share a common background of national plurality.
- a “constitutional principle” that will govern the actions of Bolivia's government authorities (Prieto Sanchís, 1998).
- the citizenship's “subjective rights” (fundamental constitutional rights), implemented as individual and collective *fundamental rights* based on the higher moral and legal value of national plurality (López García and Del Real Alcalá, 2000). Special mention should be made here of the rights of vulnerable groups such as the indigenous farmer nations and people, which are specifically recognised.
- a “legal duty” imposed on *government authorities* and the relations between *individuals* by the Constitution (Peces-Barba, 1987b, pp. 329-341), in favour of the citizens who *benefit* from the plurinational fundamental rights that are protected in the new Fundamental Law (Asís Roig, 1991).

The above examples are an indication of the way the constitutional value of national plurality is mainstreamed throughout Bolivia's Constitution. It has an *impact* on State bodies and every

political, legal, social and economic institution in the country, regardless of their size and at all levels. As I mentioned in the beginning of this paper, I have described these *organic* and *institutional expressions* of national plurality as "organic and institutional national pluralism".

They are what make the model of Plurinational State that has operated in Bolivia since the adoption of the PCS of 2009 so unique. To distinguish and clarify them will be decisive in the identification of the elements that are intrinsic to that model. I make a very brief analysis of this below, given the spatial limitations of this paper.

A) *Plurinational Democracy (Representative, Communitarian and Intercultural)*.

The expression of national plurality in the participation and composition of State Bodies and in political representation is related to the constitutional laws that make the composition of said (legislative, executive, legal and electoral) Bodies *plurinational* or the political representation of the citizenship that makes up said Bodies, respectively.

The institutionalisation of national plurality in Bolivia has an impact on the "Government System" (Chapter III, Title I, Part One), which stipulates in Article 11.I PCS that "The Republic of Bolivia adopts a democratic, participative, representative and communitarian form of government, with equal conditions for men and women". Here, the Plurinational State includes two methods of democratic representation. On the one hand, a *representative method based on universal, direct and secret suffrage*, as stipulated in Article 11.II.2 PCS (*Democratic representation*). On the other, the *method of communitarian representation*, in the spheres that envisage specific representation for the indigenous farmer nations and people – and similar communities – via the "election, appointment or nomination of authorities and representatives according to the norms and procedures of the indigenous farmer nations and people, according to law", as stipulated in Article 11.II.3 PCS (*Communitarian democracy*).

This gives rise to *intercultural* political representation, which includes the procedures of universal suffrage and communitarian representation, depending on the distribution of spheres in the PCS. Needless to say, the democratic methods set out in the PCS are a key element of *national plurality* in the State of Bolivia.

B) *National Plurality in the Territorial Model*.

This expression of national plurality is related to the constitutional laws that institutionalise national plurality in the territorial framework of the State by decentralising political authority. It is the result of the State of Autonomies model adopted by Bolivia, which leads to government at multiple levels.

The institutionalisation of national plurality *inspired* and *generated* the "territorial framework" adopted by Bolivia in the Constitution of 2009. The Constitution gives the central authority the mandate to institutionalise national plurality at territorial level via the decentralised distribution of political power at various levels according to the "list of competences" set out in the Constitution (Clavero, 2009, pp. 187-199). Thus, Article 1 PCS stipulates that: "Bolivia is constituted in a Social Unitary State [...] Plurinational [...] intercultural, decentralised and with autonomies". This implies the adoption of a "new model of territorial State" that is more in line with the "model of Plurinational State" enshrined in the Constitution. Strictly speaking, it means that Bolivia must undertake a *serious* transition from "a centralised neo-liberal Unitary State" inherited from the 19th century, typical of the initial uniform liberalism of that period (García Linera, 2010, pp. 39-52), to a *decentralised* (unitary) State more in line with the distribution of political power that gained strength as a democratising element in the last quarter of the 20th century. Part Three of the PCS (Territorial Structure and Organisation of the State) is dedicated to this question. Clearly, it is a cornerstone of the Constitution.

The territorial model of "State of Autonomies" adopted by Bolivia is rooted in Article 269.I PCS, which defines the territorial framework of the State in terms of national plurality. The PCS stipulates that "Bolivia is organised territorially into departments, provinces, municipalities and indigenous farmer territories". Said territorial departments or "territorial units" (as they are called in Article 269.II PCS) are created, modified and delimited by the democratic will of their inhabitants, pursuant to the terms and conditions stipulated in the Constitution and the law.

The Constitution and Law No 31, of the 19th of July 2010, the "Andrés Bónifaz" Framework Law on the Autonomies and Decentralisation (hereinafter referred to as the FLAD), guarantees and

implements the four levels of Bolivia's State of Autonomies: the *Departmental*, *Regional*, *Municipal*, and *Indigenous Farmer* levels. The autonomous and regional departments and the autonomies of the indigenous originary farmer nations and people may come under a *Statute of Autonomy*, whereas the municipalities base their autonomy on an *Organic Charter*. All of these come under the framework of the Constitution.

From a material standpoint, the functions of government authority, decentralisation of political power and setting up a multi-level government in Bolivia is organised according to the distribution of competences stipulated in the Constitution and assumed by the central government and autonomic bodies (Morales Olivera, 2010, pp. 559-567).

The PCS classifies the competences into four different types (Articles 297-305 PCS): "Prerogative" (competences of the central level of State, which cannot be transferred or delegated); "exclusive" (pertaining to certain areas of the central and autonomic governments that can be transferred and delegated); "concurrent" competences exercised in parallel by the State and the autonomic bodies; and "shared" by the State (basic legislation) and the autonomic bodies (implementing legislation). In all, the PCS (February 2009) recognises 56 competences for the decentralised autonomous bodies (36 exclusive and 23 concurrent and shared competences). However, the FLAD extended the list by adding 50 new competences for the decentralised bodies in July 2010.

C) *National Plurality in the Justice Model.*

Here I refer to the constitutional norms that institutionalise national plurality in the State legal system and the constitutional legal system. The most important impact of national plurality on the legal system is the constitutional principle of "legal pluralism"; the institutionalisation of a justice system based on national plurality; and the legal operators' obligation to integrate "interculturality" as a criterion for interpreting legal norms (Rodríguez Veltzé, 2010, pp. 425-433).

Legal pluralism is stipulated in Article 1 of the PCS: "Bolivia is constituted in a Social Unitary State of Plurinational Communitarian Law, free, independent, sovereign, democratic, intercultural, decentralised and with autonomies. Bolivia is founded on plurality and on political, economic, legal, cultural and linguistic pluralism, within the integrating process of the country". Legal pluralism is also stipulated in Article 179.I PCS, which states that although Bolivia has a single legal system, there are several jurisdictions within it, all on the same hierarchical level: ordinary, agro-environmental, specialised, and the indigenous farmer jurisdiction (which is exercised by their own authorities, elected according to their uses and customs, and with their own institutional rules of procedure).

Strictly speaking, Bolivia has "one" unitary legal system, although it comprises several jurisdictions at the same hierarchical level of importance. In this respect, legal pluralism (in the shape of several jurisdictions) operates at a "sub-constitutional level". However, at constitutional level, Bolivia has a single legal system with the constitutional justice system at the apex, represented by a catalogue of fundamental rights that are recognised in the PCS. Therefore, the task of standardising and giving coherence to Bolivia's legal system is underpinned, in last instance, by the case-law emanating from the Plurinational Constitutional Court (PCC). The seven magistrates who make up the CCP's constitutional justice system are elected according to universal suffrage by a plural civilian society. This should facilitate the indigenous farmer nations and people's access to the highest body of the constitutional justice, although the law ensures the presence of at least two of them. Obviously, the PCC is the most important of all Bolivia's government institutions, after the Plurinational Legislative Assembly. Undoubtedly it will play a decisive role in building and consolidating the country's renewal.

D) *National Plurality in the Social and Economic Model.*

This expression of national plurality is related to the constitutional norms that institutionalise national plurality at the social and economic level. In other words, the "communitarian economy" is the typical and habitual method of economic production of the indigenous originary farmer nations and people. The fact that the PCS *attributes value* to the communitarian economy as part of the *content* of the plural economic (and social) model means setting up a plurinational social State in Bolivia based on the core notion of the common "good life".

It should be borne in mind that national plurality also affects the social model established by the Constitution of 2009 by defining the notion of "plural economy" as a *specific component* of Bolivia's Plurinational State. It is a specific component that requires "building a paradigm of the good life" for the community as a whole (Montero Justiniano, 2010, pp. 592-593).

The impact of national plurality on the social model defined by the notion of the "good life" makes sense in the light of the intimate connection between the following four factors: the population's *cultural diversity*; the effective *limited extension* of the rights of people who are cultural *different* than the majority (i.e. members of the indigenous originary farmer nations and people); the indigenous peoples' very limited *effective enjoyment* of the benefits of the State's public services (Del Real Alcalá, 2008, pp. 569-588); and the attribution of (public) "value" to the indigenous originary farmer nations and peoples' traditional models of economic management.

Several constitutional norms itemise what constitutes *social and economic national plurality*. Thus, Article 306.I and II PCS recognise the indigenous peoples' "communitarian economy" as part of the good life economy within the country's economic organisation and an integral part of the latter: The Bolivian economic model is plural and seeks to improve the quality of life and good life of all Bolivians". Paragraph II provides constitutional protection for the "plural economy" "constituted by forms of communitarian economic organisation" that "complete" the collective good life. Thus, a close link is established between the economy of indigenous people and the "economic model of the good life" (Article 313 PCS). The Constitution (Article 307 PCS) ensures that "The State will recognise, respect, protect and promote communitarian economic organisation" consisting in "the systems of production and reproduction of public life, founded on the principles and visions of the indigenous farmer nations and people".

Thus, the Bolivian State, based on the PCS, is conceived to include a "plural economic order" that integrates a *social market economy* and a *communitarian economy*.

Conclusion: the Inclusion of National Plurality as one of the Most Transcendent Moral, Political and Legal Values of the Fundamental Law

In conclusion, Bolivia's Constitution of 2009 raises national plurality to the status of a "basic founding fact" that underpins the country's renewal. More precisely, the country is reshaped as a "Plurinational State". Moreover, Bolivia's new constitution establishes a close connection between the model of *Plurinational State* and *social* model to which it aspires, in terms of structure and objectives. They are both presented as essential models in modern Bolivia.

In any event, it is worth stressing the fact that Bolivia's Constitution of 2009 is not just one more constitution in the Andean country's history. Quite to the contrary, it represents a historical change in Bolivia; a task that involves two types of profound changes in the State's framework that were never attempted before: a shift from the former republican *Jacobin* State (Del Real Alcalá, 2004, pp. 307-340; and 2007b, pp. 165-203) to a "plurinational *State*"; and a shift from the former *neoliberal* State to a "*social State*" based on the constitutional notion of a collective "good life". Because it involves far-reaching change, it could be asserted that Bolivia's Constitutional of 2009 causes the "re-founding" of Bolivia as a country. It is a highly laudable task on a titanic scale that is fraught with difficulties. We can only wish the Bolivians the best of luck.

The 2009 Constitution builds a new Constitutional State model based on elements of modern constitutionalism (Asís Roig, 1999). National plurality is a *core, foundational, mainstreaming-institutional* value in the Constitution of 2009 and the model of State it establishes. Protecting it should be a prime endeavour of Bolivia's authorities and every political and judicial decision-maker in the country, and of the social and economic agents as well.

It is true that the country has the appropriate legal and constitutional mechanisms and with the institutions *of its time* (Bobbio, 1991) to undertake the task, but the Plurinational Constitutional Court will undoubtedly play a significant role in protecting the moral, political and legal value of national plurality. Furthermore, the PCC must ensure that the numerous constitutional expressions of national plurality in every field are not infringed in their enactment, execution and interpretation.

It should be borne in mind that due to the way the PCS is structured, infringing national plurality would mean a violation of the spirit of the Constitution and the intercultural, social and decentralised State chosen by the people of Bolivia in democratic elections. It is they who decided to give institutional substance to the Plurinational State of Bolivia, as their country is officially known.

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