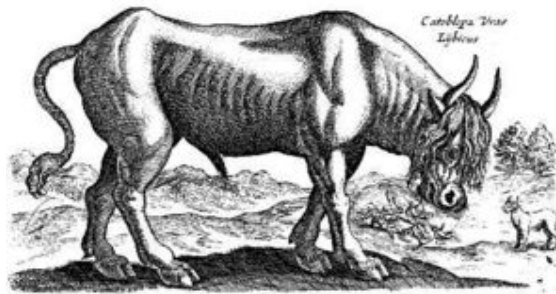


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A didactic study of the Constitution

# THE STATE OF CATOBLEPAS

THE DESTRUCTIVE CONTRADICTIONS OF THE BOLIVIAN STATE



May 2009

The Catoblepas is a mythical animal that devours itself<sup>1</sup>. The current National Constitution published on 7 February 2009 (“Constitution”), contains the germ of its own lack of viability expressed in five major contradictions: (i) the principle of equality violated by the racism that impregnates its text; (ii) the democratic system eroded by fascist-type social control; (iii) the departmental autonomy regimens annulled by an awkwardly centralized system of competencies; (iv) economic development limited by the tendency toward communitarian statism and an investment regimen for natural resources that is completely discouraging; and, (v) justice as a function of the State, which in the form of communitarian justice engenders a sea of injustice. Let’s take a look at each of these contradictions.

## 1. Equality vs Racism.

The principle of equality, the main concept of the democratic system of liberal democracy and the social and democratic state of law, is a fundamental part of this Constitution. From the preamble, which indicates that the Bolivian State

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<sup>1</sup> The Catoblepas is a black buffalo with the head of a pig that hangs down near the ground. Leonardo da Vinci describes it in his *Notebook*. It appears to Saint Anthony in Flaubert’s novel *The Temptation of Saint Anthony*. Borges recreated it in his *Manual de zoología fantástica* and Mario Vargas Llosa exemplifies it in *Cartas a un novelista*.

is based on respect and equality among all, through the entire body of its text, it refers to a State that is sustained by the value of equality<sup>2</sup>. Likewise, it is the State's essential objective and function to form a society without discrimination, and therefore, prohibit and sanction all forms of discrimination that diminish upon the people's ability to recognize and exercise their rights under equal conditions<sup>3</sup>.

However, as an antagonistic concept to the principle of equality and non-discrimination, it contains dispositions that are clearly racist by awarding constitutional privileges to certain ethnic considerations which, contrary to the concept of equality, highlight racial differences instead.

The Bolivian Constitution awards certain constitutional privileges based on ethnic considerations to the indigenous native campesino (rural peasants or farmers) peoples ("INCP"), a rare concept that mixes ethnicity and conditions which, at once, excludes indigenous people who are not campesinos and campesinos who are not indigenous peoples. Let's take a look at the racial privileges awarded to the INCP that **no other Bolivians have**:

- a. They constitute a nation differentiated from those considered Bolivian.<sup>4</sup> "INCP" and "nation" are synonyms. No other Bolivians can form a nation.
- b. Their autonomy and self-government are based on the concept of the free determination of the nations<sup>5</sup>.
- c. They exercise their own political, legal and economic systems according to their own vision and cosmovision (view of the world)<sup>6</sup>.

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<sup>2</sup> The Constitution makes reference to the principle of equality 26 times. The most important sections speak of the values upon which the State is sustained (8.II), political participation in matters of gender (26), the principles upon which the cooperative system is based (855), the rights, obligations and opportunities awarded to families (62), the regimen relating to the rights and duties of spouses (63 and 64), access to education (82), the conditions of interculturality (98), the conditions for running for public office (209), and the relationships between states (255), one of the principles that governs territorial organization and the decentralized and autonomous territorial organizations.

<sup>3</sup> The Constitution makes reference to the principle of non-discrimination 16 times. The most important sections speak of the objectives and essential functions of the State in constructing a society without discrimination (9); about the prohibition and sanctions by the State of any form of discrimination based on gender, color, age, sexual orientation, gender identity, origin, culture, nationality, citizenship, language, creed, religion, ideology, political affiliation, philosophy, civil status, social or economic conditions, type of occupation, degree of instruction, handicap, pregnancy, or other types the objective or result of which are to annul or diminish the recognition, enjoyment or exercise of conditions of equality, of the rights of each person (14.II); about the State's guarantee of the effective exercise of constitutional and legal rights without discrimination of any type (14.3). Likewise, the Constitution specifically prohibits discrimination against the right to receive an education (17), the right to access health care (18.II) the right to work (46), the principles of interpretation and application of labor standards (48.II), the treatment of children by their progenitors (59 III), the protection, promotion and participation of young people in development (222.7), international treaties (255.3), and the right of women to have access to land (402.2).

<sup>4</sup> CPE 3, 30.I.

<sup>5</sup> CPE 2, 30.II.4 and 289.

- d. The election, designation and direct nomination of their representatives are carried out according to their own standards and procedures<sup>7</sup>.
- e. They exercise their own form of justice through their own authorities<sup>8</sup>.
- f. Regarding renewable natural resources, they have the privilege of managing them<sup>9</sup>, administering them<sup>10</sup>, using them and exploiting them themselves in an exclusive<sup>11</sup> manner, and they participate in the benefits of their use<sup>12</sup>. Neither the United Nations Declaration on the rights of indigenous peoples of 7 September 2007 nor OIT Convention 169 on Indigenous Peoples and Tribes, establish the privilege of using natural resources exclusively and participating in the benefits of their exploitation<sup>13</sup>.
- g. Regarding non-renewable natural resources, they have the exclusive right to be consulted prior to using these, respecting “their” standards and their own procedures<sup>14</sup>, and they participate in the benefits of their exploitation<sup>15</sup>.
- h. The preamble of the Constitution uses the Quechua and Aymara word *Pachamama*, as a force which, along with God, re-founds Bolivia. This, to the detriment of other cultures and languages spoken in Bolivia. Throughout much of the national territory many do not know exactly what that word means.

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<sup>6</sup> CPE 30.II.14, 289 *in fine*, 290.II, and 304.2. The term “cosmovision” is an adaptation from the German Word “Weltanschauung” (“Welt” meaning “world” and “anschauen” meaning “to observe”), an expression introduced by the philosopher Wilhelm Dilthey in his works “Einleitung in die Geisteswissenschaften” (“Introduction to the Sciences of Culture”) in 1914. The “cosmovisions” are a group of opinions and beliefs that form the image or general concept a person, era or culture has, based upon which he/she interprets his/her nature and that of all existing things. A cosmovision defines common notions that are applied to all fields of life from politics, to economy, from science to religion, or from moral to philosophy.

<sup>7</sup> CPE 4. 11.II.3, 4, and 26.3.

<sup>8</sup> CPE 190 y 191.

<sup>9</sup> CPE 304.3, 30.17.

<sup>10</sup> CPE 304.3.

<sup>11</sup> CPE 30.17.

<sup>12</sup> CPE 30.16.

<sup>13</sup> The United Nations Declaration mentioned does not make reference to the rights of indigenous peoples to use natural resources exclusively or to participate in the benefits of their exploitation. What it does establish, in Article 32.2, is the obligation of governments to consult them when they want to proceed to use or exploit a natural resource that is located within indigenous territory. On the other hand, Convention 169 of the OIT, in Article 15, in addition to “consulting” establishes that “the interested peoples must participate, inasmuch as possible, in the benefits that such activities report”,

<sup>14</sup> CPE 30.15. and 352. The “consultation” to which the *United Nations declaration on the rights of indigenous peoples* of 7 September 2007 makes reference in its Article 32.2, establishes that as a requirement, there must be “free and informed consent”. It does not necessarily establish that in the formulation of said consent “their norms” must be respected, as the Constitution says. Therefore this is equivalent to meaning that if a PIOC establishes a norm that impedes the exploitation of a natural resource that would benefit the Bolivian State, this would have to be fulfilled, even to the detriment of the Country.

<sup>15</sup> CPE 30.16. Relating to the concept of “participating in the benefits of their exploitation”.

## 2. Representative democracy vs social control

For its government the Republic of Bolivia adopted participative, representative and communitarian democracy<sup>16</sup> which is structured along the lines of four branches of power (legislative, executive, judicial and electoral) which emerge directly or indirectly from popular vote. However, the Constitution gives the State a “counter-power” called “social control”, the election or designation of representatives of which is still a mystery, and this provides them instruments capable of penetrating, directing and controlling the democratically elected powers, generating yet another new destructive contradiction.

The Constitution does not precisely define who will exercise “social control”. It limits itself to indicating that civil society will organize to define the structure and composition of participation and social control and later indicates that the law will establish the general framework for the exercise of social control. There are reasons to assume that this power is designed to empower possibly the unions and social movements controlled by the governing party.

Let's take a look at the main attributions of this counter-power<sup>17</sup>:

- a. It participates in the formulation of State policies.
- b. It participates in the design of public policies.
- c. It controls public management at all government levels (national, regional, departmental, municipal, and indigenous); autonomous, autarchic, decentralized and de-concentrated territorial entities; and public, mixed or private companies and institutions that administer fiscal resources.
- d. It controls the provision<sup>18</sup> and quality of public services.
- e. It supports the legislative organ in the collective construction of laws.
- f. It establishes transparency in information management and the use of all publicly managed resources.
- g. All State organs must present management reports to it, and it must make a declaration concerning them.
- h. It coordinates planning and control with State organs and functions.
- i. The electoral organ must have its support for candidates to run for public positions.
- j. It may request the mandates of democratically elected authorities be revoked.

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<sup>16</sup> CPE 11.

<sup>17</sup> CPE 241 and 242.

<sup>18</sup> CPE 20.II.

Therefore, if “social control” co-defines State policies and controls all, absolutely all of the state and private entities that manage fiscal resources; if it participates in the elaboration of laws ('constitutionalizing' the siege?); has access to information relating to public resources; and finally, proposes revoking the mandates of those who have been democratically elected, then what are up against is a counter-power that favors the use of blackmail and this will surely lead to the erosion of the democratic system of proportional representation and of its institutions.

### 3. Autonomies vs centralism

The Constitution establishes a regimen of departmental, municipal and indigenous autonomies which, structurally, has an acceptable definition. Concerning the autonomous departmental governments, it establishes a basic structure composed of an executive organ headed by a governor and a legislative assembly authorized to dictate departmental laws<sup>19</sup>. However, on the other hand, and in a contradictory manner, it establishes a disproportionate central government and has put in place obstacles to full development, especially of the departmental governments, as we shall see below. Thus it has created a novel form of government in which autonomous territorial regimens coexist under a centralist State, an “a-la-Bolivian” formula that generates a State that contradicts itself and is, therefore, unlikely to be successful. Let’s take a look now at the main centralist dispositions of the Constitution that fundamentally annul the departmental autonomy regimen.

- a. It does not incorporate the competencies of the departmental autonomous regimens expressed in the statutes approved during the referendums in May and June 2008<sup>20</sup> in the departments of Beni, Pando, Santa Cruz and Tarija by 79.5%, 81.96%, 85.6% and 78.78% of the population, respectively,<sup>21</sup> during electoral processes which no competent court has declared null and during which not one instance of fraud was reported. Could the Constituent Assembly and the National Congress have ignored the will of the people expressed at the voting urns regarding the departmental autonomy regimen? We don’t believe so.
- b. The Constitution acknowledges very few of the competencies established in these statutes. The conclusion to which we arrive from comparative studies of the competencies in the statutes of the autonomous departments of Pando, Santa Cruz and Tarija<sup>22</sup> (the Beni statutes were not compared as its categories of competencies are

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<sup>19</sup> CPE 277., 278., y 279.

<sup>20</sup> CPE 300.

<sup>21</sup> Source: Departmental Electoral Courts

<sup>22</sup> The comparative charts are inserted as annexes to the book *El sueño imperturbable, el proceso autonómico boliviano*, published by Editorial El País, 2009, the author.

incompatible with those of the CPE<sup>23</sup>) and the Constitution's treatment of these constitutions, classified as: (i) not covered, (ii) covered but with limitations, and (iii) completely covered, are as follows:

Pando:

Not covered: 53 competencies equivalent to 77.9%.

Covered but with limitations (generally subject to a national law): 9 competencies equivalent to 13.23%.

Completely covered: 6 competencies equivalent to 8.82%.

Santa Cruz:

Not covered: 41 competencies equivalent to 62.12%.

Covered but with limitations (generally subject to a national law): 15 competencies equivalent to 22.72%.

Completely covered: 10 competencies equivalent to 15.5%.

Tarija:

Not covered: 41 competencies equivalent to 68.33%.

Covered but with limitations (generally subject to a national law): 10 competencies equivalent to 16.66%.

Completely covered: 9 competencies equivalent to 15%.

- c. The following chart shows the conclusions described above, that is to say it shows the percentages and numbers of competencies in the statutes of Pando, Santa Cruz and Tarija that the Constitution does not cover, covers but with limitations, or covers completely:

**Summary the Constitution's coverage of the competencies in the Statutes**

Department	Not covered	Covered but with limitations	Covered completely	Total percentages and number of competencies
Pando	77.9% (53)	13.23% (9)	8.82% (6)	99.95% (68)
Santa Cruz	62.12% (41)	22.72% (15)	15.15% (10)	99.99% (66)
Tarija	68.33% (41)	16.66% (10)	15.0 % (9)	99.99% (60)

Source: comparative study prepared by the author

<sup>23</sup> The Statute of Beni consigns all their competencies as competencies coordinated with the Central Government and the municipality while the statutes of the departments of Tarija, Pando and Santa Cruz, as well as the Constitution, classify their competencies as exclusive, shared and/or concurrent and executive; therefore, a comparison could not be made between the competencies of the Statute of the Department of Beni and those of the Constitution, as there are no similar competency categories to compare.

- d. In order to have an idea of the devastating manner in which the Constitution diminishes the competencies in the statutes (in a conceptual and non-numeric manner) we will use the Statute of Santa Cruz as a case in point. Please take note. The following are the competencies that the Santa Cruz Statutes record as exclusive or shared with the department, which are **not covered at all** in the Constitution: education, health, land, justice, police, renewable and non-renewable natural resources, forest soils and forests, forest usage, protected areas, environment, biological diversity, biotechnology, water, licenses for services, telecommunications, urban electricity, labor relations, sustainable socioeconomic development, consumer defense, international fairs, electromagnetic spectrum, provincial borders, development of the indigenous and campesino peoples, matters involving gender, the media, and cooperatives. Likewise, the competencies that the Constitution **covers in a limited manner, which are generally subject to national laws**, are: the writing of the Statutes, the transfer of competencies, the financial and economic regimen of the latter, departmental taxes, public works, departmental planning, agriculture, cattle ranching, hunting and fishing, housing, tourism, landline and cellular telephones, and land ordinance. Only the following are the competencies that the Constitution **covers completely**: administration of goods and income, culture, native languages and cultural and historic heritage, the health of animal and plant life and food innocuousness, trade, industry and services, land transport and other means of transportation, archives, libraries, museums, newspaper libraries and other information centers, and official departmental statistics.
- e. To the contrary, the Constitution develops an extremely ample array of competencies for the Central Government, no less than 83 in fact, among these indelegable privative, exclusive, shared and concurrent competencies<sup>24</sup>, creating which is in all likelihood the most extensive, oversized catalog of constitutional competencies in the world (for example, the central government of Spain has only 32 exclusive competencies).
- f. For all the aforementioned competencies assigned to the central government, the central government has the power to dictate national laws that establish the general framework for each<sup>25</sup> which, naturally, will define the competencies in a more or less centralized manner. In conclusion, in the privative and exclusive competencies of the Central

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<sup>24</sup> CPE 298. and 299.

<sup>25</sup> CPE 297.

Government and in the shared and concurrent competencies, the Central Government retains the monopoly on legislative faculties, and this constitutes an absolute political centralism that is incompatible with a State in which autonomies exist.

- g. It does not give the departmental governments the necessary competencies to define public policy for education<sup>26</sup> and health<sup>27</sup>, the basis for all autonomous regimens. Moreover, in these areas there is a regression relating to the Popular Participation Law as the new Constitution establishes that operative management of education and health is a “concurrent” task to be carried out between the central government and autonomous territorial entities<sup>28</sup> (departmental, regional, municipal and indigenous governments); a task which currently is carried out exclusively by the municipalities in virtue of the aforementioned Law.
- h. Departmental autonomy is tied to a “Framework Law for Autonomies and Decentralization” which establishes the mechanisms for writing up Statutes, for the transfer of competencies, and even for the economic and financial regimen for autonomous competencies<sup>29</sup>, and this completely distorts the essence of autonomies as their competencies must be taken directly from the Constitution and not be contingent upon possible variations in the laws.
- i. The State has five levels of government: national, departmental, regional (the provinces could be included in this), municipal, and indigenous. The regional governments will do nothing more than curtail the competencies and resources of the departmental governments and these five levels of government guarantee governance will become impossible.
- j. The departments do not have full autonomy to plan their development. National planning is a “priva tive”<sup>30</sup> competency of the central government, that is to say “...legislation, regulation and execution shall not be transferred nor delegated and are reserved for the Central Government”,<sup>31</sup> and the autonomous departmental governments must plan their development “in accordance with national planning”.<sup>32</sup> This centralized planning is typical of radical socialist systems and does not

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<sup>26</sup> CPE 298 II. 17.

<sup>27</sup> CPE 298. II. 17.

<sup>28</sup> CPE 299. II. 2.

<sup>29</sup> CPE 271

<sup>30</sup> CPE 298. I. 22.

<sup>31</sup> CPE 297. I. a).

<sup>32</sup> CPE 300. I. 35.



coincide at all with the decentralization of planning, which is the basic supposition of autonomous regimens.

- k. Subjecting the use of departmental “royalties” by departmental governments “...within the framework of the national budget...”<sup>33</sup> curtails the economic autonomy of the departments. In addition, the Constitution establishes that it will regulate the royalties by means of laws<sup>34</sup>, therefore creating the peril that the central government may centralize even further this right which the departments obtained with much sacrifice and blood.

The degree of autonomy the territorial entities have is measured by the autonomous competencies assigned to them. The question that arises is “what use is there in a Constitution that establishes a formal autonomous structure adapted to departmental governments if it does not award them the competencies and necessary conditions so they can function autonomously?”

There was, therefore, a conversion without faith in the autonomies and the result is a regimen of departmental autonomies that contains the germ of their own inefficiency and demise, conceived precisely by representatives of the departments that voted against said type of government. This, in certain measure, explains its implausible formulation.

In the so-called “media luna” (the four departments of the East which form a half-moon shape on the national map) the population has extended a sovereign mandate, expressed during four referendums, to implement full departmental autonomies and this cannot be ignored by the governmental authorities, the departmental authorities of the media luna, or anyone else as it is a sovereign mandate that responds to impeccable constitutional engineering. The referendums took place as follows: 1) the national referendum on departmental autonomy on 2 July 2006; 2) the referendums of May and June 2008 to approve departmental statutes during which the type of autonomy desired was specified in millimetric detail; 3) the revocatory referendum on 10 August 2008 during which the policies, actions and management by the prefects (whose policies, actions and management were at the time expressed in the approved statutes) were ratified; and 4) the constitutional referendum on 25 January 2009 during which the four departments of the media luna voted AGAINST it, mostly as they were opposed to a constitutional text that does not coincide with the spirit of the approved referendums.

### ¿Therefore what can be done?

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<sup>33</sup> CPE 300. I. 36.

<sup>34</sup> CPE 351 IV.

Resistance to implementing a Constitution which, among other things, does not acknowledge the sovereign mandate for departmental autonomies, should be based on the structuring of a solid, united, organized, and structured organic front in the departments of the so-called media luna so that, together with their allies in the capital cities of the departments in which voted against the constitution, a pact can be made with the central government to ensure, inasmuch as possible, that the departmental autonomies regimens contained in the approved statutes be respected.

This pact does not fit into the framework of the new Constitution which, as we have seen, establishes a centralized system with autonomies that are hypocritical inasmuch as they've been diminished. Therefore any agreements of this pact must be made part of a constitutional reform law to be approved by two thirds of the total members present in the Plurinational Legislative Assembly so that the current Constitution can be partially modified based on its Article 411 II, which requires that the proposal included in the reform law later be submitted to a referendum for approval.

Thus, the sovereign will of the four autonomous departments must be merged with that of the western part of the country which approved the Constitution in order to construct a pact that respects both mandates and the viability of the Bolivian State. A pact with these characteristics would respect the sovereign manifestations expressed during all the referendums.

#### **4. Social economic development vs “living well” and communitarian statism**

The Constitution establishes that “the Bolivian economic model is plural and is directed at improving the quality of life and the “living well” of all Bolivians”<sup>35</sup>. This precept and others<sup>36</sup> indicate clearly that the fundamental objective of the Bolivian economic model, as constitutionally defined, is “living well”. But, what is understood in the Constitution as “living well”? The concept of “living well” is taken from the Aymara phrase “*suma qamaña*” transformed into an ethical-moral<sup>37</sup> constitutional principle that expresses the Aymara-Quechua indigenous vision of development based on the biospheric continuum, in contrast to the Western vision of “living well” which is based on a separation of subject from object<sup>38</sup>. This differentiation is key to

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<sup>35</sup> CPE 306.

<sup>36</sup> See the Preamble “A State (...) in which the search for living well predominates”. Article 313 establishes that “... to ensure living well in its multiple dimensions, the Bolivian economic organization establishes that...”. Likewise see CPE 8, 80, 306. I. y III..

<sup>37</sup> CPE 8.

<sup>38</sup> See *Suma qamaña, la comprensión indígena de la buena vida*, article by Javier Medina at [http://www.democraticdialoguenetwork.org/file.pl?files\\_id=521:folder=attachment](http://www.democraticdialoguenetwork.org/file.pl?files_id=521:folder=attachment) which explains the

understanding many of the questions presented by the Constitution in terms of economy. The question that comes to mind, then, is “do the indigenous campesinos of Bolivia who practice or have practiced an economy based on “living well” actually lived well?” Was constitutionalizing the principle or concept of “living well” or *suma qamaña* as the fundamental object of the Bolivian economic model worthwhile?

The Bolivian economic model is “plural” and is created by the communitarian, state, private, and social cooperative styles of economic organization<sup>39</sup>. The Constitution establishes that the State acknowledges, respects and awards rights to individual and collective landowners as well as the rights to use and exploit natural resources<sup>40</sup>. However, I sustain the thesis that the Constitution introduces elements of exacerbated statism (some would say socialism as all means of production of natural resources, with very few exceptions, are fully concentrated within the State) that will impede the economic development that should benefit all Bolivians. Let’s take a look at some of these elements:

- a. To ensure “living well” and to ensure development, one of the primary purposes of the Bolivian economic organization is the production, distribution and “fair” redistribution of wealth and economic surplus<sup>41</sup> while making no distinctions between whether or not this comes from public or private economic surpluses. How will the State’s economic surpluses be distributed and redistributed? Here the Constitution opens the door to confiscating another’s wealth.
- b. Freedom of enterprise is guaranteed, although it will be regulated by law<sup>42</sup>, and this generates continuous insecurity and the accompanying lack of incentive for investment as the law can change at any moment. Therefore there is no definitive constitutional guarantee for private investment.
- c. The State will directly produce goods and services in general. In production companies “social control” over the organization and management is guaranteed as is the worker’s participation in decision-making and benefits.<sup>43</sup> This well-known formula will lead to the failure to generate profits that should correspond to all Bolivians and not only to those who operate the state-owned companies.

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qualitative vision of the good life of modern Western civilization based on the subject/object schism, and the Amerindian vision based on the contrary: the biospheric continuum.

<sup>39</sup> CPE 306. II.

<sup>40</sup> CPE 349.

<sup>41</sup> CPE 313. 2., 306. V. and 316.7.

<sup>42</sup> CPE 308. II.

<sup>43</sup> CPE 309.3.

- d. The State regulates production, distribution and commercialization processes of goods and services<sup>44</sup>. Take note. Not only does it exploit all natural resources, it also invades the trade arena.
- e. All foreign investment must be subject to the judges and laws of the Republic of Bolivia<sup>45</sup>, and foreign companies that operate in the oil and gas industry, in name and in representation of the State, may not under any circumstances invoke exceptions or request international arbitration nor may they make claims using diplomatic channels<sup>46</sup>. This disposition contradicts the 23 reciprocal investment agreements (APRIs) signed by the Bolivian Government and ratified by law and, therefore, are an enormous discouragement to foreign investment.
- f. Bolivian or foreign companies that operate in the natural resources industrial sector must reinvest their profits in Bolivia<sup>47</sup>. Good-bye foreign investment in natural resources.
- g. The State assumes control and exclusive direction over the exploration, use, industrialization, transportation and commercialization of natural resources<sup>48</sup>.
- h. Regarding the use of natural resources the Constitution award privileges based on ethnic conditions to the native indigenous campesino peoples (PIOCs) which also discourages foreign investment and to this end we refer to point 1 (equality and racism), sub-points f and g.
- i. YPFB is the only entity authorized to carry out activities relating to the hydrocarbons production chain and trade<sup>49</sup>. However, all income perceived from the commercialization of hydrocarbons are property of the State<sup>50</sup> (that is to say, the money goes to the State Treasury and not YPFB), and YPFB is unleviable (non-seizable)<sup>51</sup> which means it isn't subject to credit. In other words, the only company authorized to participate in the entire hydrocarbons production chain does not have its own money, therefore requiring continuous transfers from the State Treasury (which is always very difficult), and it cannot take out any

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<sup>44</sup> CPE 316.2.

<sup>45</sup> CPE 320. II.

<sup>46</sup> CPE 366.

<sup>47</sup> CPE 351. II.

<sup>48</sup> CPE 351. and 355.

<sup>49</sup> CPE 361 *in fine*.

<sup>50</sup> CPE 359. I.

<sup>51</sup> CPE 361. I.

loans at it is not subject to credit because it is unleviable. This amounts to self-destruction of the hydrocarbons industry.

- j. In all the semi-public enterprises YPFB forms, it must have no less than 51% ownership. It's not at all attractive to foreign investors to be minority partners with the inefficient and corrupt YPFB.
- k. In the area of mining the State is much more benevolent than with hydrocarbons. It awards rights to miners in all production chains, signing contracts with individuals and collective entities<sup>52</sup>, but obligates the beneficiaries to carry out mining activities "to satisfy social economic interests" or face the immediate dissolution of the contract<sup>53</sup>. Would local or foreign private investment or foreign state investment invest in mining to satisfy the social economic interests of Bolivians? What exactly are "social economic interests"? We believe that under these conditions, which are so subjective, it will be difficult to attract investors and develop the sector.
- l. The areas awarded by contract for mining are non -transferrable, unleviable and may not be transferred in cases of hereditary succession<sup>54</sup>. This is another discouragement to investment as this industry is only profitable in the very long term.

The Bolivian economic model prescribed by the Constitution, and marked by the *suma qamaña* or "living well" development concept, paired with the enormous restrictions to investment in natural resources and the potential for state intervention in commercial aspects, demonstrate the economic implausibility of the Bolivian State, the State of catoblepas.

## 5. Justice vs communitarian (in)justice

The Constitution, in 45 different opportunities, enunciates the concept of "justice" (not ordinary justice, necessarily), a principle that is an essential function of the State.<sup>55</sup>

Regarding preventing the cruel treatment of persons, the chapter on Fundamental Rights begins with a first generation right which establishes that "All people have the right to life and physical, psychological and sexual integrity. No person shall be tortured, nor suffer cruel, inhumane, degrading

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<sup>52</sup> CPE 370. I.

<sup>53</sup> CPE 370.V.

<sup>54</sup> CPE 371.

<sup>55</sup> CPE 9. 1.

or humiliating treatment”,<sup>56</sup> a right which agrees with the United Nations Declaration on the Rights of Indigenous Peoples which establishes that the latter shall not be subjected to “any (...) violent act”<sup>57</sup>.

The Constitution awards the native indigenous campesino peoples the right to exercise their jurisdictional functions and competencies through their authorities, and to apply their own principles, cultural values, standards and procedures<sup>58</sup>, the so-called communitarian justice. It was peremptory to include this right in detail in the Constitution and it coincides with the United Nations Declaration mentioned above, in that indigenous peoples have the right to “...preserve and reinforce their own (...) legal...institutions”<sup>59</sup>.

However, the manner in which this justice has been incorporated into the Bolivian Constitution is the reason why, in fact, during the application of this justice flagrant violations to the human rights of indigenous peoples are fundamentally committed.

Injustice, in the actions taken during the application of communitarian justice, originates from the following:

- a. The Constitution does not frame the administration of communitarian justice within the acknowledgement of fundamental human rights to which ordinary justice is subject, in frank contradiction to disposition 8.2 of Convention 169 of the OIT which establishes that “Said peoples (indigenous) must have the right to preserve their own customs and institutions as long as they are not incompatible with the fundamental rights defined by the national legal system or internationally recognized human rights”.
- b. Although the Constitution awards constitutional ranking to international human rights treaties ratified by Bolivia<sup>60</sup>, the lack of express constitutional reference to the fact that in the application of communitarian justice human rights must be respected leads the indigenous peoples to believe that communitarian justice has no limits with respect to the human rights ratified by the Bolivian State.
- c. The Constitution does not establish a clear and express catalog of human rights to be respected during the application of communitarian

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<sup>56</sup> CPE 15. I.

<sup>57</sup> Article 7. 2.

<sup>58</sup> CPE 190. I., 179.

<sup>59</sup> United Nations declaration on the rights of indigenous peoples, Article 5.

<sup>60</sup> CPE 13 IV., and 14. III.

justice. However, that justice is equal in constitutional hierarchy to ordinary jurisdiction.<sup>61</sup>

- d. The generalized lack of knowledge on the constitutional ranking of human rights treaties and their content, means that those who apply communitarian justice have not clear on which human rights must be respected when applying said justice.
- e. Communitarian justice in Bolivia is not codified, it is oral, and in addition there are as many communitarian justice models as there are native communities; therefore, most of the communitarian justice sanctions are, at any specific moment in time, subject to the criteria of the chiefs or leaders of the moment in an ayllu, tenta, marca, (indigenous community or tribe). These discretionary conditions are what modern justice attempts to avoid.

The aforementioned aspects necessarily lead us to question: “Are fundamental human rights protected in the sanctions or punishments applied in communitarian justice? What control does the State have over the punishments and sanctions imposed under this regimen?”

It was extremely irresponsible to award unrestricted freedom of sanction in communitarian justice in a country with an extremely high degree of self-identification as indigenous. At least the Constitution has left the door open to regulating it through the Ley de Deslinde Jurisdiccional (the Jurisdictional Demarcation Law).<sup>62</sup>

In the meantime, since this new Constitution has taken effect, grave violations to the human rights of indigenous peoples have already been seen. For example, the confiscation of the home of Victor Hugo Cárdenas or the flogging of Marcial Fabricano (both indigenous), justified by the aggressors, important government officials and indigenous peoples as actions framed within the text of the new constitution<sup>63</sup>, are already sufficient indications to believe that the administration of communitarian justice, as regulated by the Constitution, is the genesis of a sea of injustices in this country, and a decisive factor in the lack of viability of the State of catoblepas.

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<sup>61</sup> CPE 179. II.

<sup>62</sup> CPE 191. II. 2.

<sup>63</sup> The flogging of Marcial Fabricano was justified by the Vice Minister of Land Alejandro Almaráz and by Adolfo Chávez, the President of the Central Indigenous Council of Eastern Bolivia (CIDOB), among others, in press reports dated Tuesday 12 May 2009. See the following link to the La Razon newspaper: [http://www.la-razon.com/versiones/20090512\\_006724/nota\\_247\\_810213.htm](http://www.la-razon.com/versiones/20090512_006724/nota_247_810213.htm) and this one as well: <http://www.ernestojustiniano.org/2009/05/almaraz-estos-castigos-s-son-justificables/>

(BACK COVER)

**Juan Carlos Urenda Díaz** received his undergraduate degree in law from the Gabriel René Moreno Autonomous University, his Master's Degree in law from Harvard University and his Master's Degree in international law from American University.

He worked at the Sullivan & Cromwell law firm in New York (1990) and for the past nineteen years has been Director of the Urenda Agobados Sociedad Civil law firm ([www.urenda.bo](http://www.urenda.bo)).

He was head of the Santa Cruz Pre-Autonomy Council's committee in charge of preparing the proposed constitutional reforms of the autonomy regimen. He was a member of the Citizen's Council for Constitutional Reform 2001-2002 and the National Pre-constituent and Pre-autonomous Council in 2005. He was formerly President of the Bolivian Academy of Constitutional Studies (2004-2006) and an *ad honorem* external consultant to the Prefecture of Santa Cruz providing guidance for the autonomy process (2007-2008).

He was a project planner for the Law to Convoke a National Referendum Connected to the Constituent Assembly for Departmental Autonomy and the Autonomy Statutes of the Department of Santa Cruz, approved during a referendum on 4 May 2008.

He was distinguished in 2005 as outstanding attorney of the year by the Santa Cruz School of Law. In May 2007 the Santa Cruz Federation of Professionals awarded him the *Santa Cruz statue for professional merit*. In January 2008 the Provisional Autonomy Assembly of Santa Cruz, by means of Resolution No. 03/2008 awarded him the *Cruz Potenzada* in recognition of his work. In February 2008 the Comité Pro -Santa Cruz awarded him its maximum distinction the *Santa Cruz medal of merit*. In June of the same year the Voluntary Services Alliance distinguished him as an *autonomous leader of the new Bolivia*.

He has authored the following books:

- El sueño imperturbable, el proceso autonómico boliviano (2009).
- Autonomías Departamentales (1987, 2005, 2007).
- ¿Qué hacer si la Asamblea Constituyente incumple el mandato del referéndum por las autonomías? (2007).
- Separando la paja del trigo, bases para constituir las autonomías departamentales (2005, 2005, 2006).
- A contrapelo (2003).
- La descentralización deficiente (1996).
- Descentralización Administrativa, conceptos fundamentales y análisis (1991).

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