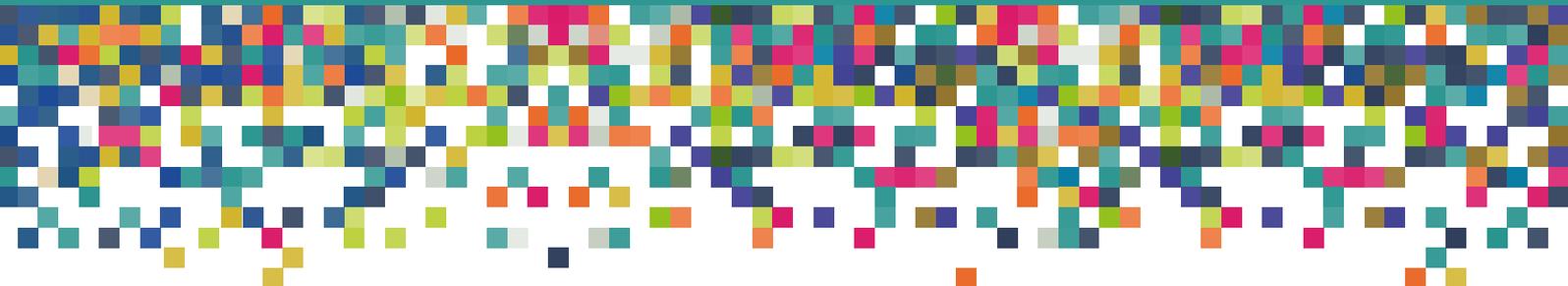




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**Intercultural dialogue, ordinary
justice and indigenous justice in
Bolivia**

Between challenges, possibilities or utopias

Johanna Lechat



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own drawing

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ABSTRACT

For years, indigenous people in Bolivia have been relegated and excluded from their right to citizenship and to live according to their habits and customs. However, since the instauration of the New Constitution in 2009, the Bolivian plurinational state has acted as redistributor thus widening the spheres of equality. This dissertation explores the question of the recognition of legal pluralism (recognition and limitation at the time) and is particularly interested in the intercultural communication, coordination and cooperation between judicial authorities from the indigenous and ordinary jurisdictions. Since justice is one of the pillars of democracy, all the current discussions on the limits and benefits of indigenous justice are part of the debate on the *Living Well* and the state management of cultural diversity. In-depth interviews will give voice to different stakeholders: ministry's employees, academics, lawyers, leaders of indigenous national union organisations, a judge from the ordinary system and indigenous community authorities. This study aimed at understanding why instead of being seen for their capacity of enriching one another, the two legal jurisdictions are often presented as opposites and why it is when legal pluralism is finally recognised that indigenous justice is the most limited in its application. To what extent does the relationship between indigenous justice and mainstream justice express genuine intercultural communication and a desire for a plurinational state in Bolivia? This study will show that there is not a genuine will of the state to establish a hierarchical equality between the different jurisdictions and that there is an insufficiency of state public policies to implement plural justice. There are still challenges ahead for the judicial system to be just and effective.

1 INTRODUCTION

For years, indigenous people in Bolivia have been relegated and excluded from their right to citizenship and to live according to their uses and customs. However, since the instauration of the New Constitution in 2009, the Bolivian plurinational state has acted as redistributor thus widening the spheres of equality. By questioning the universality of liberal law, the pluralist and specific approach to the law in the New Constitution is contrary to the principles of representative democracy, that republican liberalism which, after rejecting them, tried to homogenise them. The Constitution has then replaced the concept of equal rights for all with another ideal, that of *Living Well* that advocates for less individual values but more collective. The ideological bases are planted, pluricultural and intercultural in a decolonised state are the new founding principles and essential to the concept of *Living Well*. This societal alternative proposed through the concept of *Living Well* can only be reached by reducing gaps between peoples. It is time to walk towards an intercultural democracy based on the complementary exercise of the three types of democracies: representative, participative and communitarian. It is the desire to go back to the original definition of democracy that of a government for the people, but this people is not one but several and it is important to see plurality in plurality. It is this plurality that Evo Morales has legitimised with the New Constitution. The plurinational and intercultural state is born on paper but is it in reality?

The plurinational state has incorporated indigenous institutions into the structure of the State. Their legal systems and values are part of the institutionality of the State. Within the framework of legal pluralism, the indigenous jurisdiction and the ordinary jurisdiction enjoys a hierarchical equality, at least on paper, with the common mandate to coordinate and cooperate with each other to achieve the ends of justice summarised in *Living Well*. The challenges of creating new forms of state, new forms of living together and new forms of relation between legal systems do not arise only in Bolivia but in many Latin American countries such as Equator, Peru and Columbia, Asian, Oceanian and African countries too. While academic attention has been paid especially to the economic and philosophical dimensions of the concept of *Living Well*, the notion of genuine or subordinate intercultural, the daily practices of indigenous justice (sentences, traditions), too little attention has been paid to the intercultural dialogue, the cooperation and coordination between the two jurisdictions, indigenous and ordinary, and the challenges it implies. Keeping in mind that Interculturality is not measurable, this dissertation seeks to think of Interculturality not only as an abstract state project, as an utopian intellectual concept but as a daily practice. It does not seek firm answers but it is looking for a whole

range of possibilities regarding the implementation of Interculturality from the legal fields to the practical fields.

Throughout Bolivian history, plurality has been seen as an obstacle to development instead of a wealth. Interviewees will be asked to critically engaged with issues in my sense, not enough debated internationally. Can Interculturality as a state project be non-subordinating? Is the law the appropriate tool for its implementation or a brake? Can individual and collective rights coexist without tension? Following the thematic analysis of interviews, I will talk about some insights gleaned from a participant observation I realised in the indigenous community of Huancallo. I hope this research will raise new issues not treated in the literature and humbly suggest a few lines of thoughts to inspire future public policies for a more effective dialogue between jurisdictions and the consolidation of a plural justice.

2 LITERATURE REVIEW

2.1 Indigenous justice: concepts.

Often in the political arena and in the media, indigenous justice is understood as violating Human Rights and is synonymous with lynchings (De Sousa Santos, 2012a: 521). There are a multitude of terms referring to it such as "traditional justice", "native legal system", "customary law", "native law", "indigenous justice" or "community justice" being the most widely used. I have decided to use the notion of "indigenous justice" that seems most appropriate because the notion of "community justice" is too often confused with that of auto-justice. I must begin by saying that there is not only one definition of justice. The divergences in naming indigenous practices reflect the larger tension within the body of literature surrounding indigenous justice. Both Sierra and Peres, have admitted to rather negative views on indigenous justice. Sierra points out its precarious and arbitrary nature: "Supporting community justice is, then, the poverty, social destructuring and the competition between community, but also a State which is materially impossible to guarantee the citizenship of its members {...}" (1996: 105). Similarly, Peres asserts that recognising indigenous justice makes legal principles including Human Rights more vulnerable and that indigenous justice "is an expression of barbarism and backwardness" (2008: 216-217). In this views, the concept of indigenous justice would not be compatible with the Western legal tradition of the state law.

However, it is important to outline that for most scholars, the Bolivian judicial system has developed on the margins of the Bolivian reality and has for too long ignored the customs and practices of indigenous peoples. These ancestral practices in the administration of justice could have been led to disappear but they nevertheless lasted for centuries. Indigenous justice then developed as a parallel judicial system, a kind of internal law, hybrid, dynamic and changing. It can be said that the conception of indigenous peoples regarding justice differs from the traditional sense that has been given of it by the West where it was first restricted to the idea of equality by Platon. For Estermann, according to the philosophical conception of indigenous peoples, it means first of all a relationship. It is understood as a form of reciprocity and a means to achieve the balance of the *Pachamama* (2011: 522). It is based on an oral and unwritten legal tradition and has many advantages: it is inexpensive, fast and it is applied by people who are familiar with local traditions and aims to strengthen the social cohesion of the community (Albó, 2012: 212). The main goal is to restore the balance of the community and to keep balanced social relationships among community members (Estermann, 2011: 523).

I consider it is not appropriate here to expand on how it has conquered progressively the legal field (See ILO-Convention 169 Art 8.I, UN 2007 Declaration on the Rights of Indigenous Peoples Article 34, Bolivian 1994 Constitution Art 171; "*as an alternative solution to conflicts*", Bolivian 2009 Constitution Art 9: "*the methods used by indigenous peoples traditionally for the repression of offences committed by their members must be respected*") and what is its practical expression on the ground (See the practical studies of Chuquimía (2012); and CEJIS, CICC, CIP-SJ, CICOL, (2003)).

The republican integration has shown its limits. Bolivia exposed to the imported liberal concept of equal rights for all would suffer the effects of a late homogenisation and stifling in the name of equality. Equality seen from an eurocentric point of view and dictated from "the heterosexual catholic European white male model" (Castro-Lara, 2016: 114). Walter Mignolo rightly asks: "By constructing the idea of modernity as if it were the description of an entity and historical process, *attention to the event and what was said* dazzled the eyes and hid *the event that happened in the saying*: who was really narrating?" (2010: 64). Having failed to manage diversity, the republican system then exposed itself to a crisis of equality, the latter became a "distant deity, whose routine worship no longer feeds any living faith" (Rosanvallon, 2011: 19). Faced with this crisis and the rise of social movements in the 2000s, the State will then play a new role. The "social unitary plurinational state" is now redistributor. It will try to restore equality by giving special rights to indigenous peoples in the 2009 Constitution. Thus, the concept of equality in itself, understood as an equality of rights for all, no longer makes

much sense. It makes sense if, on the contrary, it starts from the recognition of the heterogeneity of society and is based on this recognition to create mechanisms that make it possible to overcome contradictions and coordinate differences (Dechenaud, 2008: 534). Equality is not having the same rights but rights that fit their customs. Equality and identity are closely linked and maintain an ambiguous relationship. Benjamín Arditi underlines this contradiction (Arditi, 2009: 78):

Equality is sought on behalf of a particular group that explicitly wishes to maintain its identity as such or, rather, wishes to configure its identity by emphasising its difference from others, while invoking something that transcends its own particularity.

In the reorganisation of society, indigenous peoples find themselves in a transcendental time where past and present are intertwined and where "the site of identity is the interface of the « past » self and the « present » self" (Kent, 1998: 34). Jouannet criticises the contemporary positivist vision of law, according to which positive law was the only right recognised (2009: 25). Social organisations became bargaining organisations. The production of rights is now not only a state matter but it is societal. Positive law takes on a new definition and is no longer the only source of the rule of law. We find ourselves almost with an inverted process, whereas before the rights emanated from the State today they emanate from society as stipulates Raiser (1989: 125). The meaning that the indigenous communities gave to their demands is that of legal plurality thus theoretically, ending with the monistic logic of the law.

2.2 From monopolitism to legal pluralism.

In the context of legal pluralism, the 2009 Constitution established the legal equality between the indigenous justice and the ordinary justice (2009 Constitution Art 179). Legal pluralism is reflected in the recognition of the cultural differences of citizens subject to several legal systems within the same territory and subject to the same constitutional norm (Griffiths, 1986: 1). For Griffiths, legal pluralism is a fact when legal centralism is a myth (1986: 3). Each of these jurisdictions retains its own institutions, norms, practices and legal traditions. Indigenous peoples have the right to retain their forms of social organisation and judicial authorities. This recognition is part of a process of strengthening social actors by establishing normative and cultural equality. The notion of "legal pluralism" is used for the first time by the Italian jurist Santi Romano because, according to him, the plurality of legal systems is due to the crisis of the hegemony of the modern state (Sánchez, 2008: 25). It can be understood as a response from the State to its incapacity in the administration of justice, but

for the indigenous peoples it is much more than that, it is to recognise their practices, their cultures and their ancestral traditions, it is to allow them to "exist". Many studies show that indigenous justice practices have always persisted through the centuries, maintaining a complicated connection with Crown then state law and showing relationships of interdependence, assimilation and imitation (Molina, 2008 :19; Molina, 2019: 83, Mejía, 2008: 132 and Van Cott, 2000: 231). Other scholars come to the same conclusion but they emphasise the power of resistance of indigenous justice in front of assimilation (Sierra, 2011: 390, Gómez, 2011: 409). Eugen Ehrlich was the first to speak of a living law and the possibility of a plurality of legal systems. The central point of the law is situated in society itself. "The inner order of associations makes law work" he writes, in the sense that it is the web of expectations that people have in their social life that bond them together (Ehrlich, 2009: 62).

Indigenous justice thus shifted from officious to official, but ten years after its constitutional recognition, the *2010 Law on Jurisdictional Domain* came to limit indigenous justice. In my methods essay, I demonstrated through a comparative analysis on court documents that there is not a genuine acknowledgement of power in the practice of indigenous justice. Indeed, I identified prevailing power dynamics that created inequities then enacted through laws. The material, personal and territorial competences of indigenous justice were restricted. It seems that the Bolivian government has chosen to adopt rather timid measures to maintain social peace (De Sousa Santos, 2012a: 17).

However, legal reforms are often a reflection of economic issues of the moment. Chivi points out the difficulty to decolonise the State from the State and escape from its capitalist turn (2012: 307). Racism is only the most visible trait of colonialism (De Sousa Santos, 2012a: 21). It is not only a cultural colonisation but a political colonisation. As part of the colonialist political discourse, there is the fact that indigenous justice is often presented as frozen in time, as "an archaic fossil", in Albó's words (2012: 211). Cusí also admitted to this view of indigenous justice presented as "historical traditions", and add that for him, there is no political and judicial decolonisation, only "aesthetic makeup reforms" (2016: 8). It is time to stop seeing communities as cultural unity (Fraga, 2015: 208, Viaña, 2009: 35). The State will also face the challenge of building unity in diversity and perfecting itself by becoming ever more inclusive, participative and representative for the *Living Well*. Céspedes has approached legal pluralism from a less idealistic point of view. According to him and its theory of "analogical pluralism", reaching partial agreements on common matters would be enough for legal pluralism to be beneficial to the population and develop a certain universality (2008: 92).

Differentiation by law, deepened with the Constitution through the recognition of legal pluralism, shows that equality is paradoxically, sometimes sought for, sometimes rejected. It is the right to be equal when the difference inferiorises us or the right "to be different when equality decharacterises us" (De Sousa Santos, 2010: 37). The concept of equality necessarily implies the involvement of the "Other" because it is by comparing two situations that the feeling of inequality arises. Equality implies a redefinition of relations between individuals. This complementary relationship between individuals is the basis of the alternative society, that of *Living Well*. According to Luis Tapia and his theory of co-government, the liberal authorities were not the most adapted to put in place this political equality (Tapia, 2007). Indeed, the problem of liberal authorities is that they have presented legal pluralism based on unequal relationships without taking into account the expectations of civil society (Cusí, 2016: 73, Rivas, 2008: 185-187 and Díaz, 2004: 4). It is then necessary to create common instances of government, thus contributing to the democratisation of the State. Equality is co-government, a co-government not only between indigenous and non-indigenous but also between indigenous and indigenous.

2.3 Interculturality as a basic input of the transformation process of the State.

From the preamble, the tone is set. One of the main objectives of the 2009 Bolivian Constitution is the decolonisation; cultural decolonisation (linguistic, educational, recognition of cultural practices) and spiritual (racism, subordination of the indigenous). It is about creating or recreating a new world based on ancestral values but in a "modern" world by recognising the history of indigenous peoples (2009 Constitution). Decolonisation involves the recovery of History and ancestral values because it is the collective struggles of social movements that allowed the possibility of rebuilding today the Bolivian state towards a new state. Colonisation is of all types, legal, religious, economic, social and political. Roberto Choque evokes four identities underestimated during the colonised period, that is to say from 1535 until today (2011: 45-49):

- Ethnic identity: racial discrimination. It is then necessary to "decolonise the spirits".
- Cultural identity: language is the most important factor of cultural identity but it is also the respect for the spirituality of indigenous peoples.
- Gender identity: the discriminations about the order of civil status, the sex, etc.

- Ideological identity: to decolonise the political postures of domination.

Plurinationalism is a condition of interculturalism and interculturalism is a dimension of decolonisation. Interculturality goes beyond pluriculturalism which only recognised differences without necessarily trying to articulate them within the same State, the unitary State. The challenge for the State is then, how to create unity in diversity? And the answer is, through interculturality, defined in the article 99.I of the 2009 Constitution:

Interculturalism is the means for securing cohesion and harmonious and balanced relations among all peoples and nations. Interculturalism shall entail equality and respect for differences.

Interculturality, both outside and as a facet of the communicative sphere, must be understood not as a phenomenon but as a political proposal. It is about building a dialogue between equals, generating bridges of complementarity between cultures and legal systems (here we talk about interlegality). A generally accepted definition of interculturality says that it is the interaction between different cultures within the same territory. This interaction must take place from the recognition of diversity and the respect for differences to reach an intercultural dialogue (Lozano, 2005: 28). There are tensions in the literature between those who see different levels of possibilities for interculturality and those who do not. Mayorga and Díaz see it as an unrealisable utopia where a democratic rule will always take over another (Mayorga, 2013: 4, Díaz, 2005: 160). Surely, the concept of interculturality does not come without its dilemmas. One of the major dilemmas is whether interculturality should be established by law or, is the law too far from the social reality of the population to be an effective means? I have mentioned earlier how the *Law on Jurisdictional Domain* which should have been a law that puts in place mechanisms for an effective coordination between jurisdictions came to limit the influence of indigenous justice. Some scholars see the law as a colonial tool of subordination and do not believe at all in the social power integration of law in that case. For them, interculturality should not come from a law (Viaña, 2013: 13, Cusí, 2016: 62, Exení, 2011: 701 and De Sousa Santos, 2012a: 36). Interculturality has lost its liberating potential and became functional to the State as a state tool of domination. Various terms are employed to define the subordinated interculturality: "Functional interculturality" (Cavalcanti, 2007: 24), "Conservative interculturality" (Díaz, 2005: 160). For some scholars (Fornet, 2004: 67, Viaña, 2009: 13 and Olive, 2009: 25), we should not start with thinking about the ideal characteristics of dialogue but with the question about the conditions of dialogue, that is the unequal broader societal context in order to escape from a "monocultural monologue of modern mercantile macro-culture" (Díaz, 2007: 40).

For Zuñiga, reaching an effective intercultural dialogue is an essential condition of the *Living Well* society and efforts towards this goal must be done. She identifies four types of cohabiting interculturalities: 1) The subordinated interculturality (colonial discourse). 2) The institutionalised interculturality (laws). 3) The folkloric interculturality (commercial exoticism) and 4) The interculturality with equity (2011: 89-92). For us to talk about "interculturality with equity", "critical interculturality" (Walsh, 2010: 5) or in my terms, genuine interculturality, there have to be four things: 1) a discursive tolerance (De Sousa Santos, 2012b: 21), 2) a willingness to incorporate alternative knowledge and a preference for suppressed and marginalised knowledge (Vergalito, 2009: 20), 3) a keenness to find complementarities between knowledges (De Sousa Santos, 2012a: 35 and the idea of the "dialogued universality" of Fernet, 2004: 80 where every Human wish to grow) and, 4) an eagerness to engage in reciprocal learning (De Sousa Santos, 2009: 56). This intercultural dialogue must favour the contributions of one culture to another and enhance the knowledge of each culture. It is a dialogue between knowledge and technology (Fernet, 2009: 15), a dialogue between indigenous and non-indigenous, a dialogue between indigenous and other indigenous. The "diatopic hermeneutics" of De Sousa Santos proposes an intercultural translation of knowledges between different cultures by suggesting to identify isomorphic preoccupations between cultures (Vergalito, 2009: 20-23). In the end, everyone wants to find a solution. This ideal reciprocal dialogue –nested in different methods of communication and communicative media– must be based on the respect for the Other and be done in equal conditions. Equality is understood here as the equal dignity of every human person. In an intercultural relationship, equality and difference are no longer in opposition (Muller, 2011: 48). They are two facets of social justice.

Intercultural communication studies also benefit intercultural theory. Communication is seen as a place of struggle where identities are created and recreated through their encounter with the Other (Hedge, 1998: 36). Nakayama and Martin argue for a dialectical perspective of communication where the focal point is on the relational aspect not the individual aspect. Every person must be seen in his individual capacity but also as a group member (2010a: 66). The reaction of people during an interface is partly idiosyncratic. The inter of intercultural communication must be seen "as a generative site of learning and becoming" (Rowe, 2010: 316). When communicating with the Other, it is important to remain ethical and being ethical requires three elements: 1) self-reflexivity, 2) learning about others and 3) give importance to social justice (Martin/Nakayama, 2010b: 36). Taking into account the role of power in communicative practices is imperative to generate a climate favourable towards dialogue. Nakayama and Halualani see law as an undercovered area "when studying the structures of power

that shape communication between people" (2010: 6). In order to do so, Orbe and Harris invite us to think about how our social positioning affects interface communication (2015: 5). Similarly, Jensen links cultural self-perception to experiences of understanding (2004: 6-9). Interculturality in Bolivia is a long process and still under construction. Finally, I believe that without plurinationality, there is no interculturality, without interculturality there is no decolonisation and without decolonisation, people cannot live well together. Those concepts are closely interlinked. As I have said, interculturality as a state policy seeks the articulation of differences and not only their recognition, to live together, to *Living Well*.

2.4 Towards *Living Well*.

One of the greatest principles of the 2009 Constitution is the principle of *Living Well*. *Living Well* is an ethico-political alternative, the ideological vision of an ideal society. It is the proposal of a new societal profile, a society that proposes a new social, economic and political order, the expansion and consolidation of citizenship (Article 8.I). If the concept of *Living Well* is new in legal terms, it is not a new concept. Its origin is found in the Quechua Andean culture (Makaran, 2013: 141). *Living Well* is living in harmony and in balance with the cycles of the *Pachamama*, the cosmos, History and in balance with all life forms (Huanacuni, 2010: 21-22). It is about recovering the philosophies of life of indigenous peoples in order to apply its to the society in general. Despite the clear evocation to the *Qhapaj* which was the main communication route from north to south at the time of the Inca empire (Estermann, 2011: 520), it is not a question of going back to the past, to recreate the Inca Empire, far from it. *Living Well* urges to take a new path, to recover the historical viability of the term to build a new paradigm, a path to the future, a common future (2009 Constitution-Article 8.II). The transformations of society especially during the 80/90s with the neoliberal era favoured the individual expression of society. People began to think not from the perspective of the common good but from the personal good. The colonialism of society eventually separated "the subject from its identity in a kind of collective historical alienation" (Carpio, 2009: 117). It is then a question of recovering this collective identity, this collective conception of the common good around collective values such as solidarity, complementarity and reciprocity (Artaraz/Calestani, 2015: 218). It is the articulation of all these concepts within a "new" society that will lead to *Living Well*. *Living Well* is the final goal or at least, the utopia of an accomplished society, escaping from the logic of liberalism (Huanacuni: 2010, Carpio: 2009 and Artaraz/Calestani: 2015).

Article 8 refers to individual notions at first glance, such as dignity, equilibrium and transparency to transpose them to the collective universe. A person cannot be fulfilled if he or she is not, individually and collectively speaking. For Fernando Huanacuni, aymara thinker, it is about finding the necessary balance between individuality and collectivity: "the individual does not disappear but emerges in its natural capacity within the community. It is a state of equilibrium" (2010: 19). From a political and legal point of view, equilibrium refuses the privileges of a ruling class over a dominated class. Transparency is literally the fact of being able to see through. It is to express in the light of the day its decisions and motivations like so, "there must be no dual intention in political life" (Bonete: 2014). The term of complementarity is also important to the concept of *Living Well*. Complementarity is the complementarity between humans and nature, between civil society and the State, between the indigenous and the non-indigenous and between an indigenous and another indigenous. According to the cosmic vision of indigenous peoples, there exists two forces, the cosmic and the telluric forces. They are two convergent forces that generate all forms of existence and the different forms of life (organic and non-organic life) through complementarity (Huanacuni, 2010: 71).

To return to the common future drawn by *Living Well*, the right balance must be found between the individual values of "modern" society and the collective values of the indigenous cosmivision. A return to a more ethical politics must be started as writes Bonete (2014):

Today we cannot design individual happiness (eudemonist ethics) without contemplating collective happiness; nor raise the moral problem of freedom (existentialist ethnic), without reference to political liberties; it is not possible to clarify the types of practical rationality (communicative ethics) without noticing the types of rationality that are handled in political decisions, nor is it possible to clarify what values are and their hierarchy (axiological ethics), without entering into the discussion of conflicts of values that arise in pluralistic democratic societies {...}

As well as interculturality, *Living Well* is a concept that is not measurable. It is a plural concept that proposes new horizons of conviviality. In order to get closer to *Living Well*, a simultaneous effort of society and the State is expected. Concretely, I will ask interviewees if mechanisms are put in place in order to get closer to this democratic ideal. Bolivian society cannot begin its path towards *Living Well* if there is no step taken towards genuine plurinationality (Carpio, 2009: 147). In my opinion, plurinationality is a condition of interculturality and interculturality is a condition of *Living Well*.

Medina alludes to the complexity of the subatomic world by evoking the relationship between electrons and photons: "Thus, to some extent, the whole of quantum reality is a whole network of superimposed internal relationships correlated. What David Bohm calls a type of "undivided integrity" (2010: 136). This recalls me the principle of the small bag inside the bigger bag in the Bolivian region of Tiwanaku, where I did my participant observation. *Living Well* is part of a totality. The concept of *Living Well* can be explained from various perspectives, take an historical and philosophical angle in indigenous' visions, more politico-economical in Western's views or a scientific twist like the one above. Nevertheless, it is important to outline that several authors warn us about the difference between *Living Well* and *Living Better*, the latter being a Western-inspired capitalist paradigm or a wrong translation of the Quechuan *Living Well* paradigm (Huanacuni, 2010: 22, Medina, 2010: 124, De Sousa Santos: 2012a: 15, Stefanoni, 2012: 13 and Artaraz/Calestani, 2015: 220).

For the moment, Bolivia has decided to trust the Constitutional Tribunal for questions relating to jurisdictional problems and human rights (Article 12 of the 2010 Law of the Constitutional Tribunal). I believe the Constitutional Tribunal plays a fundamental role and must maintain its neutrality as well as its plurinationality to best perform its decision-making role, plurinational conformation questioned by scholars (Negrón, 2012: 104, Exení, 2012: 716). It should be able to mediate between positive (written) law and indigenous (oral) law, two different sources of law that have found their legitimacy. Whatever the subsequent decisions taken by Bolivia, the country should not lock itself into an institutionalisation of indigenous justice at the risk of losing its essence (Peres: 2008b). Unlike Peres, Ságuës, he is in favour of a more permissive reading of the law on the part of the Constitutional Tribunal (2013: 382). He encourages communities to make constitutional compatibility consultations to the Constitutional Tribunal (2013: 391). The route for the construction of the new institutionality is still long and winding.

3 CONCEPTUAL FRAMEWORK AND RESEARCH QUESTION

This dissertation explores the question of the recognition of indigenous justice and legal pluralism (recognition and limitation at the time) and is particularly interested in the intercultural communication, coordination and cooperation between judicial authorities from the indigenous and ordinary jurisdictions. I have reviewed literature on the main concepts of indigenous justice: legal pluralism, interculturality and *Living Well* in their judicial dimension and their use in legal norms.

Some tensions were identified regarding the definition of indigenous justice and the possibilities for interculturality to be or not to be an effective tool to use in coordinating between jurisdictions. Throughout Bolivian history, plurality has been seen as an obstacle to development instead of a wealth. Interviewees will be asked to critically engage with issues such as, can interculturality as a state project be non-subordinating? Is the law the appropriate tool for its implementation or a brake? Can individual and collective rights coexist without tension? Is there today in Bolivia a political will to enforce this equality in the field of legal pluralism? Asking those questions will help me to start grasping the practical dilemmas of intercultural communication on the ground and see if the theoretical framework developed in the literature above is appropriate to walk towards a greater sense of social justice.

As stated in the abstract, this study aims to investigate through dialogue with legal and institutional stakeholders, the use or non use of these concepts in everyday life, from theory to praxis and to understand why instead of being seen for their capacity of enriching one another, the two jurisdictions are often presented as opposites and why it is when legal pluralism is finally recognised that indigenous justice is the most limited in its application. Following the thematic analysis of interviews, I will talk about some insights gleaned from a participant observation I realised in the indigenous community of Huancallo. I hope this research will raise issues not enough debated internationally. In my sense, the future holds great challenges for local justice systems in a global climate of strengthening of community identities. While academic attention has been paid especially to the philosophical and/or economical dimension of the concept of *Living Well*, the notion of genuine or subordinate interculturality, the daily practices of indigenous justice (sentences, traditions), little attention has been paid to the intercultural dialogue, the cooperation and coordination between the two jurisdictions and the challenges it implies. Keeping in mind that interculturality is not measurable, this dissertation seeks to think of interculturality not only as an abstract state project, as an utopian intellectual concept but as a daily practice. It does not seek firm answers but it is looking for a whole range of possibilities regarding the implementation of interculturality from the legal fields to the practical fields. Finally, my objective is to humbly suggest a few lines of thoughts to inspire future public policies for a more effective dialogue between jurisdictions and the consolidation of a plural justice.

The purpose of this dissertation is to answer the following research question:

To what extent does the relationship between indigenous justice and mainstream justice express genuine intercultural communication and a desire for a plurinational state in Bolivia?

4 RESEARCH DESIGN AND METHODOLOGY

4.1 Methodological Rationale

The main method I have used is interviewing mixed with some insights gained from a participant observation. This method is appropriate because it allows me to confront the different opinions of several actors which all have a link with indigenous justice. In-depth interviews as a qualitative research technique helped me answering my research question in the sense that it permits to grasp peoples' intimate perceptions and make sense of their life world (Gaskell, 2011: 2). One of the objective of interviewing coincides with the objective of my dissertation which is to develop "a fine-textured understanding of beliefs, attitudes, values and motivations in relation to the behaviours of people in particular social contexts" (Gaskell, 2011: 3). One-on-one semi-structured interviews has many other qualities: 1) it is recommended to discuss sensitive topics (Gaskell, 2011 : 12), 2) it allows me to ask follow up questions while remaining flexible (Warren, 2002: 87) and, 3) interviewing key stakeholders provides insights into "the inner workings of the political process" (Lilleker, 2003 : 207) and therefore, to get closer to my subject.

Even though the idea of doing focus groups came to mind I quickly dismissed it because of its practical infeasibility. I was not interested in placing people with different views in the same group in order to gain knowledge about group opinions and behaviours (Gaskell, 2011: 9) but in having them discussing about issues of common interest in order to find together solutions. I probably am a skeptical idealist. Consequently, I have considered using mixed methods. From the beginning, I wanted to combine interviewing and ethnography so that "the data from each can be used to illuminate the other" (Hammersley/Atkinson, 2007: 102). It is a promise that I partially fulfilled because I could participate to one indigenous trial doing participant observation in the community of Huancallo. Ethnography always fascinated me because it means going on the field and study people's actions in everyday contexts (Hammersley/Atkinson, 2007: 3). I admit to Clifford's view of ethnography as "true fictions" where the researcher represents, invents and constructs only "partial truth" (Clifford, 2010: 6-7). Doing ethnography requires high self-consciousness and reflexivity. One

must acknowledge the fact that "what we call our data are really our own constructions of other constructions" (Geertz, 1975: 6).

Potential limitations of interviewing and participant observation

Each method comes with its limits. Interviewing and participant observation share common limitations. First, there is the danger of assuming knowing everything, noting everything and over-interpreting the data. For Geertz, there is a difficulty to situate power in the discourse, he writes that "In the study of culture the signifiers are not symptoms or clusters of symptoms, but symbolic acts or clusters of symbolic acts, and the aim is no therapy but the analysis of social discourse" (1975: 26). No-one can escape from power in a society where power circulates (Smith, 2006: 645). Secondly, when gate keepers are necessary to gain access to certain spheres of society, this requires a certain amount of time and efforts (Hammersley/Atkinson, 2007: 4). Thirdly, it is not easy to find the right balance between too directive and non-directive questions as leading interviews can restrain the data obtained but asking directive questions can be useful to validate hypotheses (*Ibid*: 101). Fourth, when discussing sensitive issues, there is always the risk of getting off-tape comments not usable for further analysis (Lilleker, 2003: 213). Indeed, three participants asked me not to record part of their interview and I respected their privacy. Finally, both methods do not escape from the usual criticism of the neutrality and objectivity of the researcher doing qualitative research (Hammersley/Atkinson, 2007: 14). In spite of these limitations, I believe interviewing and the small insights gained through my participant observation, remain the best methods to discuss people's perceptions following a thematical framework that allows me answering my research question.

5 RESEARCH DESIGN AND PROCEDURES

5.1 Participants selection

One of the criteria to recruit participants was the distribution of opinions and experiences among the respondents (Gaskell, 2011: 5). I decided to interview people from different cultural and social backgrounds: lawyers with different specialisations, a judge from the ordinary system, ministry's employees, judicial community authorities, scholars and indigenous leaders of national union organisation.

5.1.1 Challenges

As no previous dissertations or books have been written specifically on the topic of the intercultural communication, coordination and cooperation between judicial authorities in Bolivia, it has been hard to collect materials. It was time consuming. I had no contacts when I arrived in Bolivia so I decided to knock on the door of the ministries, the Constitutional Tribunal, lawyers' offices and introduce myself. Regarding my participant observation, I had the chance to meet a man in the waiting room of the Syndical Confederation of Rural Workers (CSUTCB) of Bolivia whose daughter was a lawyer specialised in indigenous justice. He put us in contact and she was kind enough to serve me of gate keeper and introduce me to the rural community of Huancallo.

5.1.2 Respondent profiles

It is important to introduce each one of the interviewees in order to understand the differences of opinion encountered when analysing the findings (*See Appendix A for Respondent profiles*).

5.2 Ethical considerations

Before processing to the interview, each interviewee was given an information letter and a consent form to sign. The documents explained briefly my project and let them the choice in terms of privacy; whether they would like or not to see their name appear in the dissertation, if they allow the interview to be audio recorded, if they give their permission for the use of the informations for further research, etc. I respected the five elements brought forward by Hammersley and Atkinson regarding the ethical issues which are informed consent, privacy, harm, exploitation, and consequences for future research (2007: 210). Furthermore, concerning my own positioning as a researcher, I am aware that the interpretation of the data collected is only my reading and correspond to only a view among other understandings of the world. Since I was a child, I took at heart to defend my companions from injustices. Acknowledging my taste for social justice, I nevertheless try to be self-reflexive and stay as neutral as it is im/possible to be when working on this dissertation. I agree with Hamnett's view on the myth of methodological neutrality where there is no work that "can never be entirely value-free" (1984: 46). I told myself that we were all indigenous in the sense that our mode of thoughts is influenced by the place we are coming from and the experiences we lived. It is then with an open-mind towards every human fellows I walked into this project.

5.3 Topic guide

When drafting my topic guide I chose the wording of questions and the order in which they appeared with meticulous attention, from open-ended to more specific questions (*See Appendix B for Topic Guide*). My first question is general enough to allow the interviewee to feel confident to answer and my last one is personal and relates to the very identity of the person. My topic guide contains sixteen questions and the interviews format is semi-structured.

5.4 Conducting the interviews

All interviews were conducted face-to-face in Bolivia over a period of one month in February 2018. Initially, I aimed to interview ten people but I succeeded in interviewing thirteen. Interviews ranged between 60 and 69 minutes and were audio-taped. They took place in different settings, formal and informal such as cafés, in the middle of the fields and in people's homes. Informal locations favorises the conversation by creating "a particular social context" (Warren, 2002: 91).

5.5 Coding and analysing the data

All interviews were carefully and fully transcribed including hesitations and repetitions to guarantee more fidelity to the original discourse. I have not used a computer programme because of "the possibility that the computer could alienate the researcher from their data" (Gaskell, 2011: 14). Following an inductive interpretation of the data, I used white large boards to draw some "web-like illustrations that summarize the main themes constituting a piece of text" (Attride, 2001: 385). Thematic analysis highlighted themes and sub-themes useful for my theoretical orientation. When I did my participant observation, I took notes all along the two hours of the trial making comments on the tone of voice employed in the margins.

6 RESULTS AND INTERPRETATION

6.1 Indigenous justice: definitions.

Showing consistency with the literature, there is a general agreement among all interviewees on the fact that procedures and institutions of indigenous justice cannot be conceptually homogenised,

because there are as many indigenous justice models as communities. Many of the cultural and legal practices of indigenous peoples come from their own civilisation matrix, others are the result of impositions and cultural exchanges. Today they are porous justices, susceptible to influences and loans from other justice practices as a result of their processes of resistance, approximation or frank relationship with state forms of power management:

There are communities that maintain their norms, others that have been acculturated. There are peasant communities that refer to ordinary justice for all cases. They have lost their culture but they are still indigenous (7).

You cannot say what the limit of indigenous justice is because it cannot be standardised. You cannot separate things, black and white. There are different nuances linked to culture, to self-determination, to the conservation of norms and the recreation of norms, to reinvention as well. It is a long process, to recreate, to revalue. We are internally colonised (1).

Interviewees were asked what was their opinion about the state of justice in its actuality, responses centred upon two thematics: 1) A denunciation of an instrumentalisation of the indigenous identity (4 interviewees) and, 2) A severe critique of the colonial mentality of ordinary justice operators (5 interviewees):

We must consolidate our justice they have said but, we cannot deceive each other, just putting a poncho (Peruvian clothe) on the municipality and say this is an indigenous territory. No, we must restructure the institutionality then, we must recreate (4).

The indigenous did not know how to respond to what shaped the indigenous character. There is a somewhat perverse instrumentalisation of indigenous identity. I have asked one of our government officials what was the basic criteria that shaped the character of indigenous. He referred to racial origin. I personally do not believe that the reference to race is a consistent criterion in a historically mixed country (9).

As you know things do not change with regulations, on the subject of social processes there is also what people think, how they have lived, their customs, their practices then, ordinary justice people, prosecutors, lawyers, do not conceive in their mind that this has already changed normatively. They practice the old X3 model, the old form (1).

The lawyers do not agree with the recognition of the indigenous jurisdiction because the formations they have received in the universities unfortunately still respond to a monocultural vision and do not respond to the context of plurinationality. That is still due to the colonial mentality that there is an ordinary system that is superior. It also corresponds to racism, to the discrimination that still exists with indigenous people (12).

The way of imparting justice before the colonial invasion was participatory and communal, where the social collective exercises the power of powers and the authorities were executors of the collective's decisions. The colony and the republic involved imposing their living system on the vast majority of cultures that coexisted within the territory of Bolivia; which ultimately could have ended the plurality of identities. When they are embedded for years, it is difficult to change dominant ideologies. Interviewees had to give their opinion about the recognition and respect of the practices of indigenous justice. Are they accepted by society in general? Nine interviewees considered they were not:

You have to handle the right concepts and what they do, the media, is to manipulate concepts and confuse the population. Then, they demonise it and all the press was saying "this is community justice, they are savages, tata ta ta". No authority can dictate the death penalty in Bolivia. Define, the concept we have to define (1).

There are many who believe that establishing hierarchical equality between the two is a setback. They say "we cannot go back to the justice that handled the indigenous communities because it is archaic." Lawyers and others see it as if it were a matter of barbarism (12).

Today, it seems that ordinary justice continues to be based on positive and colonial law, in other words, it remains anchored in the logic of the old Nation-State.

6.2 The lack of political will to enforce legal pluralism.

Bolivian legal pluralism is not traditional pluralism. Legal pluralism is not something new, it has always existed in different historical periods of humanity. The Constitution proposes an egalitarian and transformative legal pluralism: it provides that ordinary justice and indigenous justice are equal in hierarchy. However, for some interviewees the problem arises when we are presented with legal pluralism based on equal relations between unequals; that is, when there is, on the one hand, an ordinary monistic legal system that has too much advantage in terms of norm, economic resources and infrastructure that, although it may be illegitimate, enjoy legality and regulatory force guaranteed from the State and, on the other, we are faced with the diversity of legal systems of indigenous peoples, which although enjoy legitimacy but do not have the same normative force as the previous one. In line with scholars, eight interviewees appear to conceive the Law on Jurisdictional Domain as a strong limitation to the establishment of good cooperation practices:

This is a work of some people who were against the rights of indigenous peoples but they are with the current government. So, sometimes the discourse is well advanced but look at how this regulation is limiting. This should not happen (4).

This law is very, very, how could I tell you this, very vague, you have to implement a lot. Many gaps. It says nothing either. It is not suitable to apply. Very poor (5).

This law has an original sin. It has not respected the prior consultation with indigenous peoples. A draft law was socialised which was very interesting because there was talk of an integral competence and said co-independence of the subjects. It was the indigenous peoples who, according to their own rules, were going to decide whether they would judge the case or not. Unfortunately, in the legislative debate, the law entered with one face but came out with another. This law is a padlock for the exercise of indigenous jurisdiction (13).

Moreover, there is a diverse range of opinions and each one is based on people's social and ideological outlooks and positions. The variation of opinions is a constant throughout the analysis of the interviews. Three interviewees implied that the Law on Jurisdictional Domain is not respected by indigenous peoples seeing the problem from another angle:

In the communities, hierarchical equality is not applied. No, the law does not apply. They have had rules for years that is "ama sua, ama llulla y ama quella" (don't be a thief, don't be a liar and don't be lazy). Then, no. Maybe in some communities, some elements of the law are used (3).

We are now subject to a still old generation. They do not review the laws, they say this is our customs, so we have to sanction like this. This is the limitation a bit. As time goes, people with more knowledge will be the authorities. They will be able to read (6).

One interviewee responded in the positive on the fact that the Law dealt with errors made in the Constitution and restored limitations to the indigenous jurisdiction but in the negative on the fact that the Law established a formal hierarchical equality:

The constitutional treatment that has been given to indigenous justice does not correspond to the reality nor is it compatible with the conceptual tools used to understand the formal legal system. There has been a constitutional over-dimensioning and an extrapoliation of community justice. When they realised that the constitutional formulation was too open, the Law on Jurisdictional Domain emerged (9).

In the Constitution, plurality and legal pluralism are the succinct expression of the diversity of Bolivian reality, in a sense of "equalisation" and "dignification" of History, justice, politics and culture, and not only as the mere coexistence of diversity in unequal conditions. Consequently, egalitarian legal pluralism is seen as the first step and is the fundamental tool to reach decolonisation and build a new plural justice. Interviewees generally responded that legal pluralism is not coexistence but rather equal cohabitation of several legal systems that base its actions on a new decolonised political institutionality. Some respondents said that in the current political situation, the legal norms put in place only a coexistence as if the legal systems were wagoons without any relationship or connection between them. The non-subordinate and horizontal coexistence of systems is not the only element of this pluralism, which remains incomplete, but it is conceived from the decolonisation of all forms of monism, cultural, legal and political homogeneity; which means to understand the "pluri" beyond the sum of various forms (like closed structures that coexist), but rather as the opening that allows the positivist formal legal system to transcend itself. Thus, pluralising and decolonising the justice system

implies the destructuring of the colonial structures and the change of mentalities of the justice operators. To achieve this, the ideas, myths and ideologies of colonial justice must be changed.

The indigenous authorities, we do not have the mechanisms or coercive forces to enforce so we leave it here. So, that's where our people, where I get a little low morale. To coordinate you have to be equals. We are living with inequality still. Among unequal how are we going to cooperate? There will always be inferiority and superiority (10).

The Constitution has been in force for many years and equality of hierarchy has not materialised. A new decolonising political line from the State has not been propitiated of how hierarchical equality is going to be materialised. I would say that the two jurisdictions are even more distanced. There is still no willingness of the ordinary authorities to coordinate and cooperate because inferiority is still visible (4).

Since there is no interculturality in strictly conceptual terms of equality, there is undoubtedly a supra-culturality. We are still living under the thought of positivism that is materialised in colonial laws. Indigenous justice still exists despite the passing of time but it has not achieved this degree of equality in conditions (11).

Contrasting with the answers above, one interviewee, a provincial judge, affirmed that the hierarchical equality was established in his jurisdiction and another interviewee criticised the very fact that hierarchical equality is discussed and normatively recognised:

Look, where I am performing my duties as a provincial judge, we see that indigenous jurisdiction is recognised and accepted. I believe that it is established but this is debatable (2).

I believe that in a state of rule of law there is no legal pluralism as it has been tried to establish here because first, there is only one legal system, the formal, ordinary, state system, the others are particular legal systems (9).

What is needed is to train the ordinary authorities in matters of indigenous justice so that they can better understand the cultural processes (5 interviewees), train community authorities in matters of state law (3) and, to encourage exchanges between pluricultural authorities within state institutions (particularly between magistrates in the Constitutional Tribunal). Vice-ministers of indigenous justice and ordinary justice must go to the field and promote exchanges and discussions on the cultural processes of this justice to stop its marginalisation and fight against prejudices. The goal is ultimately to avoid an ethnocentric and monocultural interpretation of indigenous justice and to ensure respect for cultural diversity, practices of the Other who today ceased to be an Other to become a citizen in its own right, a citizen free to live according to his traditional practices, his beliefs and his own cosmovision for the *Living Well*.

I have seen that there is not. In the sector, there is no training for indigenous authorities. There is no training (2).

There is a lack of cooperation because I have been giving training courses for some time. I have seen that they almost do not know about the Law on Jurisdictional Demarcation, what rule, what law, the authorities themselves do not know (3).

The conformation of the Constitutional Tribunal is a joke. We continue with monocultural and colonial institutions where there is a folkloric participation of the indigenous, only one of nine magistrates is indigenous. There are 4 audience rooms that do not communicate with each other. There is not really a constitution of plurinationality (13).

One answer denoted among the others, that of an indigenous authority which sees in the possible training of community authorities in matters of ordinary justice, a risk of denaturalising indigenous justice. This relates to the view that the most autonomy the indigenous justice keeps the most "original" it would stay:

If the nations enter in a real legal knowledge field, and this seen from a pedagogical perspective, we would already be entering the space of ordinary justice (7).

To conclude, findings suggest a connection between most of the respondents insofar as they believe that today the genuine cohabitation in equal hierarchy must not only be a discursive statement, but be effective and real. Consequently, the main challenge for the construction of egalitarian legal pluralism is to build, develop, consolidate, materialise the social pact that forces the creation of new power relations, opening spaces for greater political participation. For the construction of a plural justice, it is necessary to generate inter-complementarity, inter-reciprocity, interculturality between jurisdictions in the search of *Living Well*.

6.3 Interculturality as a state mechanism of subordination.

Interculturality is based on very complex relationships and is not measurable. Nevertheless, despite the recognition of legal pluralism and the instauration of the principle of intercultural communication in Bolivia, today, ten interviewees do not acknowledge that there is a genuine interculturality but think there is only a supra-interculturality because positive law remains above the indigenous law. They would like to see more opportunities for intercultural dialogue to be put in place. For seven interviewees, interculturality cannot only be limited to a dialogue between cultures, but there must be degrees. It has to start with a recognition and respect of the principles of the Andean cosmovision. Thus, there is not yet the conditions to foster intercultural dialogue:

Now to build a real interculturality you have to start creating new paradigms of seeing the law. We must begin to make a logical construction differentiated from the rationality of Western thought with the rationality of Andean thought. As long as that is not done, there is hardly going to be a true intercultural relationship and dialogue between the two justice systems (11).

For there to be an intercultural dialogue that would be in favour of Bolivian justice, one must know each other. Without that, how are you going to talk? There will be no dialogue if we do not know each other and, that has to go through courses, workshops, events, interdisciplinary and with both, not separately until we find processes of reunion, of re-engaging (4).

Building a dialogue between equals is very difficult when interculturality is asymmetric and follows monistic thinking. Interculturality is not a positive medium in itself, but as we see it, it can be used as an instrument of domination (10).

Maybe I am a dreamer but I think they can complement each other against many essentialist people who think otherwise. There is what is called the diatopic hermeneutics, which is the possibility of dialogue but which is obviously based on balance, equality in relationships. Now the interculturality is basic here and functional and implies "I tolerate you, I respect you and we stop there" but there are two types of interculturality, the other is critical and involves modifying the existing power relations between groups (13).

Confusion surrounding the starting point of the dialogue exists among interviewees. While some would like efforts to be made by the State because it is the State that has the financial means to put in place such intercultural workshops, to organise experience exchanges events, others would like to see indigenous authorities get closer to ordinary justice operators so that interculturality would not be imposed from a top-down approach but from bottom to top. One interviewee simply does not believe in the possibility of intercultural dialogue between jurisdictions and sustains a rather dichotomous view on justices:

Imagine, it would be nice that from the state it would be possible that we build our own institutionality, let's say a Plurinational Council of Indigenous Justice where we are the 50 indigenous peoples. This would be ideal but the government does not want that yet. (5).

A person who has already lived in the city is a person who has an illegitimate advantage over the handling of legal instruments, with respect to a person who remains, to use a word that may also seem questionable, in the innocence of peasant communities. So, I don't see, I don't see much possibility of dialogue and coordination between two worlds and two types of inhabitants that are so different (9).

The interviews show two forms of articulation between the indigenous justice and the ordinary justice that seem very useful in conceptual terms for the understanding of the relationships between the indigenous communities and the State throughout a long colonial and republican history. The

first form and perhaps the one that stands out the most in the media, represented above, is that of the image of two opposite and distinct systems that have been practiced simultaneously. The second form of articulation, the most interesting in my view, is that of the vision that perceives indigenous justice as a unique logical sequence. Both systems complement each other and are governed by two types of rationality, but under the same logic. It would be fruitful to adopt a symbiotic and synergistic view on justice, where both systems denote a mutually beneficial relationship, than considering them as separate entities. What both systems look for is solutions and maintain the harmony of the community, seen as a local or national space:

Ordinary justice also has good things. For example, it forces to comply, between a father and his children, there must be familiar assistance. That's right, one has to learn from the other and not be seen as opposed. (5).

We all learn from everything, no. Now, in ordinary justice, we speak of restorative justice that has many elements of reparation, coming from the indigenous justice. The return to harmony. What is that of the penal? The penal does not resolve anything, no, the damage is not repaired. The ordinary system could learn that but the indigenous nothing from the ordinary. The indigenous authority you call them by mobile phone or send a whatsapp the message. You see the authority walking with his horse. Modernity forces you to take elements but not to assume them as your own (1).

Although the Constitution establishes the hierarchical equality between the ordinary and the indigenous jurisdictions, it is fair to recognise that the latter is still debated under conditions of inequality. However, this justice, based on different logics, not positivised, is fully valid and may, without doubt, contribute to the transformation of ordinary justice. Not in the idea that it will replace it but that it will be able to imbue it with its principles, with its values, with its community approach, to preserve the harmony of the community, in an unprecedented process of decolonisation which breaks with the current monistic thoughts in the legal and cultural fields. This echoes the view of Molina, according to which, one cannot put in place a plurinational state if one does not have sufficient knowledge about other's practices, especially on the part of bureaucrats (2019: 94). And, at the same time, indigenous justice will also learn from ordinary justice in a dynamic process of

constant reciprocal enrichment of two jurisdictions that are part of the same judicial system. Building complementarity is the challenge:

What I like about indigenous justice is that there are some people, not all of them, who are very rational in their way of thinking and what I like is that they are also faster. A conflict can last one day, one afternoon, one morning, we are very bureaucratic. That, we could learn from them and what they could also learn from us is to set limits on their actions, ask them to respect at least the right to life, defense and dignity of people (2).

The reconciliation justice has been established recently in Bolivia. It was influenced by the indigenous justice it seems to me. I believe that the ordinary justice would learn a lot from the indigenous justice and also the opposite. If we could get to give a course at a national level or a dialogue workshop about how the communities handle things. It would be a good thing for all, for the community authorities also (3).

The reparation of the damage cannot be done from the penal law but in civil life. The ordinary justice leaves the victim aside. It has not solved the problem of injustice. Perhaps it is a great opportunity to recognise the indigenous jurisdiction so that this value can somehow be assumed by ordinary justice so that there is a change of vision, so that justice is sought for and not only condemnation (12).

Better than cooperation and coordination, the two justice systems need to find out how and what mechanisms establish to build complementarity between systems (Exeni, 2011: 699).

6.4 Formal and informal interculturality.

The Law on Jurisdictional Domain which was supposed to be a law of coordination and cooperation is in fact only a law of limitation. But after all, can cooperation and coordination between the two jurisdictions be established by law? The law does not guarantee the rights it puts in place, it is the citizens who, by respecting and applying the law on a daily basis, make these rights alive (Arranda, 2011: 128). I believe it can only be the result of everyone's will. There appears to exist a disagreement among one half and the other half of the interviewees on whether interculturality must be established

and forced upon the citizens through a law or if it must come from informal processes of communication occurring daily. For them, it is very important to respect the autonomy of the systems:

These are things that you clearly have to solve but if there would be a regulation to coordinate and cooperate or respect each other between jurisdictions it would be different. Why do I say this? Because we want to submit, that if there were a law that forces you well, yes, but no, by the will itself among the jurisdictional authorities there will be no such thing (4).

Unfortunately, I believe that the issue of coordination and cooperation, of dialogue between jurisdictions should start from the ordinary jurisdiction, because they are the ones with resources. It is difficult to ask indigenous authorities to come, to get together because indigenous jurisdiction is scattered and there is no head identified. The Council of the Judiciary should be working on a cooperation and coordination protocol (13).

We are doubtful to accept public policies because they impose us from above and we like more from the bottom-up. Of course there are foreign policies too but they don't know how our organisations are. It is not that we don't accept but we want to do it. Cooperation I don't think it will be voluntary. I think that laws are sometimes quite mandatory. We are not simply complying to comply. We want to organise our justice which affects other interests of our society (8).

Coordination and cooperation mechanisms have to be developed outside of a law because in Bolivia it is not that there is only one culture of indigenous peoples. Imagine, considering this great diversity of cultures, establishing coordination mechanisms in written norms would mean assimilation. It would be to subject them to a procedure that may not be so consistent with their legal systems so the right thing for each people is to see what is the best way to cooperate. This legal interculturality between jurisdictions is necessary because they cannot stay isolated from each other (12).

Interculturality for dominant intellectual, political, social sectors and lawyers seems to be a rhetoric *à la mode*, yet I am convinced that interculturality must be seen as a practice. For indigenous peoples,

it is a living and daily practice. For the plural justice system to be built, it is an imperative constitutional and normative necessity. Examples of cooperation and coordination have always existed in Bolivia. The initiatives that have taken place are individual and particular, because there is no such thing as a protocol of action between jurisdictions. The public ministry through its prosecutors has to do a joint investigation with the indigenous justice when they are in indigenous territory and no longer go by their side. Perhaps, it would not start with supra-national mechanisms but at the local levels. In stark contrast with others, seven interviewees mentioned efforts that are made on a daily basis towards improving the intercultural communication between jurisdictions, thus moving away from the almost unreal concept of interculturality as it has been portrayed in most of the literature:

I had a case that there was one of the community that was used to come to be judged in the ordinary jurisdiction, but what we have asked for was that the indigenous jurisdiction took him to their assembly, that is the bigger community. We ask for collaboration in some cases and they also come to us so we help them, more than anything they come for advice of how they can solve the case, "is it good if we solve it this way" (2).

There is a coordination between the indigenous authorities, but there is still no coordination with the ordinary authority. We are trying. I wanted to coordinate with the ordinary jurisdiction that corresponds to Tiwanaku in this case Quaqui, so I consulted with the judge, and they also have some fear of being able to get into a community, there is also distrust from both parties (6).

Among national leaders, we have meetings, we coordinate but exchange of experiences, I have seen very little. So, I think that it is very important, for the economic factor as well (7).

Two interviewees mentioned that there is a problem of trust between the authorities of both jurisdictions affecting negatively the possibility for dialogue, aspect that required my attention because I also witnessed mistrust towards the ordinary justice during my participant observation. Indeed, in addition to interviews, I also assisted to a trial in the rural indigenous community of Huancallo. The trial was about a conflict between the two neighbouring communities of Huancallo and Achaca. Huancallo was given a title of property from the government to follow their activities as

an association of dairy producers in the community of Achaca. Achaca did not recognise the association and wanted to recover the entire land. Both communities decided from the beginning it would be an internal conciliation. During the trial that lasted for two hours, at several occasions, participants claimed that they would like to solve the issue "*without the intervention of a judge X6*". Huancallo offered to give them a share and also compensate them financially from previous years. Consecutively, the judicial authority of Huancallo told them "*This is my word, if you do not want to understand us then we will have to leave it there or possibly there will be a judge that will intervene*". This caused Achaca to backtrack: "*This is my word, this conflict may die. We solve here. We don't want to fight. We want to leave peacefully. We want to live well. It is just that you know that we cannot sell community land to another community because it is ancestral territory. It will not be possible to solve the issue right now, brothers and sisters*". The day I assisted the trial, no resolution were taken. I learned that after ten months and many meetings, Huancallo finally decided to share half of the land with Achaca, coming back to "*harmonious relationship*".

The key points to remember from this succinct participant observation are:

- Everyone was free to participate in the assembly and give their opinion. I counted seven men and seven women in the room. Each person addressing the assembly started his sentence by saying "*This is my word*" and ending with "*brothers and sisters*" showing respect.
- It shows a profound mistrust from indigenous communities towards ordinary justice.
- I could observe during the trial that, in a context of interculturality, the community of Huancallo had a draft proposal written by a lawyer. Writing determinations has not been historically part of indigenous peoples' practices. Nevertheless, this somehow facilitates the relationship of cooperation and coordination between communities but also between a community and ordinary justice, if the latter comes to retake the case.
- Similarly, in a framework of complementarity and interculturality, a written determination would make it much easier to make it clear that a case has already been judged so that it is not known by another jurisdiction. It is a procedure that could be transmitted to the indigenous jurisdiction so that they keep a track record and justices could better complement each other.

Everything indicated here, makes me see the importance of carrying out further studies that show the genuine intercultural relationships that occur in everyday life. Learning on the field, would allow

eventual future reforms that do not to focus on the treatment of interculturality from a theoretical conception difficult to achieve in practice. This demonstrates that indigenous communities are practical in imparting justice, partly because of their oral justice system. If there was more dialogue between the two jurisdictions, it would allow greater objectivity in coordinating with the indigenous jurisdiction, since the knowledge depends largely on respecting their decisions and not usurping their powers. Also, it was found that, in some regions of the country, judicial operators have good relations with the authorities of indigenous communities, such as the case of the provincial judge of Quaqui, at least with the community of Huancallo. However, I am convinced that the recognition of legal pluralism is not sufficient nor is it to count on mere informal practice of interculturality to achieve effective dialogue and get closer to *Living Well*.

6.5 *Living Well* vs Living Better.

The ultimate goal of setting up an intercultural dialogue between jurisdictions and an egalitarian legal pluralism is to "*Living Well*". While it appears that for most interviewees *Living Well* is inextricably linked to the concept of self-determination (7 interviewees), others reject the premise that *Living Well* is a concept still original or untouched (4 interviewees). The concept would no longer be an idealised concept but a practical and capitalist one. The issue becomes more complex when this *Living Well*, that would be non-developmental, non-consumerist and even non- modern/Western, is opposed to living better, which would imply capitalism. In the interviewing process surprising responses from the interviewees emerged. One participant indicated that *Living Well* is an occidental state of well-being with material comfort. Two others said that it is an anti-capitalist concept of recovering past way of living. Another said that it is simply to be happy. From another perspective, for one interviewee it is a mixt of all the answered given above. He is also the only interviewee that talked about the relationship with nature, although academics emphasise that issue:

For me, *Living Well* is closely linked to the issue of self-determination of indigenous peoples. It is to be able to continue with our uses and customs. It is to be able to apply our justice, that we return to the harmony of the community. Yes, harmony is what *Living Well* seeks. The harmony between man and the *pachamama/MotherEarth* but also the harmony between one justice and the other, right? Well, for me, it is also to have a house, a beautiful wife and beautiful children. There in the cities, *Living Well* is only capitalist. It is having the most beautiful house. Me, I just want the most beautiful woman (laughs) (4).

Returning to one of the questions asked by the scholars, can it be said that indigenous justice violates human rights as it has often been reproached for? Yes, sometimes the traditions of indigenous justice may flout the universal laws of human rights as it is the case with the practice of *chicote*/whipping. But if we stop looking at the Declaration of Human Rights from a Western point of view, maybe we will better understand the internal logic of this justice that is constantly reinventing itself and adapting its practices. Expulsion or *chicote* may very well be misunderstood, but if one takes a local and not universal view, incarceration could be seen as an even stronger practice. Imprisonment solves nothing for the community. Indigenous justice has a double dimension in terms of the scope of human rights. On the one hand, its application is limited to the protection of fundamental rights, and at the same time, the indigenous justice is based on the framework of self-determination as a right, self-determination linked to the concept of *Living Well*:

There are internal robberies in communities. The justice penalises with a whip or the order to return the stolen item. Then, they sit down and say that they will never do it again. There, they learn to correct the Bolivian citizen because if he enters the jail and goes out in the streets harming our society and himself, it is not respecting his right (7).

*We practice our way of handling justice because it has always been oriented towards the principle of *Living Well*. We don't see it as a sanction, as an absolute punishment. We don't understand it as disciplinary (8).*

The logic of human rights in the Western positivist conception is different from the logic of human rights of indigenous peoples. It would be necessary to ask what is a human right for the communities. They are two different legitimate visions (11).

On a final note, Beuchot proposes to follow his proposal of an analogical hermeneutics, that is an interpretative tool to face differences of opinion. To apply an analogical hermeneutics to the human rights and to the intercultural dialogue is to understand that other cultures have a different understanding of the fundamental rights and therefore, do not violate them willingly (2005: 18). It is a proposal that refuses that a single interpretation is valid. There are other truths. It is a dual process that rejects polarised views, *univocismo*/univocal and *equivocismo*/equivocal and is open to learning and criticism from/of others (2005: 58). Accepting Beuchot's assertion, Walsh, on the other hand, refers

to going beyond the "opposition paradigm" (2010: 18). The community thus guarantees the well-being of its living space because in order to live well together, one must seek the common good by displacing the emphasis from individual consciousness to social consciousness, for the *Living Well* (Karp, 2006: 224). In this way, the challenges for achieving effective coordination between the two jurisdictions, can be synthesised in the need to obligatorily implement the organisation of the necessary means that allow an intercultural approach, and therefore, a dialogic exercise among its actors through which the construction of consensus is achieved. The challenges that determine this coordination lie in the need for articulation of two different cultures in terms of equality, articulation that is only possible through the exercise of exchange of ideas, perceptions and different conceptions of justice and life, and whose need has already been claimed by the different actors in the interviews. In my view, and against the opinion of several interviewees and scholars, the challenge is to implement a public policy that, as an intercultural tool, facilitates clear terms of understanding between indigenous communities and ordinary justice. I do not think that the power of social inclusion of the law should be left aside, especially when a law is well made, respecting a preliminary detailed fieldwork, and that to let interculturality rest solely on the goodwill of one and the other will not allow it to be put in place. In the end, it does not matter whether there are two justices and one rationality or two rationalities and one system of justice, in the sense that they both seek justice for the common good, a common good that would not be enclosed in any sphere with impenetrable walls but a common good that could take the form of flesh and bone, a *Living Well* that remains to be built.

7 CONCLUSION

The analysis carried out has attempted to investigate to what extent does the relationship between indigenous justice and mainstream justice express genuine intercultural communication and a desire for a plurinational state in Bolivia? Findings reveal that today in Bolivia, there is no genuine interculturality but only a supra-culturality because positive law remains above and subordinates the indigenous law. Also, interculturality cannot only be limited to a dialogue between judicial systems but there must be degrees through a progressive recognition and respect for the principles of the Andean worldviews. Still, there is no national acceptance of the indigenous principles. Consequently, the problem of the articulation of indigenous justice with the ordinary system is only apparently solved. The destruction of the old state has not been realised, but subsists and is strengthened today.

So the plural and decolonised justice could not materialise. The replacement of the old judicial institutions by new ones did not become a reality. From readjustments, ruptures and breaks that exceed the logic of monistic, colonial and Western law, it is proposed to "redirect" and re-create the changes and transformations, recovering and implementing the will of the constituent enshrined in the supreme norm. The foundations for the change of justice are established in the Constitution itself, in the principles on which the State is based as: plurality, legal pluralism, interculturality and *Living Well*.

Current regulations focus on the treatment of interculturality from a forced theoretical construct, in a certain way almost unrealistic, and without proposing effective application mechanisms. Interculturality is still not conceived in terms of the relationships that peoples build in their daily interactions, nor the obstacles they are faced with. By making the concept of *Living Well* the evaluative standard for assessing justice, indigenous communities are linking questions of social justice to questions of the good life. Making the world more just is about changing the dominant conception of a good society and replacing it with the *Living Well* vision. Such society, in order to be genuinely plurinational and intercultural, must accept the assertion that the ordinary justice and the indigenous justice are not parallel systems but are part of the same one. They both seek a fairer world. Within the framework of the principle of complementarity in article 4 of the Law on Jurisdictional Domain, they must complement each other by sharing their principles and values. Also, for there to be interculturality there must be a search for a complementary system.

Summarising the key insights of the dissertation and the most important points addressed in the interviews, the following conclusions can be made:

1- There is a need for an horizontal dialogue between both justices: dialogue cannot be reach in unequal conditions.

2- The necessity to accept the existence of other truths: egalitarian pluralism and legal interculturality forcs us to think about the existence of not one reality and truth, but the possibility of many realities and truths, because in intercultural dialogue processes, the dialoguing subjects are equal and they can contribute to diffuse other truths. Intercultural dialogue has the challenge of building relationships that establish horizontal communication that results in coordination and cooperation processes among its operators that enhance the possibility for mutual learning and sharing knowledge.

3- The need to recreate the law: the "plurinational" state in its different instances must face the challenge of creating processes of recreation, recovery, reconstitution, decolonisation, revaluation and articulation of the diversity and plurality of practices of indigenous peoples.

4- The function of social integration of the law has been frustrated. There is a lack of a common language that allows to negotiate shared solutions. Public policies would be welcome to decolonise justice: restructure the Constitutional Tribunal, introduce training of all authorities and plural education in the universities with a transversalisation of interculturality, introduce a specialisation in indigenous justice required to be a legal practitioner, allocate more resources to indigenous justice so that they can build their own institutionality, etc.

To date, the laws have been carried out outside of the social and cultural reality of indigenous peoples and it is important, in future research, to study and summarise the set of experiences, practices, values and principles that come from the indigenous cosmovisions in order to know the forms of intercultural relationships that build populations in their daily lives. Providing informations to the judicial reform and to see interculturality as a social construction is urgent. The future holds many challenges for intercultural communication in many countries and different contexts, either legal, social, political, cultural or even military.

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8.2 LEGAL TEXTS:

- . Bolivian Constitution of 2009.
- . Law on Jurisdictional Domain of 2010.
- . Law of the Constitutional Tribunal of 2010.
- . UN Declaration on the Rights of Indigenous Peoples of 2007.

9 APPENDICES

9.1 Appendix A: Respondent profiles.

The following information was provided by the interviewees:

- 1) **Luis Salvatierra.** Legal advisor at the Ombudman's Office, in charge of representing the interests of indigenous people and the Afro-Bolivians.
- 2) **Aldo Senteno Saavedra.** Provincial judge of the court of Quaqui.
- 3) **Thechi Hidani Quispe Limachi.** Lawyer specialised in indigenous justice. Thechi also participates in various training projects for community authorities and legal interculturality workshops.
- 4) **Humberto Guarayo.** Humberto is the leader of the nation Yampara from Tarabuco. He has been involved in the reconstitution of the Yampara nation long assimilated with the Quechuas. The struggle for a full recognition is still ongoing.
- 5) **Nicolás Mamani.** Cantonal authority of Tiwanaku and secretary of justice (23 communities).
- 6) **Leonardo Laura.** Secretary of justice. Community of Huancallo (one of the 23 communities that forms the *ayllu*/political community of Tiwanaku).
- 7) **Henry Nina.** Executive secretary of the Trade Union Confederation of Intercultural Communities (CSCIOB), one of the five national indigenous trade unions.
- 8) **Felix Ajpi Ajpi.** Secretary for economic development (CSCIOB).
- 9) **Antonio Peres Velasco.** Arbitration-Mediation lawyer and actual head of the law department of the Catholic University of La Paz (UCB).
- 10) **Ramiro Molina Rivero.** Anthropologist and professor of Legal Pluralism and Cultural Anthropology at the Catholic University of La Paz (UCB).
- 11) **Arturo Vargas Flores.** Lawyer specialised in indigenous justice and professor of Legal Pluralism at the University of San Andrés of La Paz (UMSA).

12) **Rubén Choquepalpa Choque**. Legal advisor for the Vice-Ministry of Indigenous Justice.

13) **Gabriela Saúma**. Legal advisor for the Constitutional Tribunal of Sucre.

9.2 Appendix B: Topic guide.

- Since justice is one of the pillars of democracy, all the current discussions on the limits and benefits of indigenous justice are part of the debate on the *Living Well* and the state management of cultural diversity. What is your opinion about the state of justice in its actuality?
- How would you define the concept of *Living Well* in general and in its legal dimension?
- There are still grey zones in terms of the scope of indigenous justice in the Constitution and the Law on Jurisdictional Domain. In 1996, when the subject began to be discussed with more frequency, the intellectual Ramiro Molinas spoke of the need to define what is understood by indigenous justice. Did not the laws fail in this regard?
- How is this definition communicated to Bolivians? Have efforts been made by the government or indigenous communities to make this definition known?
- The issue of indigenous justice is much discussed at the national and international level. It is no longer about recognising indigenous justice but establishing it as a respected institution. In spite of its recognition, are the practices of indigenous justice accepted by society in general today?
- The Constitution introduces the hierarchical equality between the two systems of justice but it seems that the Law of Jurisdictional Domain does everything to reduce indigenous rights and, rather, was designed as closest as possible to the norm of ordinary justice. Do you think that this has to do with power relations? Is there today in Bolivia a political will to enforce this equality in the field of legal pluralism?
- Being pre-colonial entities, indigenous have historically resolved cases in the communities. The codes of indigenous justice (to preserve the harmony of the community) are different from the Western logic (punitive, repressive). Do you believe that individual and collective rights can coexist without tension?

- In the Law on Jurisdictional Domain, there is a part that contains the idea of complementarity (Art 4.f) between the two systems and a call to support efforts and initiatives of all jurisdictions. The Art 17 establishes the obligation of coordination and cooperation but the Art 14 regarding to coordination mechanisms does not establish any obligation using a conditional future "Coordination could be ensured through the establishment of spaces for dialogue or other forms for the exchange of experience on methods of conflict resolution." Have such initiatives been implemented ?

- What does it mean to achieve complementarity with equal hierarchy between the two jurisdictions in a scenario of refoundation of the State based on interculturality and plurinationality?

- According to the opposition, the hierarchical equality should not have been recognised because indigenous justice would violate constitutional principles such as the right to life and physical integrity, rights already established by the Universal Declaration of Human Rights. Has it already happened that indigenous justice or in the name of indigenous justice, a very strong sentence was given in a community?

- We can read in the press that lynchings were caused by indigenous justice. What do you recommend to face the situation that arises with lynchings?

- You work in a legal environment and you constantly have to face and adapt to the particularism of cases. The judicial authority promotes Equality, itself promoted by the Constitution but, it seems that Equality is, in legal matters, sometimes sought for and sometimes rejected. Equality implies to apply an identical legal regime for identical situations but also to apply different rules for people who are in different situations. Can we talk about a confusion between true equality and egalitarianism?

- How can more debate be generated to reach a better understanding of the doctrines of indigenous justice?

- No justice system is perfect, the challenge for both is to improve and adapt to the dynamics of a changing society. What could the indigenous system learn from the ordinary system and vice versa?

- To better frame the practice of indigenous justice, in Mexico, hybrid courts called "*Juzgados indígenas*" have been introduced as an attempt to establish an official model of indigenous justice. The indigenous judge is accompanied by a mediator who represents the citizen commissions on human rights and has a right of veto. What do you think about the institutionalisation of indigenous justice?

- I would like to finish with a slightly more personal question. To be judged under the indigenous system, it is necessary to self-identify as indigenous but there were a controversy over the difference in the enunciation of the census questions regarding the indigenous identity, I think that from the term "indigenous community" they passed to the term "indigenous peasant community". Do you self-identify as "indigenous community", as "indigenous peasant community" or others?