Legally Stripped: Discrimination Against Female Adolescents in Bolivia

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I. INTRODUCTION

The central question of this paper is whether articles 44, 81, and 86 of the Código de Familia of Bolivia, and article 317 of the Código Penal of Bolivia impermissibly discriminate against female adolescents in violation of their rights protected under Bolivian constitutional law and international law. ¹ I argue here that they do. In short, these articles effectively trap female adolescents in horrible situations of psychological, physical, and sexual violence, and strip them of potential legal remedies for the violence they suffer.

The selected articles from the Código de Familia are part of the legal framework surrounding the marriage of female adolescents, and article 317 of the Código Penal factors into that framework. These articles are also part of the long standing problem across the world of cultural and legal discrimination against women. A look back in history reveals that for thousands of years women on every continent have suffered cultural and legal discrimination.

The articles under review also reflect the complex interaction between culture and law. These articles are without doubt the fruit of discriminatory culture. Yet these same articles reinforce and exacerbate that culture, creating a cycle in which discriminatory cultural patterns and discriminatory laws mutually reinforce one another and produce more of their kind. This paper is an effort to confront this long standing problem and cycle as it affects the marriage of female adolescents in Bolivia.

At this point, it is necessary to review the articles being challenged, which will set the tone for all that follows. Each of these articles impermissibly discriminates against female adolescents. Article 44 of the Código de Familia permits the female adolescent legally to marry at age 14.² Article 81 considers a marriage that violates article 44 to be legally valid if the female adolescent at the time of the challenge to the marriage has been 14 years of age for more than one month.³

¹ See attached Appendix “A” for the original Spanish and English translation of articles 44, 81, and 86 of the Código de Familia and article 317 of the Código Penal.
² Código de Familia, art. 44 (Bol.) [hereinafter C. Familia]. See also Id. at art. 53, 54. Article 53 requires that she obtain the consent of her parents or legal guardian if she is below the age of 18. And if she is orphan, article 54 requires her to obtain the consent of the agency charged with her protection.
³ Id. at art. 81.
violation of article 44 to be legally valid if before attaining the age of 14 the married female adolescent conceives a child.  

Moreover, if the female adolescent’s will to marry is obtained by the use of violence, and she continues to live with her husband after the physical violence has ceased, article 86 strips her of the ability to challenge the marriage on the ground that she was forced to marry by the use of violence.  

Also, if a female adolescent with her freely given consent marries her sexual aggressor, article 317 of the Código Penal expunges the sexual aggressor’s crimes if the marriage occurs before the sexual aggressor's sentence is finalized.

For male adolescents, the picture is different. Article 44 permits the male adolescent legally to marry at age 16. Article 81 considers a marriage that violates article 44 to be legally valid if the male adolescent at the time of the challenge to the marriage has been 16 years of age for more than one month. Article 86 of Código de Familia and article 317 of the Código Penal theoretically apply in the same fashion to males as they do to females, due to the gender inclusive language used in those articles. But in practice, articles 86 and 317 apply only to women.

To challenge these articles, I first establish the broader context within which these articles exist and function. I then consider the constitutional and international rights violated by these articles.

A word about the structure of the remainder of this paper: Section two considers who the female adolescent is under Bolivian law and in the relevant developmental and medical literature. Section three concerns the social context of female adolescents in Bolivia, which here is limited to their cultural setting and their relationship to the justice system. Section four considers the negative effects that the articles mentioned above have on female adolescents in light of their socio-cultural context and in light of the relevant developmental and medical literature. Section five considers which rights these articles violate under Bolivian constitutional law. And section six considers which rights these

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4 Id. at art. 81.

5 Id. at art. 86.

6 Código Penal, art. 317 (Bol.) [hereinafter C. Penal]. When a conviction is ejecutoriada, it has been finalized, or confirmed by a criminal court. During this process the conviction is reviewed for error, and all criminal defendants in Bolivia are entitled to this review. See Código de Procedimiento Penal, art. 428 (Bol.).
articles violate under international law. A few conclusory remarks follow in section seven.

II. THE FEMALE ADOLESCENT UNDER BOLIVIAN LAW AND IN DEVELOPMENTAL AND MEDICAL LITERATURE

Under Bolivian domestic law, the adolescent is defined as those persons 12 to 18 years of age cumplidos. Cumplidos in this context means that on the day that a person attains 18 years of age, that person ceases to be an adolescent. Throughout this article the term adolescent is used in accord with this definition.

The age group that comprises the category of persons labeled adolescents under Bolivian law is a very large group, and within that group there is great variance in the developmental process. That is to say, not all adolescents develop in the same fashion emotionally, intellectually, sexually, and physically. In reality, adolescents, both female and male, are exceedingly complex, and no single developmental theory seems to adequately account for the wide variance in their development.

Many factors affect the emotional and intellectual development of adolescents, including prenatal nutritional health, the emotional stability of the mother during prenatal development, early childhood stimulation, family type, family stability,
parental reactions to a child’s conduct\textsuperscript{13}, culture\textsuperscript{14}, trauma suffered in early childhood\textsuperscript{15}, quality and quantity of social interaction with other children and adults\textsuperscript{16}, and opportunities for education\textsuperscript{17}.

The development of an adolescent’s sexuality is likewise complex, and is affected by many factors. Sexual development includes the development of the ability to manage and identify emotions, as well as to use the intellect. Thus, the factors affecting the development of an adolescent’s sexuality include those factors affecting emotional and intellectual development. In addition, an adolescent’s sexuality may be affected by: the ability to manage conventional and esoteric ideologies of masculinity and femininity\textsuperscript{18}; the cultural conceptualization of sexuality; the assumed sexual maturity or immaturity of the adolescent\textsuperscript{19}; the adolescent’s capacity for and opportunities to develop self-agency; prior traumatic sexual experiences; religious and philosophical conceptions about the make-up of the human person (e.g. the inferiority—or evilness—of the body and superiority of the soul, the essential inseparability of the human person, a materialist

\textsuperscript{13}See generally E.E. Maccoby, Parenting and its effects on children: On reading and misreading behavior genetics, 51 Annual Review of Psychology 1 (2000) (discussing how parental reactions to a child's negative behaviors can reinforce those behaviors).

\textsuperscript{14}See generally Carol A. Markstrom, Identity formation of American Indian Adolescents: Local, national, and global considerations, 21 Journal of Research on Adolescence 519 (2011) (discussing the effect of local, national, and even global culture on identity formation in adolescents).

\textsuperscript{15}See Cynthia Carson-Tower, Understanding Child Abuse and Neglect 368 (4th ed. 1999). The residual effects of childhood physical abuse, neglect, and sexual abuse (i.e. those effects that last through childhood and adolescents, and that reach into adulthood), include, but are not limited to, difficulty trusting others, lowered self-esteem, substance abuse issues, perception of powerlessness, lowered intelligence, impaired development, and impaired parenting abilities. Id.


\textsuperscript{17}See generally Richard E. Snow, Aptitude Development and Education, 2 Psychology, Public Policy, and Law 536 (1996) (arguing that educational opportunities can improve intellectual development, and that a very important factor in these opportunities is the metacurriculum, i.e. the encouraging of students to learn the habits of good thinking that go beyond any particular curriculum or subject).


\textsuperscript{19}See generally Carolyn Tucker Halpern, Reframing Research on Adolescent Sexuality: Healthy Sexual Development as Part of the Life Course, 42 Perspectives on Sexual and Reproductive Health 6 (2001) (discussing various factors that affect research on adolescent sexuality, and the need reframe healthy sexuality as an integral part of an adolescent’s general well-being).
conception of the human being, etc.); and religious and philosophical beliefs about the
moral propriety of sexual activity.

Considering the multitude of factors that affect the emotional, intellectual, and sexual
development of adolescents, it is evident that the developmental process of each
adolescent is relatively unique. At each age of adolescence, some adolescents are more
developed in some ways than are others. It is also clear that adolescents must navigate in
a very complex world and confront innumerable influences to define themselves and
form a solid personal identity. In essence, the adolescent lives in an unclearly defined and
turbulent period of complex change and identity formation.

With regard to medical literature, adolescent pregnancy and child birth is of particular
relevance. Adolescent pregnancy is dangerous for both mother and child. Adolescents
who give birth are at higher risk for anemia, preterm delivery, postpartum hemorrhage
and other complications, mental disorders, and increased economic and social
difficulties.20 Moreover, pregnant adolescents who have suffered physical, psychological,
or sexual abuse, or other traumas, earlier in life are at even higher risks for complications
during pregnancy and childbirth.21 Babies born to mothers below age 20 are 50% more
likely to be stillborn or to die within the first week of life, suffer from low birth weight,
and are more likely to be admitted to intensive care units upon birth.22

III. THE FEMALE ADOLESCENT’S SOCIO-CULTURAL
CONTEXT IN BOLIVIA

The socio-cultural context of the female adolescent in Bolivia is an unhappy one.
Toxic culture, sexual violence, a collapsed justice system, and harmful legislation
threaten her from all sides. Despite the complexity of her developmental process, and the

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20 See generally World Health Organization, Making Pregnancy Safer,
WHO] (discussing the risks of adolescent pregnancy to both mother and child); Salah Rasheed et al.,
(discussing the increased risks associated with pregnancy among adolescents below the age of 16 in Upper
Egypt); Suparp Thaithae & Ratsiri Thato, Obstetric and Perinatal Outcomes of Teenage Pregnancies in
Thailand, 24 Journal of Pediatric and Adolescent Gynecology 342 (2011) (discussing various risks and
complications associated with adolescent pregnancy in Thailand, and concluding that adolescent pregnancy
is associated with increased maternal and neonatal adverse outcomes).
21 See generally Susan D. Hillis et al., The Association Between Adverse Childhood Experiences and
Adolescent Pregnancy, Long-Term Psychosocial Consequences, and Fetal Death, 113 Pediatrics 320
(2004) (discussing the increased risks for psychosocial sequelae and fetal deaths among teenage mothers
who have suffered adverse childhood experiences, such as verbal, physical, and sexual abuse).
22 World Health Organization, supra note 20; Thaithae, supra note 20.
need to protect it, she is sexually objectified, reduced to a second class citizen, and railroaded in her attempts to access justice when she suffers violence.\footnote{It is necessary to keep in mind that the female adolescent is similarly objectified and reduced to a second class citizen in most parts of the world. Bolivia, in this respect, is no anomaly when considered in its global context. This is certainly cause for alarm, and should propel us forward in efforts to seek social change that benefits women in general, whether children, adolescents, or adults.}

A. Toxic Culture and Sexual Violence

Bolivia is by no means a homogenous society with a single culture. The cultural tenor varies greatly from region to region and within each region, as well. However, despite the incredible and beautiful cultural diversity of Bolivia, \textit{machismo} is a strong, unifying cultural theme. Within Bolivia’s androcentric, \textit{machista} culture, the female adolescent is reduced to a subordinate position as a second class citizen, and the male supposedly is strong, powerful, and invulnerable, and possesses ownership over the woman.\footnote{Silvia A. Gonzales et. al., \textit{La Impunidad en Las Agresiones Sexuales a Niños, Niñas, y Adolescentes: Realidades, Perspectivas y Desafíos} 52 (2006).}

The Bolivian culture of male domination and female subjugation creates a context of extreme vulnerability, hostility, and discrimination for female adolescents.\footnote{For a more in-depth discussion of Bolivia’s cultural discrimination against female adolescents, particularly female adolescent victims of sexual aggression, see Brisa De Angulo, \textit{Bolivian Socio-cultural Patterns Discriminate Against Female Adolescent Victims of Sexual Assault} (2011) (unpublished manuscript, on file with author).} This toxic culture is reflected in the prevalence of sexual violence in Bolivia. Approximately 1 out of 3 girls suffer some form of sexual violence before the age of 18.\footnote{Brisa De Angulo, \textit{Child Sexual Abuse and The Conspiracy of Silence} 18 (2009).} Moreover, women report roughly 92% of all reported cases of sexual violence.\footnote{Gonzales et. al., \textit{supra} note 24, at 51.} Of this 92%, 42% are reported by female adolescents.\footnote{\textit{Id.}, at 52.}

Another reflection of the Bolivian \textit{machista} culture is the frightening expression, “\textit{mia o muerta}.” The expression means literally, “She is mine, or she is dead,” and it reflects the intensity of the man’s sense of ownership over the woman. It expresses the notion that, “if this woman is not with me, it is better that she be dead.” If it is not possible to kill the woman, then severely beating her and marring her appearance will suffice.
A recent story from a Cochabamba newspaper provides a small glimpse into the reality and severity of this *machista* culture. On October 13 of this year, Donato Vargas Toledo, 25 years of age, assaulted his 15-year-old *concubina* with a club, causing her hospitalization. She suffered multiple contusions, fractures in the facial bones, and had hematomas in various parts of her body.

The assault was triggered, according to reporters, by a phone call that Donato received from another man. The man on the phone stated that he was the 15-year-old’s boyfriend and that he would soon live with her. Donato, who was inebriated at the time, felt intense jealousy, became furious, and then brutally assaulted the 15-year-old.

Donato was detained by the police on the following day, and the 15-year-old continued in the hospital. Meanwhile, their 3 month old baby was placed in the care of their families. No further information on the case is currently available.

Stories like these are not rare in Bolivia. In any Bolivian medical clinic, one can hear seemingly endless stories of women who have come for help after having been beaten brutally by their husbands and boyfriends. This type of male behavior frequently makes the papers, and is a clear reflection of the androcentric, *machista* culture that permeates all regions of Bolivia.

**B. A Collapsed Justice System**

When the female adolescent suffers sexual aggression or physical violence (both of which are barbaric expressions of male desire for control and ownership), and has the strength to begin the legal process, her petition enters a collapsed justice system. When she suffers violence within an early marriage, her access to justice is even more limited. Cases within the system suffer horrible delay. And the general public, including female adolescents, lack knowledge of the few and slow judicial remedies that are available to them.

The Bolivian justice system is severely understaffed, underfunded, corrupt, does not have effective mechanisms of internal and external control, and is inefficient. There are

30 *Concubina* and *concubino* in Bolivian Spanish are used to refer to the persons of an unmarried couple who live together.
31 Last checked on Dec. 9, 2011.
no judges in 45% of Bolivia's municipalities. In those municipalities with judges, the ratio of judges to inhabitants is extremely low. For example, in El Alto, Bolivia, there are roughly two family law judges per one million inhabitants. Moreover, seventy-six percent of Bolivia's municipalities do not have a prosecutor.

This lack of staff is partly to blame for female adolescents’ lack of access to justice. In criminal matters, there are very few prosecutors, all of whom are overburdened. And there simply are not enough judges to hear all of their claims, if their claims ever reach a judge. Thus, a female adolescent’s report of a crime may not be welcome, and probably will not receive the care and attention it deserves.

In addition to the lack of personnel, the Bolivia judicial system is underfunded and corrupt. The judicial system receives less than 1 percent of the national annual budget, while the executive branch receives roughly 62%. And as Bolivian President Evo Morales stated, corruption in Bolivia is practically “institutionalized.” Others have agreed. The Inter-American Commission on Human Rights stated that an “aspect that seems to impede effective judicial responses is the alleged corruption among judges in Bolivia, involving primarily political interference and influence peddling as the only way to obtain a decision.” The Commission also reported that in the eastern regions of Bolivia, judges are influence by economically powerful groups and those who have no means “to influence decisions have no access to the system.”

Not only is the justice system understaffed, underfunded, and corrupt, but it also lacks mechanisms of internal and external control. As the Inter-American Commission on Human Rights noted, “[M]echanisms of internal and external control have still not been implemented or are not working properly. In practice the performance in the administration of justice is not measured by any standards and indicators of quality, efficiency and effectiveness of the services provided, nor are there any mechanisms for

33 Id. at ¶ 65.
34 Id. at ¶ 60.
36 Access to Justice, supra note 32, at ¶ 57.
37 Id.
making judges and prosecutors accountable to society for their performance.”38 As a result, discrimination against female adolescents by judges and prosecutors is largely undetected and unpunished.

Also, judicial backlog, or delay, is a massive problem. The time period for the criminal process from start to finish as set in the Código de Procedimiento Penal, assuming the process functions properly, is a little less than one year. However, the actual process takes on average 1,970 days, or 5.4 years.39 Thus, for female adolescents who disclose sexual and physical assault, the criminal process is for all practical purposes not available. Making matters worse, the overwhelming majority of families in Bolivia do not have the economic resources or emotional support system to sustain litigation for over 5 years. Thus, most cases are dropped somewhere in the process.40 This means that many adolescent victims never find justice and closure for their cases, and their perpetrators continue with impunity to move freely in society.

Moreover, the inhabitants of Bolivia generally lack knowledge of the judicial procedures and remedies available to them.41 Without doubt this general lack of knowledge affects female adolescents. Lack of knowledge about rights and the legal mechanisms available to pursue enforcement of rights is detrimental to any member of society, especially to women, whether children, adolescents, or adults, who live in a violent, machista culture such as that of Bolivia.

IV. THE ARTICLES’ NEGATIVE EFFECTS ON FEMALE ADOLESCENTS

It is within this context of toxic culture, sexual violence, and a collapsed judicial system that the Bolivian female adolescent faces legislation that violates her rights under Bolivian Constitution law and under international law. If the female adolescent attempts to pursue justice for the crimes committed against her, she faces a legal regime that makes her extremely vulnerable to sexual and physical violence. Articles 44, 81, and 86

38 Id. at ¶. 98.
40 See generally Brisa De Angulo, Legal Practice and Social Constructs Override Legal Intent: Maintenance of the Revictimization of Child and Adolescent Victims of Sexual Abuse (2010) (unpublished manuscript, on file with author) (considering the various ways in which victims of sexual aggression are revictimized during the pretrial procedural process in Bolivia).
41 Access to Justice, supra note 32, at ¶ 66.
of the Código de Familia and article 317 are part of this harmful regime, and each negatively affects the female adolescent in various ways.

Article 44 of the Código de Familia permits the female adolescent to legally marry at age 14. Article 81, however, considers a marriage that violates article 44 to be legally valid if the female adolescent at the time of the challenge to the marriage has been 14 years of age for more than one month. Article 81 also considers a marriage in violation of article 44 to be legally valid if before attaining the age of 14 the married female adolescent conceives a child.

Moreover, if the female adolescent’s will to marry was obtained by use of violence, and she continues to live with her husband after the physical violence has ceased, article 86 strips her of the ability to challenge the marriage on that ground. Also, if a female adolescent with her freely given consent marries her sexual aggressor, article 317 of the Código Penal expunges the sexual aggressor’s crimes if the marriage occurs before the sexual aggressor's sentence is finalized.

Articles 44 and 81 of the Código de Familia together reflect the simplistic and reductionist belief that female adolescents are ready at a younger age than are males to engage in sexual activity and to assume the responsibilities of marriage, including child birth. For the female adolescent, this younger age drops below 14. However, developmental literature does not support this assertion about the developmental maturity of female adolescents. Rather, as seen above, the literature reflects an incredibly complex process of emotional, intellectual, and sexual development, and shows that adolescent pregnancy is plagued with heightened risks for both the mother and the baby.

This reductionist conception of the female adolescent is both damaging and demeaning. It is damaging because it threatens to arrest her developmental process, and even her life; demeaning because it simply denies the complexity of her development as a person. In effect, article 44 and 81 create a legal context in which early marriage can suspend the female adolescent’s developmental process in a premature state that negatively affects her for the duration of her life.

42 C. Familia, supra note 2, at art. 44.
43 Id. at art. 81.
44 Id. at art. 86.
45 See supra note 6.
Furthermore, Articles 86 of the Código de Familia and Article 317 of the Código Penal place the female adolescent in a position of vulnerability and subjugation. These laws in practice apply only to women, giving ample room to the reign of violent, machista culture. The net effect of these laws is to trap vulnerable female adolescents, and adult women as well, in violent relationships with violent men.

Also, each of these articles in question violates female adolescents’ rights under both Bolivian constitutional law and international law. These articles institutionalize a regime of de jure discrimination and sustain and encourage de facto discrimination. Thus, what follows is a set of proposed arguments to challenge article 44, 81, and 86 of the Código de Familia, and article 317 of the Código Penal as unconstitutional and as violations of women’s internationally protected rights.

V. VIOLATIONS UNDER BOLIVIAN CONSTITUTION LAW

Under the Nueva Constitución Política del Estado (hereinafter NCPE)\textsuperscript{46} female adolescents have the right to equal protection under the law,\textsuperscript{47} the right to a full development,\textsuperscript{48} and the right to live free from violence.\textsuperscript{49} Article 44, 81, and 86 of the Código de Familia and article 317 of the Código Penal violate these rights. The constitutionality of these articles, however, previously has not been treated or decided by any controlling judicial authority in the Bolivian jurisdiction. Thus, this analysis is one of first impression.

Pursuant to the NCPE, citizens through their governmental representatives can lodge a constitutional challenge in abstracto. Article 132 of the NCPE states that all persons affected by a legal provision contrary to constitutional principles have the right to present a petition alleging the unconstitutionality of the legal provision, so long as the petition is presented in accordance with the procedures established by law.\textsuperscript{50} This avenue of challenge requires a concrete case, an actual victim. However, the Constitutional Tribunal also has the authority to rule on a question of “pure law.” A petition concerning a question of pure law (i.e. a petition in abstracto) can only be presented to the

\textsuperscript{46} The Nueva Constitución Política del Estado entered into force on January 25, 2009, and is the current and controlling constitution of Bolivia. Nueva Constitución Política del Estado pmbl. ¶ 8 (2009) [hereinafter NCPE].
\textsuperscript{47} NCPE, supra note 46, at art. 14.
\textsuperscript{48} Id. at art. 59.
\textsuperscript{49} Id. at art. 15(II).
\textsuperscript{50} Id. at art. 132.
Constitutional Tribunal by the President of the Republic, Senators, Delegates, Legislators, or the highest executive authority of an autonomous territory.\footnote{\textit{Id}. at art. 202.}

Once the Constitutional Tribunal declares a given norm unconstitutional, that norm is inapplicable as a matter of law. Thus, a norm declared unconstitutional has no force, even when it remains in one of the legal codes due to legislative inaction.\footnote{An example of such a norm is article 99 of the Código de Familia of Bolivia. \textit{Código de Familia}, art. 99 (Bol.). Although the Constitutional Tribunal declared this norm unconstitutional, it nonetheless remains in the Código de Familia even though it has no force as a matter of law. Tribunal Constitucional, \textit{Sentencia Constitucional 0058/2003}, June 25, 2003 (Bol.).} Also, the Tribunal’s decisions demand obligatory compliance, and there is no further ordinary recourse or appeal beyond the Tribunal.\footnote{\textit{NCPE}, supra\textit{ note 46, at art. 203.}}

\textbf{A. Constitutional Doctrine of Equality}\footnote{\textit{Id}. at art. 133.}

The challenge to articles 44, 81, and 86 of the Código de Familia, and article 317 of the Código Penal should be lodged under the constitutional doctrine of equality. The Constitutional Tribunal developed its jurisprudence setting out the doctrine of equality under the Constitution of 1967, which is now obsolete in its entirety. This presents a novel question of law that has not been resolved definitively in Bolivia: What happens to the jurisprudence of the Constitutional Tribunal when the entire Constitution undergirding that jurisprudence changes? My position here is that prior decisions should be read in light of the changes in the new Constitution, and should apply to the extent that the language they interpret has not been changed. Applying that here, the doctrine of equality as set out in prior decisions does not require modification.

The discrimination clauses of the Constitution of 1967 and the NCPE are substantively the same. The only differences are that the NCPE expands the list of forms of discrimination and sets out criteria for identifying other forms of impermissible discrimination not listed. A review of the text of each will illustrate these differences. Article 6(I) of the Constitution of 1967 states:

\begin{quote}
All human beings have juridical capacity and personality in accordance with the laws, and enjoy those rights, liberties, and guaranties recognized by this Constitution, without distinction based on reasons of
\end{quote}
race, sex, language, religion, political opinion or other creed, origin,

economic or social condition, or any other.\textsuperscript{55}

Article 14(II) of the NCPE states:

The State prohibits and sanctions all forms of discrimination based on
reasons of sex, color, age, sexual orientation, gender identity, origin,
culture, nationality, citizenship, language, religious creed, ideology,
political or philosophical association, civil status, economic or social
condition, type of occupation, degree of education, disability, pregnancy,
or others that have as their objective or result to annul or to undermine the
recognition, enjoyment, or exercise, in conditions of equality, of the rights
possessed by all persons.\textsuperscript{56}

The Constitution of 1967 in its discrimination clause lacks the entire phrase, “that
have as their objective or result to annul or to undermine the recognition, enjoyment, or
exercise, in conditions of equality, of the rights possessed by all persons.” This phrase
merely sets out criteria for identifying additional forms of discrimination that violate the
constitution. It does not augment or change the elements of doctrine of equality as
developed in the Constitutional Tribunal’s prior decisions, though it does add content, or
bigger teeth to the fourth element of the doctrine of equality. The fourth element requires
that the given norm be reasonable in light of constitutional principles. The additional
phrase in the discrimination clause of the NCPE indicates what a norm that is reasonable
in light of constitutional principles would do: uphold the recognition, enjoyment, or
exercise of the rights enjoyed by all persons.

The doctrine of equality thus retains its prior form, and reads as follows: To survive
constitutional scrutiny, a norm that accords differentiated treatment to persons on the
basis of reasons prohibited in article 14(II) of the NCPE, must: (1) distinctly treat persons
who are in reasonably unequal situations; (2) obey a normative end that rationally and

\textsuperscript{55} \textit{Constitución Política de la República de Bolivia}, art. 6(1) (Bol.) (Parker Palmer trans.), available at
http://pdba.georgetown.edu/Constitutions/Bolivia/consboliv2005.html\#parte1titulo1

\textsuperscript{56} \textit{NCPE}, supra note 46, at art. 14(II) (Parker Palmer trans.).
objectively justifies the difference in treatment; (3) be proportionate to the normative end sought; and (4) be reasonable in light of constitutional principles and values.\(^7\)

**B. Some Likely Defenses of these Articles**

Before beginning the constitutional analysis of each article in question, it is helpful to consider some likely defenses to articles 44 and 81 as a pair, and also to articles 86 and 317 as a pair. I address each pair in turn.

1. **Articles 44 and 81**

Three likely defenses to articles 44 and 81 are: 1) that these articles protect the right of the female adolescent to marry, either because she chooses to do so, or because she is pregnant and prefers to marry the father; 2) that to abolish these articles would be to deprive female adolescents of the right to make this choice; and 3) that these articles protect pregnant female adolescents from exile from their communities. I address the first

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\(^{57}\) The analytical framework of the doctrine of equality in Bolivian constitutional jurisprudence as formulated here results from a synthesis of three formulations of the doctrine that are currently good law in Bolivia, except for one phrase in formulation 1, which is explained below. This synthesis captures, I believe, the substance of each formulation. However, the cases that contain the various frameworks are not discussed because the cases are not analogous or relevant to the articles being challenged in this paper. Thus, the relevant legal rules have been extracted, and the rest left aside. What follow are the three current formulations of the doctrine of equality.

**Formulation 1:** “[I]t is not permitted to create differences that lack an objective, reasonable, and proportional justification; that pursue arbitrary, capricious, or despotic ends; that in some manner deny the essential unity and dignity of human nature, causing the violation of the rights and liberties enshrined in the Constitution; or which in general are contrary to any precept or principle recognized in the Constitution.” Tribunal Constitucional, *Sentencia Constitucional* 0058/2003, June 25, 2003, sec. III (Bol.) (Parker Palmer trans.); Tribunal Constitucional, *Sentencia Constitucional* 0062-2003, July 3, 2003, sec. II.1 (Bol.).

**Formulation 2:** Differentiated treatment must meet the following requirements: “1) empirical: that it treat different cases; 2) normative: there exists a normative end that justifies rationally and proportionally the difference in treatment; and 3) evaluative: that the measure adopted be adequate—reasonable—in light of constitutional principles and values.” Tribunal Constitucional, *Sentencia Constitucional* 0051/2006, June 22, 2006, sec. III.3.2 (Bol.) (Parker Palmer trans.).

**Formulation 3:** To be permissible, a discriminatory principle must: “[G]ive distinct treatment to situations that are reasonably unequal, so long as it obeys a justified cause, essentially valued from the perspective of the act and the situation of the persons, for some make it imperative that, based on criteria proportionate to them, the State procure equilibrium, the sense of which in Law is none other than concrete justice.” Tribunal Constitucional, *Sentencia Constitucional* 0063/2006, July 17, 2006, sec. III.3 (Bol.) (Parker Palmer trans.); Tribunal Constitucional, *Sentencia Constitucional* 0003/2007, January 17, 2007, sec. III.2 (Bol.).

These three formulations should be read in light of the fact that “constitutional control does not reach the assessment of ends, of purposes . . .” Tribunal Constitucional, *Sentencia Constitucional* 0063/2006, July 17, 2006, sec. III.1 (Bol.) (Parker Palmer trans.). Thus, the requirement in formulation 1 that a legal provision not “pursue arbitrary, capricious, or despotic ends” is no longer good law. The assessment of a normative end considers the value of the end in itself, which is distinct from the assessment of whether a given norm is proportional and justified in relation to its purported normative end. The Constitutional Tribunal of Bolivia embraces the later form of assessment.
two defenses in light of the State’s obligation under international law to set an appropriate age for the marriage of adolescents.\footnote{Convention on the Elimination of All Forms of Discrimination against Women art. 16(2), Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 [hereinafter CEDAW]; see also Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages art. 2, Dec. 10, 1962, 521 U.N.T.S. 231 [hereinafter Convention on Consent to Marriage] (also requiring that states set a minimum age for marriage).}

Articles 44 and 81 do protect the right of the female adolescent to marry. Nevertheless, female adolescents below age 16 should be protected from making the choice to marry, whatever their reasons. In other words, the right to marry should not be extended to those below age 16. The female adolescent, just as the male, is still in the turbulent process of developing emotionally, intellectually, and physically; still forming an identity. Moreover, women under age 20 face higher risks of complication during pregnancy and childbirth,\footnote{WHO, supra note 20.} and for adolescents who become pregnant before age 16 the probability of such complications is even higher.\footnote{Rasheed et al., supra note 20. See also Hillis et al., supra note 21.} It is safe to say that female adolescents below the age of 16 are not ready developmentally for marriage, pregnancy, or childbirth.

To protect the right of the female adolescent to marry, it is not necessary to discriminate against her by setting for her a lower age for permissible marriage than for male adolescents, or by creating an exception that allows her to marry at age 13, or possibly even younger. This right to marry is protected simply by setting equal ages for permissible marriage for both males and females. The de jure discrimination established by these articles is unnecessary, and harmful to female adolescents.

Moreover, female adolescents have the right to a full development (under both Bolivian constitutional law and international law), and this right cannot be abridged or violated. However, it is within the State’s authority to withhold the right to marry from adolescents below a certain age, and the State has the obligation to do so if extending the right to marry to adolescents will obstruct their full development. And it safely can be said that to extend the right to marry to female adolescents, and male adolescents, below age 16 would to be place a severe restriction on their right to a full development. Thus, at very least, the State has the obligation to withhold the right to marry from those below age 16.
And indeed, to abolish articles 44 and 81 would be to deprive female adolescents of their right to make the choice to marry while adolescents. The issue is not whether to abolish these articles. Rather, the issue is how to modify articles 44 and 81 to be more sensitive to the developmental realities of the female adolescents. Thus, as stated in the prior paragraph, the legal age for marriage for both female and male adolescents should be equalized and set, at very least, at age 16.

While it is possible that these articles protect pregnant female adolescents from exile from their communities (a common practice in rural Bolivia\(^1\)), these articles also discriminate against pregnant female adolescents. The defense here would be that to protect female adolescents from exile from their communities, the legal age for marriage for them must be lower than the age for males, which lower age accommodates for the reality of life in Bolivia. However, to afford the pregnant female adolescent the choice to marry for the purpose of avoiding exile is to provide a mechanism to trap her in an unwanted, early marriage. The key question here is how would a caring, non-sexist, non-patriarchal legal system respond to the fact that a pregnant female adolescent will be exiled from her community if she does not marry?

A non-discriminatory response would be for the State to begin by prohibiting the practice of exile of pregnant female adolescents as a form of unconstitutional discrimination in violation of article 14(II) of the NCPE. And this is just what the Bolivian Government should do. In addition, the Bolivian Government should provide information to communities about the horrible impact of exile in the life of an adolescent mother, the provision of which education would be in line with Bolivia’s obligation to change discriminatory culture.\(^2\) The Bolivian government should also provide support to pregnant female adolescents who have been exiled from their communities, such as the provision of safe sleeping conditions, proper nutrition to protect both the mother and child’s health, information about the experience of pregnancy and childbirth, and access to support groups and institutions (both governmental and non-governmental) that offer support to teenage mothers. The prohibition of exile and the provision of such services

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\(^1\) Interview with Pedro Guion, General Prosecutor, Prosecutor’s Office of Sacaba, in Cochabamba, Bol. (Oct. 27, 2011).

would be the beginning of a response sensitive to the developmental realities of female adolescents. And such a response would force a needed change in local culture to the benefit of pregnant female adolescents.

2. Articles 86 and 317

The most likely defenses to articles 86 and 317 are: 1) that these articles offer stability to certain marital relationships; and 2) that they extend the protection offered by articles 44 and 81 to the female adolescent’s right to marry. I address each defense in turn.

While it is possible that these articles offer stability to certain marital relationships (i.e. that of an abusive man to a woman, or that of a sexual aggressor to his victim), these articles do so in practice by protecting violent men and exacerbating the vulnerability of already vulnerable women. However, men who use violence to force women into marriage and who commit sexual assault should not be insulated from legal action against them. Rather, they should be subject to the full weight of the legal consequences of their actions. And while the state should do what it can to facilitate the stability of the marital relationship, its efforts in this regard cannot serve as a pretext for pardoning the heinous crimes of violent men and stripping women of their right to legal recourse.

And though it is true that these articles may extend the protections offered by articles 44 and 81 to the female adolescent’s right to marry (i.e. affording stability to certain marital relationships and protecting the female adolescent from exile), this extra protection comes at the price of violating her constitutionally and internationally protected rights (as explained below). These articles facilitate marriage to violent men and sexual aggressors, and in doing so make women, including female adolescents, vulnerable to further physical and sexual assault. This extended protection comes at far too high a cost.

C. Analysis of Violations of Constitutional Rights

The analysis that follows demonstrates that articles 44, 81, and 86 of the Código de Familia, and article 317 of the Código Penal fail to satisfy the requirements of the constitutional doctrine of equality.
1. Article 44

The text of Article 44 in relevant part reads, “A man before 16 years of age cumplidos and a woman before 14 years of age cumplidos, cannot enter into marriage. . . .”

Article 44 sets out a clear distinction for the permissible age of marriage based only the sex of the persons involved. This distinction based on sex is the subject of analysis here.

Reasonably Unequal Situations. This distinction based on sex assumes that 14 year old female adolescents are more mature and capable of handling the marital relationship than are 14 year old male adolescents. The assumption that female adolescents are more advanced developmentally at age 14 than are males is not supported by the developmental literature. Rather, the literature demonstrates that the emotional, intellectual, and sexual development of both males and females vary greatly from person to person depending on a multitude of factors.

It light of developmental literature, it appears that female and male adolescents are not in a reasonably unequal situation with regard to their ability to handle the marital relationship. Rather, it appears that they are in a reasonably equal situation; neither is fully developed at the young age of 14. Article 44 therefore fails the first element of the constitutional test by treating adolescents in reasonably equal situations as if they were in reasonably unequal situations.

Normative End. Based on the text of the Article 44, its normative end appears to be to protect the societal desire that those under the age of 18 be able marry. This normative end does not make necessary or in itself justify objectively or rationally the need to make an age distinction based on sex between female and male adolescents. The lower age of 14 years for women is entirely arbitrary in light of this normative end.

The arbitrary nature of this distinction is supported only by traditional values and beliefs, and rests on a false assumption that female adolescents are ready at a younger age than are male adolescents to engage in sexual activity and to assume the responsibilities of marriage, including pregnancy and child birth. This traditional, scientifically

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63 C. Familia, supra note 2, at art. 44 (Parker Palmer trans.). For the meaning of cumplidos, see supra p. 3.

64 The legislative history for this article is not readily accessible. Thus, of necessity, the normative end of article 44 is derived from the text and the text’s position in the structure of the statutory scheme surrounding it.
unsupported belief about female adolescent development does not in itself rationally and objectively justify the existence of the age distinction based on sex in article 44.

**Proportionate to the Normative End.** The lower age for women signaled in article 44 is fundamentally disproportionate to the normative end just mentioned. The normative end of article 44 is perfectly accomplished by setting an equal age for both female adolescents and male adolescents. Moreover, the detrimental effect of this article on the enjoyment of constitutional rights by female adolescents makes article 44 even more disproportionate to its normative end.

**Reasonable in Light of Constitutional Principles.** Article 44 is not reasonable in light of other constitutional principles, such as the right to equal protection under the law65 and the right to a full development.66 Article 44 denies women legal protections that are afforded to men. The man is afforded legal protection from early marriage until the age of 16, and as a result his developmental process is closely protected until that age. The female adolescent losses legal protection at age 14, and even before age 14 in light of the article 81 exceptions. As a result, her developmental process is made extremely vulnerable at age 14 (or below), at least two years before the male. This type of *de jure* discrimination violates the right to equal protection under the law and the right to full development.

It is clear that article 44 violates the prohibition on discrimination contained in article 14(II) of the NCPE. Moreover, those articles the application of which depends on the ages signaled in article 44 are unconstitutional in their application as a result of the unconstitutionality of article 44. These dependent articles include much of the Código de Familia.

**2. Article 81**

The text of Article 81 reads, “A marriage entered into by one or both spouses while below the age set in article 44 cannot be impugned when there has transpired one month since the spouse [or spouses] obtained the required age or when the woman without having the required age has conceived.”67 Article 81 provides an exception to what is an

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65 *NCPE, supra* note 46, at art. 14(II).
66 *Id.* at art. 59.
67 *C. Familia, supra* note 2, at art. 81 (Parker Palmer trans.).
otherwise illegal marriage.\textsuperscript{68} Article 81 also guarantees the differentiated treatment of males and females in matters of early marriage by establishing different requirements for a permissible challenge to the marriage that depend entirely on the sex of the adolescent spouse.

Thus, a female adolescent can enter into a legitimate, unchallengeable marriage when she is under the age of 14 and has conceived. However, a male adolescent can enter into a legitimate, unchallengeable marriage only when he is age 16. This differentiated treatment on the basis of sex is the subject of analysis here.

\textbf{Reasonably Unequal Situations.} A female adolescent below the age of 14 who is pregnant is in a reasonably unequal situation when compared to a male adolescent who has been 16 years of age for at least one month. The problem with article 81 is that it treats adolescents in reasonably unequal situations as if they were in reasonably equal situations. It treats the pregnant, female adolescent who is younger than age 14 as equally ready to enter a marital relationship as a 16 year old male adolescent. During adolescence, two years of age difference, two years of life experience, make a big difference in the level of maturity of an adolescent. Article 81, as article 44, ignores solid developmental science that establishes the complexity of, and wide variance in adolescent development.

\textbf{Normative End.} Article 81 seems to pursue two normative ends, the first of which protects traditional Bolivian values, particularly the values of those Bolivians who live in rural communities.\textsuperscript{69} The first is to protect the practice of early marriage. The second is to protect pregnant female adolescents from exile from their communities, a common practice in rural Bolivia.\textsuperscript{70}

\textbf{Proportionate to the Normative End.} Article 81 is disproportionate to both of these normative ends. The first normative end, that of protecting early marriages that violate article 44, requires, at most, that female adolescents married before the age signaled in article 44 be the required age for at least one month before the challenge to the marriage.

\textsuperscript{68} \textit{Id.} at art. 80 (stating that a marriage in violation of article 44 is null).
\textsuperscript{69} The legislative history and case law offering insight as to the intended normative end of article 81 is either non-existent, or not readily accessible by the public. Thus, the normative end of article 81 is derived from the text of the statute, its position in the structure of the statutory scheme surrounding it, and it is function with the broader context of Bolivian cultural values.
\textsuperscript{70} Interview with Pedro Guion, supra note 61.
And the additional provision allowing for a valid marriage if the adolescent conceives a child while below age 14 goes far beyond what is necessary to accomplish the normative end of article 81.

This additional provision affecting only female adolescents appears to pursue the second normative end, that of protecting pregnant female adolescents from exile from their communities by allowing legal marriage to the father of the child. The more appropriate, or proportionate way to prevent exile would be to prohibit exile of and discrimination against pregnant female adolescents. Validating an otherwise illegal marriage is not the most effective, or objectively rational way to protect pregnant female adolescents from exile from their communities. There are various other mechanism available to prevent and lessen the impact of such exile, as discussed above in section V(B).

However, as it stands, article 81 provides less protection to female adolescents than to male adolescents, and serves as an incentive for early marriage and pregnancy, and for forced early marriage and pregnancy when coupled with article 86 (discussed below). In addition, article 81 functions as an exception to the prohibition of the rape of minors in the Código Penal,71 and thus as an incentive to rape minors. It provides incentive to a possibly much older adult male to impregnate his 13 year old illegal wife for the purpose of protecting the illegal marriage. And it can hardly be said that a 13 year old female adolescent is in a position of equal bargaining power with an adult male, especially when it comes to the decisions regarding sexual intercourse and conception of a child.

Moreover, this article reinforces the unequal treatment instituted in article 44. Protection of marriages that violate article 44 is questionable due to the de jure discrimination established in article 44. Also, while the statute may actually prevent pregnant female adolescents from being exiled from their communities, it provides incentive to males to rape and thereby impregnate female adolescents, and a mechanism that traps female adolescents in unwanted, early marriages. The protection supposedly offered by article 81 is not worth the price paid for it. Article 81 is plainly disproportionate to each of its purported normative ends.

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71 *C. Penal*, *supra* note 6, at art. 308 bis.
Reasonable in Light of Constitutional Principles. Article 81 is not reasonable in light of constitutional principles, particularly the rights to equality under the law and to a full development. Article 81 exacerbates the violations seen in article 44. Article 81 drops the permissible age of marriage below 14 years of age if within an illegal marriage the young female adolescent conceives a child. This law only widens the gap in legal protection offered to male and females, for the male’s developmental process is protected until the age of 16, while the female’s developmental process is protected only until age 14 (or below). Article 81 is entirely arbitrary, constitutes de jure discrimination, and severely threatens the already restricted developmental opportunities afforded to female adolescents.

3. Article 86

Article 86 states, “The marriage is annulable when the will [to marry] has been obtained through violence or has been given through error by one of the persons entering marriage. The [legal] action corresponds to the spouse who suffered the violence or incurred the error; but [the spouse who suffered violence or incurred error] cannot bring [a legal action] if there was co-habitation after the violence ceased or [after] the error was known.”

This article functions as an exception to article 315 of the Código Penal, which makes it illegal for a person to use violence, threats, or deceit to sequester or retain another with the goal of marrying that person. Article 86 rewards the man who uses violence to attain his goal of marrying the woman he sequestered or retained for that purpose, so long as the woman continues to live with him after his violence has ceased. His reward is that the woman, or female adolescent, cannot challenge the marriage on the ground that it was obtained by the use of violence.

Moreover, the text of article 86 represents the institutionalized approval of domestic violence against women. The provision guarantees ineffective legal protection for women whose husbands beat them and who are trapped in the abuse relationship. The great majority of women in Bolivia live in de facto economic subordination to men. And many women do not leave abusive relationships because of fear of the consequences.

72 C. Familia, supra note 2, at art. 86 (text in brackets was added to increase the clarity of the English translation) (Parker Palmer trans.).
73 C. Penal, supra note 6, at art. 315.
According to Maria Da Penha Maia Fernandes of Brazil, the violence she received from her husband, including attempted murder, became unbearable, but she was too afraid to take steps to obtain a separation.74

Article 86 essentially traps those women who cannot leave the home after the violence has ceased, and thus cuts these women off from perhaps their only avenue of escape: challenging the marriage on the ground that it was obtained by the use of violence. Men could theoretically find themselves in this same situation, but the practical realities of contemporary Bolivian society suggest that such a role reversal is perhaps non-existent, or is at very best extremely rare.

**Reasonably Unequal Situations.** Article 81 in application applies to people in reasonably unequal situations. In reality, article 86 applies to women who are forced to marry by the use of violence, and not to men. Female adolescents who find themselves in such a situation will almost always be in a position of subordination to the abusive man, who is generally an adult. The abusive adult male and the female adolescent are certainly in reasonably unequal situations.

Article 81, in practice, offers protection to abusive men, rather than extra protection to the vulnerable women trapped in such situations. One would think that the law would make strides to protect women from being trapped in such abusive relationships. However, article 86 provides the exact mechanism necessary to completely trap them. It takes advantage of the unequal situation of men and women, rather than discriminate in such a way as to help equalize gender relations.

When article 86 is combined with articles 44 and 81, the result is grave. A female adolescent younger than age 14 who is forced to marry through violence, who continues to live with the abusive spouse after the violence ceased, and who conceives a child before age 14, is in a legal marriage, and has absolutely no legal right to challenge the marriage. This amounts to legal exploitation of the vulnerability of women, or, better yet, governmental complicity in a violent, *machista* culture.

**Normative End.** The normative end of article 86 appears to be to offer predictability and stability to the marital relationship obtained through error or by the use of violence.

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To protect such a marital relationship, the victim must, under certain circumstances, be stripped of her right to challenge the marriage on those grounds. In a strictly logical sense, this normative end does justify rationally and objectively the staggeringly disproportionate effect that article 86 has on women.

**Proportionate to the Normative End.** The normative end of article 86 is accomplished by nothing less than stripping the victim of her right to challenge the marriage. This statute allows the culprit to continue living with the victim without any possibility of legal action against the marriage by the victim to recover and restore her rights. So also in a strictly logical sense, article 86 is proportionate to its normative end.

**Reasonable in Light of Constitutional Principles.** Article 86 literally approaches absurdity in light of female adolescents’ constitutional right to live free from violence.75 Article 86 condones and incentivizes a man’s use of violence to force a woman to marry him. A woman in who is psychologically or economically subjugated to a violent man may hesitate to leave upon the cessation of violence. As a result, many women, especially female adolescents who do not have the support or economic resources necessary to live independently, may find themselves miserably trapped by article 86 in marriages with violent men; marriages they never wanted. Article 86 does all but uphold the recognition, enjoyment, and exercise of the female adolescent’s right to live free from violence.

Article 86 also violates the constitutional right to equal protection under the law. Since article 86 in practice applies exclusively to women who suffer violence, it strips women of their right to legal recourse, while providing added protection to violent men. The only effective means of escape for a woman battered into marriage may be her ability to later challenge the marriage on the grounds that she was forced into marriage by the use violence and thereby obtain a separation or divorce. Article 86 dismembers this ability.

**4. Article 317**

Article 317 states, “There will be no place for [penal] sanction when the defendants, in the respective cases, having no impediment whatsoever, enter into marriage with the

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75 NCPE, *supra* note 46, at art. 15(II).
victims, so long as there exists free consent, before the [issuance of the] sentence finalizing the conviction.”

Before focusing specifically on article 317, a review of its complex interaction with articles 44, 81, and 86 of the Código de Familia is in order. The following situation brings the function of these four articles together, and highlights the problem: An adult man rapes a 13-year-old female adolescent. The man then uses violence to force the female adolescent to marry him. Shortly after marriage his use of violence ceases. The female adolescent continues to live with the adult man, and conceives a child while under the age of 14.

Under article 44, this marriage is illegal. However, article 81 renders the marriage legally valid because the female adolescent conceived a child within the marriage, even though she lacked the required 14 years of age. Her will/consent to marry was obtained by the use of violence, and she continued to live with the violent husband after the violence ceased. Thus, under article 86 the female adolescent has no legal recourse to challenge the marriage on this ground that she was forced into marriage through the use of violence.

Moreover, the adult man’s crime of raping the 13-year-old female adolescent is extinguished as a matter of law. The legally valid marriage surely satisfies the freely given consent requirement of article 317. The fact that the female adolescent continued to live with the violent husband after the cessation of violence would be considered evidence of her freely given consent.

The net effect of the interaction of these four articles is to strip the young victim of all legal recourse for the crimes committed against her, to leave her in a state of defenselessness. These articles punish vulnerability and reward brutality. Aside from the interaction of article 317 with these other legal provisions, article 317 is impermissibly discriminatory in its own right. It, just as articles 44, 81, and 86 of the Código de Familia, fails the constitutional test for permissible discrimination.

Reasonably Unequal Situations. The victim of sexual violence and the perpetrator of that violence undoubtedly are in reasonably unequal situations. The victim is almost always in a psychologically subordinate position to the aggressor, which casts serious

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76 C. Penal, supra note 6, at art. 317 (Parker Palmer trans.).
doubt on the victim’s ability truly to give “free consent” in marriage to the aggressor. And precisely because of this, one would think that the law would preserve the right of the victim to press charges against the aggressor, regardless of marriage. However, article 317 does the opposite.

Normative End. The apparent normative end of article 317 is to increase predictability and stability in the marital relationship between the victim and the sexual aggressor. This normative end targets the marriage of a male aggressor with a female victim, as in practice the law applies exclusively to such marriages. With this normative end as the syllogistic premise, it follows in a strictly logical sense that the victim of sexual aggression ought to be stripped of her right to seek legal recourse for the sexual violence committed against her, and society of its right and obligation to punish criminals (i.e. the sexual aggressors who offer to marry their victims). However, when this normative end is placed within a broader context of constitutionally protected rights, it does not rationally and objectively justify stripping a female adolescent of her constitutionally protected right to redress for the sexual violence committed against her.\footnote{NCPE, supra note 46, at art. 14(II) (the right to equal protection before the law).}

Proportionate to the Normative End. Article 317 certainly is proportionate to the normative end of protecting marriage between sexual aggressors and their victims. It does just that, and perhaps no other provision would fully protect a marriage between sexual aggressors and their victims. Without this provision, there would always be the risk that the victim might press charges against the aggressor for the sexual violence he committed. And though by pressing charges the victim would vindicate her constitutional rights, such action would disturb the marriage. Moreover, if the sexual aggressor has already been prosecuted and convicted, and then marries his victim, the sexual aggressors crimes are legally forgiven. Article 317 accomplishes its goal. However, the proportionality of article 317 to its normative end does not mask the threat that it poses to all women, including female adolescents.

Reasonable in Light of Constitutional Principles. Article 317 is unreasonable in light of the right to equal protection before the law, the right to live free from violence, and the right to a full development. In theory, article 317 is gender neutral in its application. However, in practice article 317 strips women, including female adolescents,
of their right to legal recourse for the sexual violence committed against them and offers extra protection to male sexual aggressors. The male sexual aggressor finds in article 317 insulation from criminal prosecution. His victim finds exacerbated vulnerability, and loss of legal protection. It is clear that article 317 does nothing to recognize, or to uphold the enjoyment and exercise by female adolescents of the right to equal protection before law.

Moreover, article 317 creates an incentive for sexual aggressors to force victims to marry them. It is not difficult to imagine feigned consent by a psychologically subjugated victim of sexual violence who has been threatened by her aggressor. This law does nothing to discourage violence against women, but rather rewards the sexual aggressor who can marry his victim. This incentive to use violence, particularly sexual violence against women, violates the right to live free of violence.

Article 317, especially along side articles 44, 81, and 86, deeply threatens the female adolescent’s right to a full development. The female adolescent is threatened with sexual violence, and faced with the prospect of marriage to her aggressor. Such a marriage would be catastrophic, and would most likely arrest the developmental process of the female adolescent. Thus, by providing the possibility of such a marriage, article 317 does not uphold the recognition, enjoyment, or exercise of the right to a full development, and that violates that right.

D. Conclusion of Constitutional Law Analysis

In sum, article 44, 81, and 86 of the Código de Familia and article 317 of the Código Penal impermissibly discriminate against female adolescents and violate their constitutionally protected rights to equal protection under the law, to live free from violence, and to a full development. These articles thus fail constitutional scrutiny under the doctrine of equality. The Bolivian legislature should therefore modify articles 44 and 81, and should repeal articles 86 and 317.

V. VIOLATIONS UNDER INTERNATIONAL LAW

The argument below is a challenge in abstracto to articles 44, 81, and 86 of the Código de Familia and article 317 of the Código Penal, and is ripe for presentation to the Inter-American Commission on Human Rights (hereinafter “the Commission”) in thematic hearing. This challenge, however, would not be admissible within the Commission’s individual case system, which redresses only concrete instances of
violations of human rights to identified victims.\textsuperscript{78} No concrete instance of violation has been identified, here, mainly due to the lack of transparency in Bolivia’s case reporting system among lower courts.

This proposed challenged begins with a review of the relevant rights and obligations under international law, which is followed by an analysis of the violations of those rights and a few conclusory remarks. In short, each of the articles challenged violates numerous human rights.

A. Female Adolescents’ Protected Rights

Female adolescents’ protected rights and Bolivia’s obligations are found in both American agreements and non-American agreements, all of which Bolivia has ratified and which are binding on Bolivia. These agreements include the American Convention on Human Rights\textsuperscript{79}, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women\textsuperscript{80}, the Convention on the Elimination of All Forms of Discrimination Against Women\textsuperscript{81}, and the Convention on the Rights of the Child\textsuperscript{82}. The Commission utilizes each of these treaties in its reports and case law, including the non-American agreements.\textsuperscript{83} Also, Bolivia is subject to the jurisdiction of the Commission.\textsuperscript{84}

Female adolescents have many rights under these binding treaties, but for present purposes only a few are applicable. These are: the right to equal protection before the law; the right to freely enter into marriage; the right to a full development; and the right to exercise these rights free from discrimination.

\textsuperscript{81} CEDAW, supra note 58, at art. 1.
\textsuperscript{83} The Inter-American Commission has incorporated this definition into its case law in case Maria Eugenia Morales De Sierra v. Guatemala, supra note 78, at ¶ 32.
\textsuperscript{84} Bolivia ratified the Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3, on Sept. 25, 1950, which now subjects Bolivia to the jurisdiction and authority of the Commission.
Female adolescents are entitled, free from all forms of discrimination, to equal protection before the law. This right is enshrined in Article 24 of the ACHR, Article 4 of the CBDP, and Article 15.1 of the CEDAW.

Also, female adolescents have the right to freely enter into marriage on the basis of equality. Article 17.2 of the ACHR guarantees to women and men the right to marry at an appropriate age, under the conditions set in domestic law, so long as the conditions set in domestic law do not violate the principle of non-discrimination. Article 17.3 of the ACHR prohibits all marriage entered into without the free and full consent of each intending spouse.

In addition, female adolescents have the right to a full development on the basis of non-discrimination. Article 6.2 of the CRC guarantees to all children, including female adolescents, the right to full development. Article 2 of the CRC guarantees that the State shall protect this right on the basis of non-discrimination. Article 3 of the CEDAW also guarantees to female adolescents the right to a full development.

Central to each of these rights just mentioned is their exercise free of discrimination on the basis of sex. The CEDAW defines discrimination as: “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

Also, the CBDP includes discrimination on the basis of sex within its conception of violence against women. The convention defines violence as: as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or
suffering to women, whether in the public or the private sphere.\textsuperscript{94} Under Art. 6, the woman’s right to be free from violence includes the right to be free from discrimination.\textsuperscript{95}

**B. Bolivia’s Obligations**

With regard to Bolivia’s obligations, the State of Bolivia has a general obligation to prohibit discrimination against female adolescents. Article 1 of the ACHR guarantees that the rights therein will be respected and recognized without discrimination on the basis of sex.\textsuperscript{96} The CBDP, in article 7(h) requires the State to take all legislative and other measures to eliminate discrimination against women.\textsuperscript{97} The CEDAW, in article 2(b) places upon the State the general obligation to prohibit discrimination against women.\textsuperscript{98} Also, the CRC in article 2(1) requires the State to respect and to ensure the rights of adolescents without discrimination based on sex.\textsuperscript{99}

More specifically, the State of Bolivia has the obligation to eliminate legislation that institutionalizes or sustains impermissible or de jure discrimination against female adolescents. Under article 7(e) of the CBDP, the state has the obligation to “take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women.”\textsuperscript{100} The CEDAW, in article 2(f), similarly requires the State to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”\textsuperscript{101} In addition, the Commission has held that de jure discrimination is a flagrant violation of the international commitments assumed by States.\textsuperscript{102

\textsuperscript{94} CBDP, supra note 80, at art. 1.
\textsuperscript{95} Id. at art. 6.
\textsuperscript{96} ACHR, supra note 79, at art. 1.
\textsuperscript{97} CBDP, supra note 80, at art. 7(h).
\textsuperscript{98} CEDAW, supra note 58, at art. 2(b).
\textsuperscript{99} CRC, supra note 82, at art. 2(1).
\textsuperscript{100} CBDP, supra note 80, at art. 7(e).
\textsuperscript{101} CEDAW, supra note 58, at art. 2(f).
C. Commission’s Test for Permissible Discrimination

The Commission’s test for permissible discrimination requires that a statutory distinction: (1) be based on reasonable and objective criteria; (2) pursue a legitimate aim; and (3) employ “means which are proportional to the end sought.”\(^{103}\) Moreover, statutory distinctions based on sex “necessarily give rise to heightened scrutiny,”\(^{104}\) and “very weighty reasons” must be put forward to justify them.\(^{105}\) This notion of “very weighty reasons” does not include the categories of “traditional values,” “morals” and “good customs.”\(^{106}\) These categories cannot justify any statutory distinction against women, and thus any legal distinction supported by these categories violates the right to equal protection before the law.\(^{107}\)

D. Application of the Commission’s Test

In application, the Commission’s test for permissible discrimination is broader than the test under Bolivian constitutional law. One requirement of the Commission’s test focuses on the legitimacy of the statute’s aim, which inquiry is strictly prohibited under Bolivian constitutional law. The assessment of the legitimacy of an aim (or normative end) considers whether the aim in itself is reasonable, which is distinct from the assessment of whether a given norm is proportional and justified in relation to its purported aim.

The proportionality requirement of the Commission’s test is the same as that under Bolivian constitutional law. This requirement is explored above in section V(B), where it is established that articles 44 and 81 are disproportional to their purported aims, and articles 86 and 317 proportional to theirs. To avoid unnecessary repetition, the analysis that follows focuses only on the first two requirements of the Commission’s test.

Before beginning the separate analysis of each article, it is useful consider the first requirement of the Commission’s test that the statutory distinction be based on reasonable and objective criteria. Each of the articles in question shares a common criterion: sex. Sex is explicitly a criterion in the text of articles 44 and 81, and is the dispositive criterion of articles 86 and 317 in their application.

\(^{103}\) Maria Eugenia Morales De Sierra v. Guatemala, supra note 78, at ¶ 31.
\(^{104}\) Id. at ¶ 36.
\(^{105}\) Id.
\(^{106}\) Access to Justice, supra note 32, at ¶ 306.
\(^{107}\) Id.
Sex as a criterion is certainly reasonable and objective. The crucial inquiry with regard to these articles is, therefore, whether the purpose for which sex is used as a criterion is legitimate; i.e. whether the aim of the legal provision is legitimate. Thus, the inquiry turns to the remaining question under the Commission’s test: Whether each article in question pursues a legitimate aim.

1. Article 44

The text of article 44 reads, in relevant part, “The man before 16 years of age cumplidos and the woman before 14 years of age cumplidos, cannot enter into marriage . . .”108 Based on the text of article 44, its aim appears to be to protect the societal desire that those under the age of 18 be able to marry. In light of international standards for marriage, the aim of article 44 is legitimate. Article 17.2 of the ACHR requires that the State set an appropriate age for marriage.109 Article 16(2) of the CEDAW states with regard to the marriage of children that States shall specify a minimum age for marriage.110 These articles, taken together, imply that to drop the legal age for marriage below 18 years of age is to some extent permissible.

Nevertheless, this otherwise legitimate aim does not provide reasons sufficient to justify the *de jure* discrimination that article 44 establishes against female adolescents by setting a lower age for them than for males. The Commission, in 2007, reminded Bolivia that statutory distinctions based on reasons of sex are “strictly scrutinized as to their necessity and proportionality,”111 and noted that the civil society of Bolivia has repeatedly criticized article 44.112 Article 44’s discrimination based on sex is not necessary to accomplish its purported aim. Moreover, the lower age set for female adolescents exposes them to increased psychological and medical risks (such as depression and complications during pregnancy), as reviewed above.113

2. Article 81

Article 81 states, “A marriage entered into by one or both spouses while below the age set in article 44 cannot be impugned when there has transpired one month since the

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108 *C. Familia*, supra note 2, at art. 44 (Parker Palmer trans.).
109 *ACHR*, supra note 79, at art. 17.2.
110 *CEDAW*, supra note 58, at art. 16(2).
112 *Id.*, at ¶ 305.
113 See supra pp. 3-5 and notes 8-21.
spouse [or spouses] obtained the required age or when the woman without having the required age has conceived.”114 Article 81 validates the otherwise illegal marriage of a female adolescent below age 14 if she conceives a child within the marriage while under age 14.

As mentioned above, Article 81 appears to pursue two aims, the first of which safeguards traditional Bolivian values and practices. The first is to protect early marriage, which is a common practice in rural Bolivia. The second is to protect pregnant female adolescents from exile from their communities, also a common practice in rural Bolivia.

Both of these aims are legitimate. The first, protection of early marriage, is to some extent permissible under international law. The second aim is also legitimate, and is in fact admirable. Protecting pregnant female adolescents from exile from their communities is certainly a noble goal. However, as explained above in section xxxx, the means employed to accomplish these statutory aims, or goals, are wildly disproportionate and unnecessary.

3. Article 86

Article 86 states, “The marriage is annulable when the will [to marry] has been obtained through violence or has been given through error by one of the persons entering marriage. The [legal] action corresponds to the spouse who suffered the violence or incurred the error; but [the spouse who suffered violence or incurred error] cannot bring [a legal action] if there was co-habitation after the violence ceased or [after] the error was known.”115

The aim of this statute appears to be to offer predictability and stability to the marital relationship obtained by the use of violence. This aim reflects the notion that violence against women is tolerable, and is in fact socially acceptable. It also affirms the use of violence as a legitimate means of obtaining marriage.

The aim of article 86 reinforces harmful practices that degrade women, such as the use of violence to force a woman into marriage or to maintain a woman in a psychologically subordinate position, trapped in fear. It also sustains de facto discrimination against women, and offers protection to violent men. In practice, this aim

114 C. Familia, supra note 2, at art. 81 (Parker Palmer trans.).
115 C. Penal, supra note 6, at art. 86 (the text in brackets was added to increase the clarity of the English translation) (Parker Palmer trans.).
targets relationships between violent men and battered women. And in light of the Commission’s recognized goals of gender equality in Americas, the aim of article 86 is illegitimate.116

4. Article 317

Article 317 provides that “There will be no place for [penal] sanction when the defendants, in the respective cases, having no impediment whatsoever, enter into marriage with the victims, so long as there exists free consent, before the [issuance of the] sentence finalizing the conviction.”117

Article 317 appears to pursue two aims: to increase the predictability and stability of the marital relationship between the victim and the sexual aggressor; and to protect the sexually aggressed female adolescent from exile from her community. The first aim diminishes the severity of the crime committed by the sexual aggressor. It rests on the notion that aggressors ought to marry their victims; that it is socially desirable for the victim to marry her aggressor. It presumes that society ought to pardon the crimes of sexual aggressors who manage to marry their victim, and that marrying the victim somehow makes sexual aggression “okay.”

When this aim is placed within its social context of Bolivia’s male dominant society, it offers predictability and stability to the aggressor, not to the victim. To offer additional security to the aggressor is to institutionalize an already existent asymmetry of power, making fundamental inequality the status quo for the victim. And in light of the Commission’s goals of gender equality, this aim too is illegitimate.

Sadly, the Constitutional Tribunal of Bolivia has not ruled on the constitutionality of article 317. In 2007, however, the Commission expressed concern about article 317. The Commission stated that pursuant to article 317, “a person convicted of a sexual crime can win remission of punishment by marrying the victim before the sentence is confirmed.”118 The Commission then reminded Bolivia that this type of de jure discrimination against women is a flagrant violation of international law.119

116 Maria Eugenia Morales De Sierra v. Guatemala, supra note 78, at ¶ 36.
117 C. Penal, supra note 6, at art. 317 (Parker Palmer trans.).
118 Access to Justice, supra note 32, at ¶ 304.
119 Id. at ¶ 308.
In 2009, the Commission again expressed its concern about article 317 of the Código Penal. The commission stated, "Article 317 of the Criminal Code . . . allows culprits to evade punishment by marrying their victims," and that this provision violates international standards of women’s rights.\textsuperscript{120} The Commission again declared that provisions such as article 317 constitute \textit{de jure} discrimination, and violate internationally protected rights.\textsuperscript{121} Unfortunately, the Bolivian Government has not repealed article 317, and thus it remains the law of the land in Bolivia.\textsuperscript{122}

\textbf{E. Conclusion of International Law Analysis}

As demonstrated, each of the articles fails the Commission’s three part test for permissible discrimination. Despite the fact that each article employs a reasonable and objective criterion, sex, each suffers from other defects. Article 44 employs means which are disproportional to the ends sought, though the ends sought are legitimate. Article 81 does the same. Article 86 employs means proportional to its aim, but pursues an illegitimate aim. And article 317 suffers the same defect as article 86.

As a result, these articles violate female adolescents’ internationally protected rights. Articles 44 and 81 violate the rights to equal protection before the law, the right to a full development, and the right to enjoy these rights free of discrimination. Articles 86 and 317 violate the rights to equal protection before the law, the right to freely enter into marriage, the right to a full development, and the right to enjoy these rights free of discrimination. Moreover, by maintaining these discriminatory legal provisions, Bolivia is in violation of its international legal obligations not to discriminate against female adolescents, and more specifically to eliminate legislation that institutionalizes or sustains impermissible or \textit{de jure} discrimination against female adolescents.

\textbf{VII. GENERAL CONCLUSIONS}

The legal provisions here challenged—articles 44, 81, and 86 of the Código de Familia, and article 317 of the Código Penal—establish a legal framework that institutes \textit{de jure} discrimination and sustains \textit{de facto} discrimination against female adolescents. As result, these legal provisions violate Bolivian female adolescents’ constitutional and international human rights. Moreover, these legal provisions have a harmful effect on

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{120} \textit{Follow-Up Report}, supra note 102, at ¶ 194.
  \item \textsuperscript{121} \textit{Id.} at ¶¶ 195, 196.
  \item \textsuperscript{122} \textit{C. Penal}, supra note 6, at art. 317.
\end{itemize}
\end{footnotesize}
public opinion of the female adolescent and her status within the family, community, and society. The legal provisions also reinforce machista cultural tendencies that harm female adolescents and their process of development, and as a result harm public opinion about the female adolescent and her status within the family, the community, and within Bolivia society as whole.

To rectify this situation, the Bolivian Government should: 1) modify article 44 of the Código de Familia to include a uniform age—preferably age 16 or higher—for both female and male adolescents; 2) eliminate the provision in article 81 of the Código de Familia that applies only to female adolescents who have conceived a child; 3) repeal article 86 of the Código de Familia and article 317 of the Código Penal; and 4) fulfill its legal obligation to eliminate harmful customs and practices which constitute discrimination against women, including physical and sexual violence.
APPENDIX “A”

Código de Familia:

Article 44

English Translation: A man before 16 years of age cumplidos and a woman before 14 years of age cumplidos, cannot enter into marriage. The judge has discretion with regard to the age requirement in grave and justified cases.

Original Spanish: El varón antes de los dieciséis años cumplidos y la mujer antes de los catorce años cumplidos, no pueden contraer matrimonio. El juez puede conceder dispensa de edad por causas graves y justificadas.

Article 81

English Translation: A marriage entered into by one or both spouses while below the age set in article 44 cannot be impugned when there has transpired one month since the spouse [or spouses] obtained the required age or when the woman without having the required age has conceived.

Original Spanish: El matrimonio contraído por uno o ambos cónyuges antes de la edad fijada por el Artículo 44 no puede ser impugnado cuando ha transcurrido un mes desde que se llegó a la edad requerida o cuando la mujer sin tener esa edad ha concebido.

Article 86

English Translation: The marriage is annulable when the will [to marry] has been obtained through violence or has been given through error by one of the persons entering marriage. The [legal] action corresponds to the spouse who suffered the violence or incurred the error; but [the spouse who suffered violence or incurred error] cannot bring [a legal action] if there was co-habitation after the violence ceased or [after] the error was known.

Original Spanish: El matrimonio es anulable cuando la voluntad ha sido obtenida por violencia o ha sido dado por error en la persona del otro contrayente. La acción corresponde al cónyuge que sufrió la violencia o incurrió en el error; pero no puede proponerla si hubo cohabitación después de que cesó la violencia o conoció el error.
Código Penal:

Article 317

English Translation: There will be no place for [penal] sanction when the defendants, in the respective cases, having no impediment whatsoever, enter into marriage with the victims, so long as there exists free consent, before the [issuance of the] sentence finalizing the conviction.

Original Spanish: No habrá lugar a sanción cuando los imputados, en los casos respectivos, no teniendo impedimento alguno, contrajeran matrimonio con las víctimas, siempre que existiera libre consentimiento, antes de la sentencia que cause ejecutoria.