



Thanks to progressive courts and the pressure of organised indigenous and social movements, Latin American countries are at the forefront of formally acknowledging indigenous justice systems.

## RECOGNITION OF INDIGENOUS JUSTICE IN LATIN AMERICA

### SUMMARY

Throughout most of the 19<sup>th</sup> and 20<sup>th</sup> centuries, the reality of indigenous communities has largely been one of political subjugation and economic exploitation. The aim of Latin American nation-states was largely to make indigenous communities disappear and integrate their members into the national culture.<sup>1</sup> Indigenous movements and new trends in international law have demonstrated the failure of integration and assimilation policies, opening the way for policies that take into account multiculturalism and legal pluralism. Since the early 1990s, Latin American countries have been incorporating specific rights for indigenous communities into their legislation, which then paved the way for greater legal recognition of indigenous systems of justice. This Brief begins by outlining some of the features of indigenous governance systems in Latin America. It then analyses the ways Latin American countries have aimed to give legal recognition to these indigenous systems, including the many challenges that were encountered in the process. It concludes with lessons learned that may be useful for countries in other regions considering how best to address the challenge of legal recognition of indigenous justice systems.



### INTRODUCTION TO RECOGNISING INDIGENOUS JUSTICE IN LATIN AMERICA

Indigenous communities have an ancestral presence; however, over the last decades of the 20<sup>th</sup> century, their struggles have been expressed in modernised forms of political participation and their demands have been reconfigured in the language of rights. These new forms of indigenous struggle are known as the Contemporary Indigenous Movement (CIM).<sup>2</sup> Through significant and sometimes violent mobilisations and confrontations, the CIM in countries such as Bolivia, Colombia, Ecuador, Guatemala, Mexico and Panama, have demonstrated that their cultures have a historical viability which is still relevant

<sup>1</sup> Niezen, R. 2003. *The Origins of Indigenism - Human Rights and the Politics of Identity*. University of California Press, Berkeley.; Borshay Lee, R. 2006. [Twenty-first Century Indigenism](#). *Anthropological Theory* 6(4) 455-479.

<sup>2</sup> For background reading, the author recommends: Langer, E., Muñoz, E. (eds). 2003. *Contemporary Indigenous Movements in Latin America*. Scholar Resources, Inc., Wilmington.; Stavenhagen, R. 2002. Indigenous Peoples and the State in Latin America: An Ongoing Debate. In: Sieder, R. (ed.) *Multiculturalism in Latin America, Indigenous Rights, Diversity and Democracy*. Palgrave Macmillan, New York.; Stavenhagen, R., Iturralde, D. (eds.) 1990. [Entre la Ley y la Costumbre \(Between the Law and Custom\)](#). Instituto Indigenista Interamericano e Instituto Interamericano de Derechos Humanos, Mexico City.; Mejía Piñero, M., Sarmiento Siva, S. 1987. *La Lucha Indígena: Un Reto a la Ortodoxia (The Indigenous Struggle: A Challenge to Orthodoxy)*. Siglo XXI Editores, Mexico City.; Barre, M. 1983. *Ideologías Indigenistas y Movimientos Indios (Indigenous Ideologies and Indian Movements)*. Siglo XXI Editores, Mexico City.; Davalos, P. (ed.) 2005. [Pueblos Indígenas, Estado y Democracia \(Indigenous Peoples: State and Democracy\)](#). CLACSO Libros, Buenos Aires.



for organising their social, political and economic lives and offers important contributions to universal culture.

One of the CIM's most significant demands of Latin American states has been the recognition of their norms, institutions and procedures for justice. The slow but progressive recognition of indigenous jurisdiction by ordinary justice systems<sup>3</sup> has served to legally formalise ancestral practices. Indigenous justice systems' mechanisms are usually expedient, economical and culturally adequate, as they bring justice closer to the people within the communities, reduce the burden on the ordinary state institutions and realise the rights granted by international bodies for self-determination in indigenous communities.<sup>4</sup> When appropriately coordinated with ordinary justice systems, it favours the specialisation of both structures, lowers rates of impunity and is often seen to be a better use of public resources. Independently of the level of agreement that these indigenous institutions can reach within dominant society, it should be recognised that for centuries they have been in charge of maintaining social peace and harmony and providing a fair method for channelling the demands of their communities' populations, despite the colonial context in which they developed.<sup>5</sup>

## WHAT IS THE RECOGNITION OF INDIGENOUS JURISDICTION?

Indigenous jurisdiction is an ancestral means of resolving internal conflicts and today it is a method of governance. As used in this Brief, the right to indigenous jurisdiction involves the following:

- Indigenous communities have the collective right to create and apply their own norms and regulations
- The internal normative systems of indigenous communities should be recognised by the state

- Traditional authorities of indigenous communities have the power to resolve their internal conflicts according to their own normative systems in different areas such as civil, family, criminal or administrative, whilst respecting certain basic human rights as interpreted within an intercultural framework
- Ordinary justice systems respect the decisions of indigenous authorities when issued within the sphere of their competencies

## COMMON CHARACTERISTICS OF LATIN AMERICAN INDIGENOUS JUSTICE SYSTEMS

Although a large number of different practices, processes and forms of indigenous justice have been documented, with different levels of permeability in these traditional cultures, certain common principals of indigenous processes of conflict resolution can be found across the region:

- Procedures are usually oral, simple and flexible, and there is great importance placed on testimonial evidence and community participation, as was documented by Laura Nader in a Zapotec community<sup>6</sup> and Jane Collier with the Tzotziles in Zinacantán.<sup>7</sup>
- The authorities are group members and typically the justice and deliberation processes are orientated to dialogue. Specific solutions are created for every case, and depend not only on the ability and management of the authority, but also on the different sides' attitudes and dispositions to finding a means to resolve any imbalances caused by the conflict. These practices have been documented in diverse indigenous groups throughout the continent, such as councils of elders in Mexico,<sup>8</sup> *rondas campesinas* in Peru,<sup>9</sup> *sagladummagan* in Panama<sup>10</sup>

<sup>3</sup> In this Brief, we refer to 'ordinary justice' as the justice system exercised by the state's formal institutions.

<sup>4</sup> Anaya, J. 1996. *Indigenous Peoples in International Law*. Oxford University Press, New York.; Lillich, R. et al. (eds). 2006. *International Human Rights: Problems of Law, Policy, and Practice*. Aspen Publishers, New York.

<sup>5</sup> Bohannon, P. 1989. *Justice and Judgment Among the Tiv*. Waveland Press Inc.; Glukman, M. 1965. *Politics, Law and Ritual in Tribal Society*. Aldine Transaction, New Brunswick.; Comaroff, J. 2002. Governmentality, Materiality, Legality, Modernity: On the Colonial State in Africa. In Deutsch, J-G. Probst, P., Schmidt, H. (eds). 2002. *Perspectives on African Modernities*. James Currey, London.; Nader, L. 1990. *Harmony Ideology: Justice and Control in a Zapotec Mountain Village*. Stanford University Press, Stanford.; Mamdani, M. 1996. *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*. Princeton University Press, Princeton.; Hoekema, A. 2001. Reflexive Governance and Indigenous Self-Rule: Lessons in Associative Democracy. *Critical Review of International Social and Political Philosophy* 4 (1) 157-186.; Martínez, J-C. 2011. *La Nueva Justicia Tradicional: Interlegalidad y Ajustes en el Campo Jurídico de Santiago Isxtayutla y Santa María Tlahuitoltepec* (The New Traditional Justice: Interlegality and Adjustment in the Legal Field in Santiago Isxtayutla and Santa María Tlahuitoltepec). Universidad Autónoma "Benito Juárez" de Oaxaca, Mexico.; Sánchez Botero, E., Jaramillo, I. 2001. *La Jurisdicción Especial Indígena (Indigenous Special Jurisdiction)*. Procuraduría General de la Nación, Bogotá.

<sup>6</sup> Nader 1990, above n 3.

<sup>7</sup> Collier, J. 1973. *Law and Social Change in Zinacantan*. Stanford University Press, Stanford.

<sup>8</sup> Sandstrom, A., García Villegas, H. (eds.). 2005. *Native Peoples of the Gulf Coast of Mexico*. The University of Arizona Press, Tucson.

<sup>9</sup> Palomino, G. 1996. *The Rise of the Rondas Campesinas in Peru*. *Journal of Legal Pluralism* 36111-123.

<sup>10</sup> Lecumberry, M. 2006. *San Blas: Molas and Kuna Traditions*. Txango Publications, Panama City.



and the *lonkos* in Mapuche communities in Chile and Argentina.<sup>11</sup>

- Solutions to conflict tend to provide compensation for damages, to dynamically transform the subjective perceptions of the conflict, and to 'heal' any wounded emotions. For example, Jane Collier documented that in Tzotzil justice in Zinacantán, in the Chiapas area of Mexico, the objective of conflict resolution efforts was to "calm angry hearts."<sup>12</sup>
- In terms of naming authorities for solving conflicts or administering justice, three main methods can be observed: a) meritocracy, or when a person is nominated because of having provided some kind of service to the community; b) having spiritual training; or c) family position, as is the case of the *salías* for the Kuna in Panama, the *maloqueros* in Amazonian indigenous groups in Colombia, or the governorships formed by the *marakame* of the Wixarika in Mexico. In the majority of cases, the authorities are elected by assemblies, and beyond knowing a person and their qualities, the election has more to do with addressing the specific moment in the community. In some cases, the position is temporary and in others it is life-long. This means that people's security in how their cases are managed depends on the care with which they selected their authorities and the legitimacy that they achieve within their community during their lifetime.
- A persistent spirit of community, which is manifested in collective work and property, marks the role of individuals in society. This vision of the world is fundamental to the way that solutions to conflicts are created. In the majority of communities, indigenous philosophy understands an individual as an entity fundamentally united with their community, so the understanding and exercising of individual rights comes from the collective rights of the group, which provides the basis for the collective as well as ensuring its continuity.<sup>13</sup>
- During conflict resolution processes, spiritual beliefs and moral references come into play which give cohesion to

the community. There is an assumption that disputes break the social and the transcendental order, which is why they often use expiatory measures and rituals to re-establish the social order and the connection between the social and spiritual. In the social, political and religious lives of indigenous communities in Latin America, there are designated individuals who play the role of mediating between the political and spiritual realms to maintain individual health and a specific type of social order framed within a spiritual logic. Examples include: *iloles* within Tojolabales communities in Chiapas, Mexico; the *xemabiëë* of the Mixes in Oaxaca, Mexico; the *ajqui'j* of the Mayas in Guatemala; the *saila* of the Kuna community in Panama; the *mamo* in the Kogui culture in Colombia; the *machi* of the Mapuches in Chile; and the *yatiri* in Aymara communities in Bolivia and Peru.<sup>14</sup>

- The procedures and punishment systems are considered more culturally appropriate than those of the state. Although they have generally been used for many generations, there is also a dynamism that adapts these principles to new situations. Mayan communities in Guatemala<sup>15</sup> and the Aymaras in Peru and Bolivia have made multiple adaptations to their justice systems to make them appropriate in their post-war and urban contexts.<sup>16</sup>

## STRATEGIES TO RECOGNISE INDIGENOUS JURISDICTION IN LATIN AMERICA

What are some of the different ways Latin American countries are effectively recognising the legality of indigenous jurisdiction? First we describe some of the general strategies implemented across different countries in the region, then, the following section highlights the experiences of a selection of individual countries.

### Key Strategies

Latin American countries have made efforts to recognise indigenous jurisdiction in three key ways. The first is ratifying international agreements and instruments related

<sup>11</sup> For more information, see: <http://ancientweb.org/explore/country/Chile>.

<sup>12</sup> Collier 1973, above n 6.

<sup>13</sup> Olivé, L. 2005. A Philosophical Debate Concerning Traditional Ethnic Groups in Latin America and the History of Philosophy. In Salles, A., Millán-Zaibert, E. (eds.). 2005. *The Role of History in Latin American Philosophy: Contemporary Perspectives*. State University of New York Press, Albany.

<sup>14</sup> To find out more about spirituality in indigenous communities: Taiaiake, A., Corntassel, J. 2005. [Being Indigenous: Resurgences Against Contemporary Colonialism](#). *Government and Opposition* 40 (4) 597-614.

<sup>15</sup> Sieder, R. 2003. Renegotiating 'Law and Order': Judicial Reform and Citizen Responses in Post-War Guatemala. *Democratization* 10 (4) 137-160.

<sup>16</sup> Peña Jumpa, A. 2001. [Community-Based Judicial Power: Alternative Paradigms for Judicial Reform, The Case of the Aymara of Peru](#). *Beyond Law* 23.

For more information on the urban reality of indigenous people in Bolivia: Crowder, J. 2007. *Aymara Migrants in El Alto, Bolivia: A Photographic Essay*. In Hutchison, R., Kruse, J. (eds). 2007. *Ethnic Landscapes in an Urban World*. *Research in Urban Sociology* 8, 183-198. Elsevier, Amsterdam.





to indigenous rights. One effective measure that all Latin American countries have taken is to ratify International Labour Organization (ILO) Convention No. 169, which recognises the right of indigenous communities to use their regulatory systems or customary laws in the resolution of internal conflicts. Another important and more recent measure has been the signing - by the majority of Latin American countries - of the United Nations Declaration on the Rights of Indigenous Peoples, which establishes respect for indigenous communities' legal and political institutions.

A second important measure has been the recognition, to varying degrees, of indigenous justice systems within countries' constitutions. The constitutions of Bolivia, Ecuador and Colombia are those which best guarantee the right to self-determination of indigenous communities and the legitimacy of their own norms and institutions.

The third and final strategy in countries with a positivist tradition, such as in Latin America, is to undertake measures to ensure that judges and authorities use and apply the human rights principles included in their constitutions and in international treaties over and above their secondary laws. This would be the equivalent to generating precedents in common law systems.

The majority of Latin American countries use their constitutions as a means of obliging judges to interpret their internal legislation with regard to constitutional and international human rights principles. This is commonly referred to as diffuse constitutional control, meaning that any judge in the country, whatever the area, location or court, is authorised to interpret the constitution. On the other hand, there are judiciary branches that regard the interpretation of the constitution as the exclusive right of the constitutional courts - and constitutional law - which means that international treaties for human rights are incorporated on the same level as the constitution, obliging judges to put human rights ahead of internal legislation. With this normative framework interpreted from a human rights perspective, the formal recognition of indigenous justice by ordinary justice systems should be unavoidable. And finally, and particularly in civil law systems, this requires taking measures to ensure that judges and authorities

apply the human rights expressed in the constitution and international legislation above their secondary legislation.

### Country Examples

Although not all constitutions have advanced examples, it is worth highlighting that in practice indigenous justice is a reality throughout Latin America, as are efforts to coordinate it with ordinary justice systems. Different countries have gone about recognising indigenous jurisdiction in different ways.

In Panama, for example, there are regional statutes that give a great deal of autonomy to their indigenous communities and institutions, particularly in the regions of Kuna Yala and Ngöbe-Bugle, that were implemented at the beginning of the 20<sup>th</sup> century. In 1925, there was an indigenous revolution, which had a positive impact on indigenous people having their demands written into legislation.<sup>17</sup>

In Peru, advances have come from indigenous organisations, which have joined with intellectuals and activists to generate greater knowledge regarding indigenous issues and their *rondas campesinas*. This convergence created pressure which ultimately led the Supreme Court of Justice to issue in 2009 its Plenary Agreement No. 1-2009, which recognises *rondas campesinas* and Amazonian justice systems in criminal matters.

In Venezuela, the *los palabrer* institution is still in force for applying the *wayuu* justice system. *Los palabrer* is an institution of the Wayú Population of Colombia and Venezuela, and made up of an independent third party who visits the two parties in conflict to try and build a solution. Despite not having a particularly strong indigenous movement like those of Bolivia and Ecuador, during the constitutional process of 2000, indigenous people voiced demands that had been developed largely in the international arena. The result of their pressure was that the Venezuelan constitution now provides full recognition of indigenous rights.<sup>18</sup>

Something similar happened in Colombia during the constitutional reform process of 1991, which resulted in incorporating a series of specific rights into the country's constitution. Today, although indigenous people are not a large population in terms of percentages, representing

<sup>17</sup> Jackson, E. February 2012. [Dule Revolution Day](#). *The Panama News* 18 (2).

<sup>18</sup> Van Cott, D. 2002. Constitutional Reform in the Andes. Redefining Indigenous-State Relation. In: Sieder 2002, above n 2.



approximately 4% of the total population, their indigenous movement has notoriety and historical force. Without a doubt, the Constitutional Court of Colombia is the judicial entity that has permitted the most progress in indigenous rights in Latin America. That is to say, in comparison with other countries in the region, the advance of indigenous rights has been achieved more through legal decisions than through legislative advances.<sup>19</sup>

The three countries that have made the most progress in recognising indigenous jurisdiction are Bolivia, Colombia and Ecuador,<sup>20</sup> and all three countries have powerful indigenous movements. In Colombia and Ecuador, there are important national organisations for these movements: the [National Indigenous Organisation of Colombia \(ONIC\)](#) and the [Confederation of Indigenous Nationalities of Ecuador \(CONAIE\)](#). A large part of the Bolivian indigenous movement is grouped into the [Confederation of Indigenous Peoples of Bolivia \(CIDOB\)](#), which along with the coca growers association, supported the political movement that brought to power Evo Morales, the current Bolivian president and the country's first indigenous leader. Morales' political party Movement Towards Socialism (*Movimiento al Socialismo* - MAS) formed an important alliance with the indigenous movement, though their collaboration has now been undermined through the government's building of a road through traditional indigenous territories in the Tipnis reserve.<sup>21</sup>

Mexico is home to the largest indigenous population in Latin America, with more than 10 million people, though there is strong resistance to the recognition of indigenous jurisdiction in the country.<sup>22</sup> During the 1990s, significant advances were achieved which reflected proposals made by the *Zapatistas*, an indigenous guerrilla movement in the southern part of the country, whose success many argue owes more to the force of words and the Internet than to arms.<sup>23</sup> Thanks to the *Zapatista* movement, some key legal successes were achieved; for example, currently there are local laws that recognise ancestral indigenous justice practices in the Mexican states of

Oaxaca, San Luis Potosí and Quintana Roo.

Guatemala, along with Bolivia and Ecuador, is one of the three countries with the highest percentage of indigenous people as a proportion of the total population. It is also arguably the country with the most extreme history of indigenous rights violations.<sup>24</sup> After more than thirty years of civil war, the ensuing peace process led to some gains in indigenous rights and in strengthening the institutions aimed at managing those rights, such as the Justice Centres designed to strengthen the coordination between ordinary and indigenous justice systems.<sup>25</sup>

### **The Distribution of Political Responsibilities: Indigenous versus Ordinary Justice Systems**

In the majority of cases, indigenous justice systems' capacity to solve minor civil and criminal cases has been recognised. However, this limited power granted by the state is far from the reality of actual practices in indigenous communities. Limitations continue to be imposed despite legal advances and constitutionally recognised rights in countries such as Ecuador, Guatemala, Mexico and Peru. For example, Bolivia's recent Law 073 of Jurisdictional Delimitation, approved in December 2010, along with the perceptions of justice officials, further limit the recognition of indigenous rights.<sup>26</sup> Law 073 defines three jurisdictions, each of which is granted with certain competencies, with detractors arguing this goes against the idea that indigenous people should define the competencies they want to be in charge of when exercising their own autonomy.

Such restriction of indigenous communities' legal authority does not carry judicial weight nor does it have a clear material rationality, since the majority of communities revolve issues outside of these frameworks. Although there are many examples where indigenous authorities decide to refer serious cases to ordinary jurisdiction, it is also common for them to resolve cases that are not considered to be under their jurisdiction according to secondary legislation and

<sup>19</sup> Cultural Survival. May 10 2011. [Colombian Court Confirms Indigenous Peoples' Right to Free, Prior, and Informed Consent](#). Online Publication.

<sup>20</sup> Ibid.

<sup>21</sup> For a description of this case: Kenner, D. February 5 2012. [Interviews: Bolivian Indigenous Leaders from CONISUR and CIBOD on Tipnis Conflict](#). *Bolivia Diary*.

<sup>22</sup> Speed, S., Collier, J. 2000. [Limiting Indigenous Autonomy in Chiapas, Mexico: The State Government's Use of Human Rights](#). *Human Rights Quarterly* 22 (4) 877-905.

<sup>23</sup> Russell, A. 2005. [Myth and the Zapatista Movement: Exploring a Network Identity](#). *New Media & Society* 7 (4) 559-577.

<sup>24</sup> Falla, R. 1994. *Massacres in the Jungle: Ixcán, Guatemala, 1975-1982*. Westview Press, Boulder.

<sup>25</sup> Preti, A. 2002. Guatemala: Violence in Peacetime - A Critical Analysis of the Armed Conflict and the Peace Process. *Disasters* 26 (2) 99-119.

<sup>26</sup> For more information, see these two reports published by United Nations Special Rapporteurs for the rights of indigenous communities: Stavenhagen, R.. 2009. [Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: Mission to Bolivia](#). UN Human Rights Council, La Paz.; Anaya, J. 2012. [Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: The Situation of Indigenous Peoples in the United States of America](#). UN Human Rights Council, Tucson.



the perspective of ordinary justice officials. Clear examples come from murder trials implemented by indigenous communities such as the Mixe in Mexico, the Kuna in Panama and the Quichuas in Ecuador. Ethnographic studies reveal that indigenous authorities often resolve issues that extend beyond their formal powers,<sup>27</sup> which makes it worthwhile asking if the exercising of these powers should even be contested by the state.

International human rights law recognises indigenous peoples' right to self-determination. Therefore, they are empowered to define which individual behaviours are prohibited, permitted or obligatory within their own communities. Colombia is an interesting case to focus on, since it has made many advances in this regard. In Colombia, the principle of maximisation of authority, in ruling T-1294/05 of the Constitutional Court of Colombia regarding the jurisdiction of the community Paez del Valle in Cuaca, affirms that it is the community - not the state - that determines appropriate behaviours and applies sentences within an indigenous community. At the same time, indigenous communities must respect certain basic values, which in the case of Colombia, have been defined as including a prohibition against the use of the death penalty, torture and mutilation, and also include respecting a particular process as it is understood within the cultural context.

The Colombian approach is the closest to meeting international standards that oblige the state to respect indigenous jurisdictions<sup>28</sup> in cases where the community has established the following elements:

"[...] An indigenous community which (ii) has traditional authorities, which (iii) exercises its authority in a defined area. To the elements already identified in special indigenous jurisdiction, it should be added, (iv) the existence of traditional customs and practices, both procedural and substantive and (v) the condition that these customs and practices do not go against the constitution or the law."<sup>29</sup>

Once defined, these elements should respect the pursuit of all types of behaviour that maintain the integrity of the

community and their cultural diversity, applying sanctions which they consider to be most effective while respecting the principles of proportionality and human rights.

## HUMAN RIGHTS VS. INDIGENOUS JURISDICTION: IS THERE A CONFLICT?

The ILO Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples are part of the International Human Rights Law (IHRL), and according to the Vienna Convention, states are obligated to respect them. According to an integral vision of human rights, the fundamental limit to indigenous justice is human rights. However, indigenous rights are also human rights, so it is not possible to conceive the absolute subjection of one right to another. Therefore, it is important to understand how to negotiate between the collective human rights of indigenous communities and an individual's human rights, the latter of which were created within a modern liberal vision of the law.

Whenever the two rights seem to be contradictory, they should be balanced to safeguard both within what is possible. In the case of significant contradictions, one should turn to the *pro homine* principle of IHRL, which mandates using the norm most beneficial to the person.

When analysing rights, it is necessary to understand exactly what or who they are intended to protect. It is not possible to achieve universal human rights without understanding the contexts in which they are applied and the interests that certain actors may have in obliging others to respect certain dominant values.<sup>30</sup>

In the case of indigenous rights, it is defending communities' right to self-determination outside of the colonialist logic and injustice that has often defined their relationship with other more dominant communities. It is also defending the more general interest of maintaining cultural diversity. Currently, international human rights law values the diversity of cultures, visions and customs as a richness that permits dialectic feedback between cultures and that also offers strategies and alternatives to questions that have been left unanswered within the paradigms of dominant societies.

<sup>27</sup> Martínez, J-C. 2005. *Derechos Indígenas en los Juzgados. Un Análisis del Campo Judicial Oaxaqueño en la Región Mixe (Indigenous Rights in Tribunals: Oaxaca Judicial Field Analysis in Mixe Region)*. INAH, Mexico.; Valiente, A. 2008. La Jurisdicción Indígena en la Legislación Panameña. In Huber, R. et al. 2008. *Hacia Sistemas Jurídicos Plurales, Reflexiones y Experiencias de Coordinación entre el Derecho Estatal y el Derecho Indígena*. Konrad Adenauer Stiftung, Bogotá.; García, F. 2002. *Formas Indígenas de Administrar Justicia: Tres Estudios de Caso de la Nacionalidad Quichua de la Sierra y Amazonia Ecuatoriana (Indigenous Ways to Administer Justice: Three Case Studies on Quichua Nationality of the Ecuadorian Sierra and Amazonia)*. Flacso Ecuador, Quito.

<sup>28</sup> Yrigoyen Fajardo, R. 2004. *Legal Pluralism, Indigenous Law and the Special Jurisdiction in the Andean Countries*. *Beyond Law* 27 32-49.

<sup>29</sup> Constitutional Court of Colombia, Sentence T 552/03 of the 10th of July 2003, M.P. Rodrigo Escobar Gil, File T-50699.

<sup>30</sup> De Souza Santos, B. 2002. *Hacia Una Concepción Multicultural de los Derechos Humanos*. In: Hernández-Truyol, B. (ed). 2002. *Moral Imperialism. A Critical Anthology*. New York University Press, New York.



## KEY CHALLENGES

In the majority of Latin American countries, judges and other judicial personnel are trained in the idea of legal positivism and the universality of legal norms. Their understanding is often that ordinary law should be the only kind and it should govern all the citizens of a country; this itself is one of the key underlying reasons why the coordination of different justice systems in the region often faces the following challenges:

- Lack of awareness on the part of actors in law enforcement and administration of justice that a normative indigenous jurisdiction exists. For example, in 2007, the “Report of the Diagnosis on Access to Justice for Indigenous in Mexico: Case Study of Oaxaca”, undertaken by the UN High Commissioner for Human Rights in Mexico, points out that the majority of judges in Oaxaca, Mexico, did not understand the procedural rights of indigenous peoples. In response, numerous judicial schools in the Americas, for example, in Colombia, Ecuador, Guatemala, Mexico, Panama and Peru, have incorporated issues related to anthropologic law and legal pluralism into their academic programmes.
- Actors in the ordinary justice system often feel that they have neither the regulatory tools nor the procedural or substantive laws to make exercising and respecting these rights possible. For this reason, courts of countries such as Colombia or Peru have been defining, through resolutions or agreements, basic coordination guidelines for both systems of justice. Reports and protocols that set the foundation for this coordination have been produced, which in turn has generated even more teaching and consultation tools for the training mentioned above.
- On occasion, actors in the ordinary justice system feel that some regulations within the law itself are an obstacle to fulfilling the constitutional and international standards that establish indigenous jurisdiction. Frequently, laws such as those governing mining or that establish criminal prosecution as an exclusive responsibility of the attorney general, are considered to be an impediment to fulfilling indigenous rights. In this sense, it would help if judges fully understood that human rights took precedence over any legal or administrative consideration, especially given that most Latin American constitutions clearly express the prevalence of human rights as the foundation of the entire legal system.
- Some public servants consider that the application of indigenous jurisdiction violates principles of equality. In Ecuador, Guatemala and Mexico, judges have expressed that the existence of a special jurisdiction is a violation to the equality principle because other citizens do not have those rights.
- The lack of official recognition of indigenous authorities opens spaces for discretionary behaviour on the part of both indigenous and official authorities, which can result in abuse and corruption within both systems.
- Official allocation of competencies for indigenous jurisdiction does not always follow the reality of how these competencies are practiced. For example, when laws prevent indigenous people from resolving issues that they traditionally do, indigenous authorities merely begin hiding their activities from state authorities. On the other hand, internal normative systems sometimes operate beyond what is established by the law as their sphere of legal responsibility. Actors in the system often demonstrate tolerance by not interfering, permitting the indigenous authority’s decision to stay in place, although it goes beyond the judicial scope established by law.
- There is confusion between the rights of traditional authorities to exercise indigenous jurisdiction as an expression of their autonomy, and the right of a person or an indigenous group to have their customs and norms taken into account within a trial or procedure before the state. Some laws, such as in Oaxaca, Mexico, give citizens the right to go to the justice system they prefer. Some argue, however, that this weakens indigenous institutions and progressively damages social fabric.
- There are many regions and cities in Latin America with a strong, but not exclusively, indigenous presence. In areas where indigenous and non-indigenous people live together, it makes it difficult and confusing to define competencies. Cities such as Cuenca in Ecuador and Alto La Paz in Bolivia are indigenous cities, but their population is mixed with non-indigenous people. Some countries are dealing with this challenge through establishing intercultural courts, with notable examples coming from the Bolivian constitution and Mexican laws, in which the use of translators is mandated within the ordinary justice system, and to better take into account customs and traditions, reports of cultural experts and exhibits used in indigenous justice are required. Though it is important to insist that certain minimums of international and national laws should be upheld when respecting indigenous legal systems, nevertheless, this is often interpreted as though ordinary justice should regard indigenous systems with suspicion, as though they will potentially violate human rights.

# CONTEXTUAL FACTORS

# ENABLING LATIN AMERICA'S SUCCESSFUL RESPONSE



A fundamental factor in the development of indigenous rights is the existence of CIMs. Indigenous movements have challenged the established powers in countries such as Bolivia, Ecuador and Mexico. They have produced critical-thinking intellectuals and strengthened their collective self-esteem by understanding that they are not evolutionary throwbacks but communities with dignity that have an important contribution to make to wider society.

Globalisation has also made international diversity more apparent than ever. It has facilitated technological developments that put ideas, people and things in contact internationally, creating spaces for alliances between CIMs around the world, and helping to increase their impact.

In many cases, it has been the national-level public sector, as well as international actors, that have been key to pushing forward reforms. In some countries, such as Colombia, Argentina and

Peru, legal activism and the political disposition of the high courts have been important for advancing the interpretation and content of indigenous rights, in particular the right to recognition of indigenous jurisdiction. The resolutions of the [Inter-American Court on Human Rights](#) have also been of particular importance in the cases of Ecuador, Nicaragua, Paraguay and Suriname.

Another important factor has been an end to legal monistic thought - meaning seeing laws as coming only from the state and not recognising the legal plurism that actually exists in societies - and the positivist vision of rights towards more realistic theories and so called neo-constitutionalism which understands the constitution as a means of providing principles which demand judicial reasoning which safeguard both democratic order and human rights. From this new perspective, legal pluralism becomes a possibility and different judicial systems can coexist in the same space.

## KEY LESSONS

- 1 Indigenous justice is more accessible for communities because it is closer, has social legitimacy, is more economical and adjusts better to the cultural criteria of justice, order and the distribution of resources.
- 2 Indigenous justice is useful for maintaining countries' cultural diversity and for strengthening the political systems that organize this diversity while maintaining harmonious relationships within and between communities in the country.
- 3 The recognition of indigenous authorities actually helps expose any authoritarian and violent practices within them. Official recognition means that indigenous authorities must become public actors and enter into a dialogue with the larger society and international communities. This allows for the incorporation of human rights standards into their practices without diminishing their culture or undermining their system of accountability.
- 4 Coordination between indigenous and ordinary justice in intercultural terms allows for the sharing of competencies, collaborating in the prosecution of crimes, and establishing channels for mutual understanding and mutual improvement through the exchange of best practices.
- 5 It is important that the recognition of indigenous justice safeguards the human rights of particularly vulnerable people within these communities, such as women, minors, members of other religions, and internal minorities, such as *avecindados*, meaning people who have moved into the area from elsewhere.

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To learn more about the recognition of indigenous justice in Latin America, contact the author, Juan Carlos Martínez, PhD, Researcher in Fundar's Human Rights and Citizen Security Area, and an expert on indigenous rights, at [juancarlos@fundar.org.mx](mailto:juancarlos@fundar.org.mx).

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