

# A Political Analysis of Legal Pluralism in Bolivia and Colombia\*

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*Abstract.* In this article the author compares recent efforts in Bolivia and Colombia to implement constitutionally mandated regimes of legal pluralism, and identifies the most important factors affecting the practical realisation of legal pluralism: the capacity of the political system, the legal tradition and society to tolerate normative diversity; the geographic isolation and cultural alienation of indigenous communities; the degree of internal division within indigenous communities and movements regarding legal pluralism in general, and in specific cases, that have arisen, and the availability of effective legal mechanisms to indigenous communities seeking to protect this right.

Among the greatest challenges facing democratic societies today is that of incorporating populations claiming distinct group identities and cultural norms into a single polity governed by a constitution that reflects and affirms the identities and norms of all citizens. During the last decade ethnic minorities have mobilised as never before to demand recognition of their distinct identities and to claim special constitutional rights. Many new constitutions reflect their success.

Some of the most dramatic and unexpected achievements in the constitutional recognition of cultural differences have occurred in Latin America. The region's independent states have long wrestled uncomfortably with the persistence of partially unassimilated, ethnically distinct populations. Approximately 10 per cent of Latin Americans are considered indigenous, with proportions ranging from less than one per cent in Brazil, to more than 50 per cent in Bolivia and Guatemala. For most of their history, states pursued nation-building policies that sought to eliminate or make invisible ethnic distinctions. Over the past decade, however, seven – Bolivia, Colombia, Ecuador, Mexico, Nicaragua, Paraguay and Peru – adopted or modified constitutions to recognise the multiethnic, multicultural nature of their societies. Securing such recognition was the result of local and national-level political mobilisation

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by indigenous peoples organisations that originated in the late 1960s<sup>1</sup> and peaked in the early 1990s, when Indians throughout the Western hemisphere organised to present an alternative reading of the 500th anniversary of the arrival of Europeans in the Americas.<sup>2</sup> But this recognition is not attributable solely to the canny mobilisation of indigenous organisations. Improving the representation and participation of excluded groups and codifying fundamental rights is a strategy employed by Latin American states in the 1990s for consolidating the fragile legitimacy and legality of democratic institutions.<sup>3</sup>

Having secured a foothold in national psyches and constitutions, indigenous and African–American organisations are now attempting to put the principle of respect for diversity into practice. One barometer of their success is the status of efforts constitutionally to incorporate the practice of customary law – the mostly unwritten forms of dispute resolution and social control practiced by ethnic communities or language groups among their members. This article analyses efforts in Bolivia and Colombia to put into practice new constitutional provisions that recognise the jurisdiction of indigenous authorities over the administration of

<sup>1</sup> The United Nations Sub-commission on the Prevention of Discrimination and Protection of Minorities defines indigenous peoples as follows: “Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, considered themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.” UN, *Study of the Problem of Discrimination Against Indigenous Populations* (New York, 1986), para. 379.

<sup>2</sup> On these movements, see H. D. Polanco, *Autonomía regional. La autodeterminación de los pueblos indios* (México, 1991), pp. 111–49; R. Stavenhagen, ‘Challenging the Nation-State in Latin America’, *Journal of International Affairs*, vol. 34, no. 2 (1992); D. L. Van Cott (ed.), *Indigenous Peoples and Democracy in Latin America* (New York, 1994); P. Wade, *Race and Ethnicity in Latin America* (London, 1997); and D. Yashar, ‘Indigenous Protest and Democracy in Latin America’, in J. I. Domínguez and A. F. Lowenthal (eds.), *Constructing Democratic Governance. Latin America and the Caribbean in the 1990s* (Baltimore, 1996).

<sup>3</sup> On recent reforms of the state affecting indigenous peoples see, Willem Assies, ‘Pueblos indígenas y reforma del estado en América Latina’, paper prepared for the workshop on Indigenous Peoples and Reform of the State, Amsterdam, October 29–30, 1998; J. Dandler, ‘Indigenous Peoples and the Rule of Law in Latin America: Do They Have a Chance?’ paper prepared for the Academic Workshop on the Rule of Law and the Underprivileged in Latin America, Kellogg Institute for International Studies, University of Notre Dame, 1996; D. Iturralde, ‘Demandas indígenas y reforma legal: retos y paradojas’, *Alteridades*, vol. 7 (1997), pp. 81–98; E. Sánchez, (comp.) *Derechos de los pueblos indígenas en las constituciones de América Latina* (Bogotá, 1996); and D. L. Van Cott, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America* (Pittsburgh, 2000).

justice within specified territorial units. The theoretical debate over the compatibility of liberalism and group rights is left to others.<sup>4</sup> The article's approach is empirical and comparative. It identifies variables that account for the 'success' of legal pluralism, which are defined along two qualitative continua: the extent to which multiple legal systems are able to operate without interference, and the extent to which conflicts among legal systems are managed institutionally. It concludes that the success of legal pluralism is determined by the outcome of repeated strategic interactions among indigenous peoples' organisations, the professional judiciary, and state institutions. These interactions are affected by the capacity of the political system, the legal tradition and society to tolerate normative diversity; the geographic isolation and cultural alienation of indigenous communities; the degree of internal divisions within indigenous communities, movements on legal pluralism, in general, and in specific cases that have arisen; and the availability of effective legal mechanisms to indigenous communities seeking to protect legal rights.

Although legal pluralism has long been a concern of anthropologists and legal scholars, it is fundamentally a political issue. But it is one that most political scientists have ignored.<sup>5</sup> The goal of this article is to provide a more explicitly political analysis of legal pluralism by focusing both on interactions among political actors and on the broader political context in which the recognition of legal pluralism takes place. The term 'legal pluralism' connotes the simultaneous existence of distinct normative systems within a single territory, a condition usually associated with colonial rule.<sup>6</sup> Under colonial rule, the exercise of sub-state legal systems was commonly restricted to cultural or personal matters in which the state was not concerned, and was tempered by the invocation of a 'repugnancy clause' in the event that customary practices offended the sensibilities of European judges.<sup>7</sup> Since the 1970s, jurists have recognised that practically all societies exhibit some aspects of legal pluralism. Many multiethnic states in Asia, Africa and Latin America that succeeded the colonial powers and adopted European-style legal systems continue to recognise

<sup>4</sup> For an introduction to the literature on this topic, see S. Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton, 1996); A. Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition* (Princeton, 1994); W. Kymlicka, *Multicultural Citizenship* (Oxford, 1995); and J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, 1995).

<sup>5</sup> D. Iturralde, 'Movimiento indio, costumbre jurídica y usos de la ley', in R. Stavenhagen and D. Iturralde (eds.), *Entre la ley y la costumbre. El derecho consuetudinario indígena en América Latina* (México, 1990), p. 59.

<sup>6</sup> B. da Sousa Santos, *Estado, derecho y luchas sociales* (Bogotá, 1991), p. 69.

<sup>7</sup> M. B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (Oxford, 1975).

some scope for customary law, particularly for religious minorities and geographically isolated and culturally alienated indigenous peoples. Most contemporary cases reflect the efforts of post-colonial or multiethnic states to accommodate the claims of sub-state groups in order to reduce inter-ethnic conflict, as well as to serve other state aims, such as extending the rule of law and state authority into peripheral areas. Horowitz observes that another frequent impetus for legal change is the need to make the legal system more 'authentic', that is to create a better fit between society and its norms.<sup>8</sup> In many cases, achieving such authenticity involves recuperating and revaluing traditional practices that enjoy greater popular legitimacy than the edicts of the state, and that have persisted, in part, due to the geographic vacuum of state authority in peripheral regions. All these goals motivated legal reform in the cases discussed below.

Until the 1980s most national legislation in Latin America did not recognise indigenous customary law (an exception is Peru's 1977 recognition of *rondas campesinas* [peasant patrols]). Today, in response to claims by indigenous groups, in addition to Bolivia and Colombia, the constitutions and/or laws of Brazil, Chile, Ecuador, Nicaragua, Paraguay and Peru recognise some scope for indigenous customary law. Constitutional recognition of this right affirms protections under International Labor Organisation (ILO) Convention 169 (1989) on the rights of indigenous and tribal populations in independent states, which nine Latin American countries have ratified, including Bolivia and Colombia.<sup>9</sup> Draft international declarations on the rights of indigenous peoples are being prepared by the United Nations and Organization of American States and also protect the right to exercise customary law.

Comparing Colombia and Bolivia provides an opportunity to examine constitutional language recognising how strikingly similar legal pluralism is implemented in two distinct political contexts. The similarity in language is due to the use of the earlier Colombian example as a model by Bolivian government personnel. The recognition of legal pluralism in both countries was part of comprehensive reforms undertaken in 1991 and 1994, respectively, in which the legitimacy of state institutions, particularly the judicial system, was a priority. The two cases also enable us to explore whether legal pluralism has different implications depending on the proportion of the population that is indigenous. At the legal and philosophical level, there is no difference. In both countries constitution-

<sup>8</sup> D. Horowitz, 'The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change', *American Journal of Comparative Law*, vol. XLII, nos. 2 & 3 (1994), pp. 233–93, 543–80.

<sup>9</sup> They are Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Paraguay and Peru. Argentina signed ILO 169 in 1992 but the deposit of its ratification has been delayed. Denmark, Fiji, Holland and Norway also have ratified ILO 169.

makers sought to construct a new basis of legitimation for the state by making the legal and political systems more inclusive and participatory. Recognising and empowering oppressed ethnic groups suited this purpose equally well in both cases. However, at a practical level, the positive and negative implications of legal pluralism are magnified in the Bolivian case, where the indigenous population constitutes a majority and the territory where indigenous jurisdiction is recognised covers a substantial portion of the country. Another striking difference between the two cases is the process through which both reforms were achieved. In Colombia, two Indians representing the country's major indigenous organisations were elected to the national constituent assembly in 1991. During this cathartic public process both played a highly visible and symbolic role by personifying the inclusion of society's most marginalised groups. In Bolivia, President Sánchez de Lozada managed a closed process confined to a handpicked team personally loyal to the president, which produced legislation passed by a legislature lacking representatives of the organised indigenous movement. The president's team included the Aymara vice president and anthropologists with close ties to the country's indigenous organisations.<sup>10</sup> Nevertheless, the new constitutions are strikingly similar with respect to legal pluralism.

The achievement of a genuinely pluralistic legal regime is crucial to the realisation of the new multicultural conception of the nation enshrined in the new Bolivian and Colombian constitutions. As Colombia's Interior Minister observed in 1997, the articulation of indigenous legal systems with Colombian law is one way in which the plural nation is constructed 'with regard to themes like the public and the private, the scope of state autonomy and that of indigenous peoples and territories, and the rights and duties of citizens and of national public and indigenous authorities'.<sup>11</sup> For Latin America's indigenous peoples the recuperation of customary law is part of a long struggle to reject a 'neo-colonial' Latin American state and to adjust the Latin American elites' mythical homogenous nation to the reality of heterogeneous populations. The indigenous demand for recognition of legal pluralism is part of a larger project to assert a collective right to self-determination: it is one aspect of the autonomous, collective citizenship that they seek within the state.<sup>12</sup>

Indigenous organisations struggling on behalf of this project engage in a variety of strategic interactions. Their struggle has occurred mainly in

<sup>10</sup> For a thorough discussion of the reform process in both countries, see D. L. Van Cott, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America* (Pittsburgh, 2000).

<sup>11</sup> H. Serpa 'Introducción: Justicia, diversidad y jurisdicción especial indígena', in *Del olvido surgimos para traer nuevas esperanzas. La Jurisdicción especial indígena* (Bogotá, 1997), p. 22. Translation by the author.

<sup>12</sup> See note 3.

spheres dominated by national and international legal discourses, which shape the way indigenous organisations articulate their identities and aspirations. As Sieder and Witchell argue, the necessity to assert claims in ways compatible with legal discourse has resulted in the essentialisation, reification and idealisation of indigenous customary law practices. Indigenous leaders paint a picture of coherent, widely understood and uncontested norms and procedures that have been passed down for generations, systems that have operated autonomously from the state, maintaining a cultural purity that must now be protected from any intrusion. These legal systems are portrayed as promoting and protecting a harmonious way of life particular to indigenous peoples.<sup>13</sup> But in fact this idealised vision obscures the reality of most indigenous customary law systems in at least three ways.

First, many practices indigenous communities claim are traditional were adopted quite recently. Clear examples included the *rondas campesina* adopted by many indigenous communities in highland Peru in the 1990s, and the new normative structures adopted by Guatemalan Maya internally displaced by the civil war.<sup>14</sup> Indigenous communities continually adopt new practices as new needs arise. Although the antiquity of customary law is often invoked to legitimise it, the authenticity of these new structures and norms comes not from their age but, rather, from their autonomous adoption in the absence of effective access to state justice. Secondly, indigenous communities are not immune from the internal contestation of culture and norms common to all human groups. Even the smallest, most isolated indigenous communities contain power differentials and conflicting interests, the most obvious being those between women and men.<sup>15</sup> Internal dissensus within indigenous communities has increased in recent years due to patterns of urbanisation, displacement due to violence and migration that bring Indians into closer contact with one another and with Indians from different geographic areas and linguistic backgrounds, as well as the growth of Protestant faiths in once-hegemonically Catholic communities. The assertion that indigenous cultures are uniquely characterised by harmony and consensus is a typical counter-hegemonic

<sup>13</sup> R. Sieder and J. Witchell, 'Advancing Indigenous Claims Through the Law: Reflections on the Guatemalan Peace Process', in J. Cowan and R. Wilson (eds.), *Culture and Rights* (forthcoming); D. Iturralde, 'Usos de la Ley y usos de la costumbre: La reivindicación del derecho indígena y la modernización del Estado', Alberto Wray et al., *Derecho, pueblos indígenas y reforma del Estado* (Quito, 1993), p. 132.

<sup>14</sup> On the former, see W. Ardito, 'The Right to Self-Regulation. Legal Pluralism and Human Rights in Peru', *Journal of Legal Pluralism*, vol. 39 (1997), pp. 1–42; on the latter see R. Sieder, *Customary Law and Democratic Transition in Guatemala* (London, 1997).

<sup>15</sup> Ardito, 'The Right to Self-Regulation', p. 25; R. Sieder, 'Customary Law and Local Power in Guatemala', in R. Sieder (ed.), *Guatemala after the Peace Accords* (London, 1998), p. 114.

strategy of dominated groups, and should be examined critically in each case. As Sieder argues, perpetuating the myth that customary law is characterised by tradition and consensus runs the risk of 'freezing' methods and customs particular to certain historical circumstances and of reifying traditions which may no longer be applied in practice, or which may not be shared by the entire group.<sup>16</sup> Third, very few extant indigenous legal systems are autonomous, self-contained or 'culturally pure'. The vast majority developed in opposition to state law in a 'dynamic, asymmetrical relationship'.<sup>17</sup> This is even more the case in Latin America, as compared to other colonised regions, because the Spanish were more disposed to modify the internal structure of indigenous communities and to promote the eventual disappearance of Indians as a distinct group, rather than to sign treaties with them or to treat them as external to the nation. Thus, the challenge of articulating indigenous customary law to state systems, required by the new constitutional recognitions of customary law, is posed incorrectly, since this articulation has been negotiated and renegotiated in practice since colonial times in response to changing political conditions. The challenge now is to codify this relationship formally to represent the transformation in indigenous-state relations implied by the new constitutions.

### *Colombia*

An estimated 2.7 per cent of Colombia's population of almost 35 million is indigenous; 84 per cent live on indigenous *resguardos* covering about one-quarter of the national territory.<sup>18</sup> The widely dispersed indigenous population is comprised of 81 distinct ethnic groups speaking 64 languages. Contemporary indigenous organisations formed in the 1970s, mainly to struggle for the recuperation of ancestral lands. Nevertheless, a set of cultural rights including language, educational and customary law has long been part of the indigenous agenda.

The administration of César Gaviria, which presided over the constituent assembly in 1991, accorded implementation of the judicial reform its highest priority. Judicial reform was viewed as its ultimate guarantee.<sup>19</sup> Among the first measures implemented was the *acción de tutela* (writ of protection), the citizen's primary defence against the violation of fundamental constitutional rights. The most important new judicial

<sup>16</sup> Sieder, *Customary Law and Democratic Transition*, pp. 17–19. <sup>17</sup> *Ibid.*, p. 16.

<sup>18</sup> Paraphrasing from Decree 2001 (1988), an indigenous *resguardo* is a legal and socio-political institution that corresponds to an indigenous community and a specific territory. Under Colombian law, the internal affairs of the *resguardo* are governed by the community according to its customs and traditions.

<sup>19</sup> Interview, Fernando Carrillo, Washington, 18 Sept. 1997.

institution established was the Constitutional Court which, already in its first year, gained public prestige by defending the rights of the common citizen with respect to virtually all of the constitution's fundamental rights. Among the Court's most innovative rulings are those concerning indigenous rights, including three rulings with respect to customary law, pursuant to Article 246 of the 1991 Constitution on Special Indigenous Jurisdiction, which reads:

The authorities among the native peoples may exercise judicial functions within their territorial areas in accordance with their own rules and procedures, which must not be contrary to the Constitution and laws of the Republic. The law shall establish the forms of coordination of this special jurisdiction with the national judicial system (translation by the author).

Other constitutional provisions establishing anomalous indigenous territories and recognising the official status of indigenous traditional authorities as public authorities with territorial jurisdiction (Articles 329–330) provide the political and territorial context for the exercise of this right.

In order to prepare Colombian courts for the challenge of adjudicating cases involving indigenous customary law, the Gaviria government commissioned studies of the legal systems of 20 indigenous language groups. Anthropologists criticised the project for imposing Western, positivist categories and concepts onto more flexible, oral traditions that defy such categorisation, and for separating the practice of customary law from the fabric of indigenous society.<sup>20</sup> Positive and customary law, they argued, do not even share the same purpose: while positive law seeks to punish the guilty, customary law generally seeks if possible to reconcile parties in order to conserve the harmony of the group. The overriding value of group harmony often reaches the extreme of expelling or executing community members whose behaviour is deemed sufficiently disruptive of group harmony, usually where prior efforts to negotiate a solution or enforce conformity to group norms have failed. In such cases customary law may trample on principles common to a Western, liberal tradition of positive law with respect to minority rights and may even sanction behaviour that is not deemed unlawful by the state. This controversy underscores a fundamental debate within juridical anthropology over whether it is possible or desirable to attempt to analyse other societies in terms of the concepts of the social scientists doing the analysis. Western jurists tend both to distort indigenous law and to deny the legal character of indigenous culture and practices to the extent that these do not exhibit Western-style legal artifacts – such as courts, written texts and

<sup>20</sup> Interview, Esther Sánchez, Bogotá, 3 Feb. 1997.



professional judges. Some anthropologists err in the other direction by incorporating under the category of 'law' all behaviours, structures and norms connected to practices of social control which are not properly assimilable to a western definition of law.<sup>21</sup> The Colombian project directors defended their methodology as the most effective means of presenting information about indigenous administration of justice to the judges that must rely on them in making important judicial decisions and, thereby, facilitating coordination of the indigenous and positive systems.<sup>22</sup>

In his introduction to one of the studies, Carlos César Perafán identified difficulties in the coordination of indigenous and national law. First, whereas the national system is highly segmented and specialised, indigenous systems lack these distinctions and even lack separation between forms of social control, self-government and the administration of justice. Secondly, national law is applied to individuals, whereas indigenous communities generally apply sanctions to the unit of society of which the offender is a member. Entire families may feel the weight of fines or even be expelled from the community. Thirdly, in indigenous communities punishments are not necessarily pre-existing for each crime, as in the national system. An appropriate punishment is designed for each case, and is often negotiated with the social group of the victim. Fourthly, in indigenous communities, corporal punishment, forced labour and loss of community rights are common, while imprisonment is rare. Most seriously, many indigenous communities punish homicide and witchcraft with the death penalty, which is illegal in Colombia.<sup>23</sup> These normative and procedural disparities posed difficult problems for the creation of implementing legislation with broad-based support.

In fact, the implementing legislation required by Article 246 was never passed because a consensus could not be reached on the meaning of 'coordination'. The subordination of indigenous special jurisdiction to the Colombian constitution and legislation would appear to imply that

<sup>21</sup> R. Stavenhagen, 'Derecho consuetudinario indígena en América Latina', in R. Stavenhagen and D. Iturralde (eds.), *Entre la ley y la costumbre. El derecho consuetudinario indígena en América Latina* (México, 1990), p. 42; Santos, *Estado, derecho y luchas sociales* (Bogotá, 1991), pp. 65–7.

<sup>22</sup> C. Perafán et al., *Sistemas jurídicos indígenas: Pueblos Awa, Cocama, Maku, Utioto, U'wa y Yuki* (Bogotá, 1996), p. 7.

<sup>23</sup> C. Perafán, *Sistemas Jurídicos Páez, Kogi, Wayúu y Tule* (Bogotá, 1995), pp. 33–41, 112; Perafán, et al., *Sistemas Jurídicos Tukano, Embera, Sikuani y Guambiano* (Bogotá, 1997), p. 6; M. Vásquez, 'Antecedentes sobre la aplicación de la jurisdicción Especial Indígena', in *Del olvido surgimos para traer nuevas esperanzas*, pp. 259–60. In comparison to national sentences for comparable offenses, indigenous sentences appear to be shorter. For example, Perafán gives the example of the different penalties for murder: 16 years of prison, under Colombian law, compared to six years of hard labour in other *resguardos* under Páez law, although in the most aggravated cases the death penalty may be applied.

conflicting elements in customary law are to be superseded. As Dander observes, this limitation on customary law is typical of language in most Latin American constitutions, which ‘tends to downgrade the role of traditional norms or relegate them to further study, special legislation or other “future” measures which are not easily forthcoming’.<sup>24</sup> Yet, no less an authority than the former chief magistrate of the Colombia Constitutional Court, Carlos Gaviria Díaz, argued that to subject indigenous jurisdiction to this limit would be absurd, since it would nullify the meaning of autonomy under Article 246 by implying that Indians must conform to all the procedures of the Colombian penal code, including the creation of pre-existing written laws.<sup>25</sup>

The Organización Nacional Indígena de Colombia (ONIC) presented its own legislative proposal to coordinate indigenous and national justice administration shortly after the close of the constituent assembly in 1991. The ONIC plan failed to address the question of coordination between the two systems, stipulating that this would be worked out later in consultation with indigenous communities.<sup>26</sup> The proposal envisaged indigenous jurisdiction as mandatory within the territorial jurisdiction of indigenous authorities, unless the authorities elect to ‘delegate’ their authority. Jurisdiction over Indians committing crimes outside their community falls to the national justice system, which would be required to take the culture of the defendant into account in determining guilt and sentencing.<sup>27</sup> ONIC also called on the government formally to recognise zonal and regional indigenous organisations as the courts of second instance in cases where indigenous community justice is appealed, recognising what had already become the practice in many communities.<sup>28</sup> This practice exacerbates the conflict when there are intra- or inter-ethnic antagonisms within the organisations, (as occurred in the case of the murder of the mayor of Jambaló, discussed below).

In early 1992, the Justice Ministry offered its own draft legislation. In response to harsh criticism from anthropologists and legal experts, the

<sup>24</sup> J. Dandler, ‘Indigenous Peoples and the Rule of Law in Latin America’, pp. 14–15.

<sup>25</sup> C. Gaviria Díaz, ‘Alcances, contenidos y limitaciones de la Jurisdicción Especial Indígena’, in ‘*Del olvido surgimos para traer nuevas esperanzas*’, p. 165.

<sup>26</sup> In Perafán’s opinion, the project confused territorial and personal jurisdiction while referring substantive and procedural questions with respect to the development of indigenous jurisdiction to written legislation, notwithstanding the fact that the constitution had not called for legislation developing indigenous jurisdiction, apart from the problem of coordination with the national judicial system. Perafán, *Sistemas Jurídicos Páez, Kogi, Wayúu y Tule*, p. 20.

<sup>27</sup> Jurisdicción Indígena, Código de Procedimiento Penal, Régimen Transitorio, Propuesta presentada por la ONIC a la Comisión Legislativa (Congresito), 1991.

<sup>28</sup> This is also the case in some provinces of Peru, where *rondas campesinas* have formed federations that act as appellate bodies. Ardito, ‘The Right to Self-Regulation’, p. 9.

Ministry declined to present the proposal to congress.<sup>29</sup> No subsequent attempt has been made to legislate Article 246. According to Perafán, a consensus exists between the government and indigenous organisations that there should be more study of indigenous justice systems and more reflection on the possible ways to coordinate with the ordinary justice system.<sup>30</sup>

In the absence of implementing legislation, the Constitutional Court has ruled on the constitutional limitations on indigenous jurisdiction. This was in response to three *tutelas* presented by indigenous defendants claiming that their fundamental constitutional rights had been violated by indigenous justice. (It is actually more often the victim's family that tries to move jurisdiction to Colombian courts because indigenous sentences usually are deemed more lenient than those of the national system.)<sup>31</sup> In so doing the Court relied on the 1991 Constitution as well as ILO Convention 169. In decision T-254 (1994), the Court began developing a standard for implementing Article 246. First, it ruled that cultural traditions are to be respected, depending on the court's judgment with respect to the extent that those traditions have been preserved. That is, the more contact an indigenous community has had with Western culture, the less weight may be given to its cultural traditions. The Peruvian Criminal Code includes the principle, exempting Indians from criminal liability in proportion to the extent that the norms violated are culturally alien to them.<sup>32</sup> Secondly, the decisions and sanctions imposed by indigenous tribunals must not violate fundamental constitutional or international human rights. Finally, the Court established the supremacy of indigenous customary law over ordinary civil laws that conflict with cultural norms, and over legislation that does not protect a constitutional right of the same rank as the right to cultural and ethnic diversity.<sup>33</sup>

<sup>29</sup> In a memorandum to the Interior Minister, Indigenous Affairs Office director Luis José Azcárate identified problems with the proposal. First, the proposal's stipulation of causes for which indigenous legal authorities may be removed by a new state institution that polices the legal profession interfere with indigenous communities' constitutional right to autonomy in choosing their own authorities. Some authorities exercising judicial functions hold permanent or hereditary office and are not removable. Secondly, the project includes Western legal concepts that are not applicable to indigenous justice system, including the idea that an authority's ruling might be revocable by some outside higher authority. Finally, the project allows Colombian judges to determine who is indigenous, a violation of ILO Convention 169. Memorandum from Luis José Azcárate to Humberto de la Calle, 'Comentarios al Proyecto Preliminar de Ley Sobre Organización de la Jurisdicción Especial Indígena, Elaborado por el Ministerio de Justicia', 3 February 1992.

<sup>30</sup> Perafán, *Sistemas Jurídicos Páez, Kogi, Wayúu y Tule*, p. 20. <sup>31</sup> *Ibid.*, p. 117.

<sup>32</sup> Ardito, 'The Right to Self-Regulation', p. 28.

<sup>33</sup> Cepeda, 'Democracy, State and Society in the Colombian Constitution: The Role of the Constitutional Court', unpublished manuscript (1995), p. 37, n. 126.

The Court further defined the scope of indigenous special jurisdiction in a 1996 ruling on a claim brought by an Embera-Chamí Indian that his *cabildo* (a form of community government imposed on Colombian Indians by the Spanish crown and later adopted and ‘indigenised’ by indigenous cultures) had violated his right to due process,<sup>34</sup> ruling that the standard for interpreting indigenous jurisdiction must be ‘the maximum autonomy for the indigenous community and the minimisation of restrictions to those which are necessary to safeguard interests of superior constitutional rank’.<sup>35</sup> Restrictions on the right to autonomy must protect a more important interest than that of cultural diversity (i.e. national security, the right to life, prohibition of slavery and torture) and must represent the manner of protecting that right that is least destructive to indigenous autonomy. As the minimum basis for ‘intercultural dialogue’ the Court offered the limitation of indigenous autonomy by the right to life and freedom from torture and slavery, arguing that indigenous cultures in Colombia do not practice torture or slavery, but *do* sanction murder. According to these criteria, the defendant did not have a right to ‘due process’, as that term is understood in Western law, but only to the legitimate procedures used by his community in similar cases. However, the Court did take issue with the decision of the *cabildo* to condemn the claimant to a Colombian jail, since this is not a traditional sanction of this community. While acknowledging that cultures are dynamic and that sanctions might change over time, the Court admonished indigenous authorities not to act arbitrarily but, rather, to follow custom and tradition. The Court offered the *cabildo* the alternative of either retrying the case and imposing a more traditional sanction, or of remanding the case to the Colombian courts.

The decision is also noteworthy for its defense of the *cepo*, a form of corporal punishment common to indigenous communities that was imported from Spanish colonial law. A number of the punishments used today by indigenous communities are derived from Spanish colonial rule, but indigenous authorities insist that these have become part of their own ‘authentic’ culture, as most cultures continuously borrow and adapt practices from cultures with which they have contact. As Horowitz argues

<sup>34</sup> The *cabildo* found the defendant, who had escaped from captivity during the investigation, guilty of murder. *Cabildo* authorities had initially condemned the defendant to eight years in prison, but subsequently lengthened the term to 20 years in response to the defendant’s flight and his refusal to submit to their authority. A municipal court granted the *tutela*, arguing that the defendant was not allowed to defend himself, since the *cabildo* decided the case while he was in the municipal jail; that there had been no precedent of the *cabildo* ruling on a case of homicide; and that the judges in the case were biased because they were relatives of the murder victim.

<sup>35</sup> Tutela-349/1996, p. 10.

based on his study of contemporary Malaysian legal reform, authenticity need not be derived from practices or norms considered ‘indigenous’.<sup>36</sup> The Court argued that the *cepo*, although painful, does no permanent damage to the offender, and is used for a brief duration. As such, it does not constitute cruel or inhumane treatment. Finally, the Court exempted indigenous customary law from the Western expectation that pre-established sanctions would be meted out in similar cases. Nevertheless, as Magistrate Carlos Gaviria ruled, this does not imply:

an opening for absolute arbitrariness, in that authorities are necessarily obligated to act in conformance with what has been done in the past, with a basis in the traditions that serve to sustain social cohesion. On the other hand, this requirement may not be extended to the point of holding traditional norms completely static, inasmuch as all cultures are essentially dynamic, even though the weight of tradition may be strong.

A 1996 decision (T-496) extended the territorial scope of indigenous jurisdiction beyond indigenous territories to a ‘personal jurisdiction’ in cases where a judge deems the cultural alienation of an indigenous defendant to warrant it, although in the specific case brought by a Páez Indian, the Court ruled that ordinary jurisdiction was appropriate.

The issue of special indigenous jurisdiction gained national attention in 1997, when a third indigenous defendant, Francisco Gembuel, a Guambiano Indian living in a Páez community, filed a *tutela* against the *cabildo* of Jambaló, Cauca. The Páez are the largest (approximately 120,000 individuals) and politically most dominant indigenous group in the southwestern department of Cauca, the area of greatest indigenous concentration in the country and the origin of the national indigenous movement. It is an area of intense rural land conflict where several guerrilla organisations maintain active fronts and vie with drug traffickers, paramilitary organisations, and public authorities for control over the legitimate means of force. In this case a conflict had erupted between the *cabildo* and seven indigenous defendants banished from the community, stripped of their political rights as Indians, and sentenced to varying amounts of lashes with a leather whip (*fuete*). The sentence, announced by *cabildo* authorities on 24 December 1996, followed the defendants’ conviction as ‘intellectual authors’ of the assassination of the town’s indigenous mayor, Marden Betancur. Local guerrillas actually claimed responsibility for the murder; the indigenous defendants were convicted of publicly linking Betancur to the paramilitaries and, thus, inspiring an indigenous sector of the Ejército de Liberación Nacional (ELN) guerrillas to kill him. Gembuel’s supporters argue that the *cabildo*’s ruling violated Páez norms of procedure – a claim sustained by a confidential mem-

<sup>36</sup> Horowitz, ‘The Qur’an and the Common Law’, p. 570.

orandum from indigenous law expert Perafán, in which he argued that there is no evidence of intellectual authorship, but only of ‘*tardecer*’ – a concept in Páez law that attributes guilt to a prior act that may have inspired a later outcome, although no causal link can be proven.<sup>37</sup> Moreover, in Páez law the expulsion of a community member is never applied as a punishment for the first offence, as it was applied against Gembuel and his associates. A lower court ruled that the *cabildo* had denied the defendants the opportunity to defend themselves, that the judges in the case were biased, that the whipping constituted torture and, thus, was illegal under international law, which has constitutional rank in Colombia. A new investigation and trial were ordered. Following an appeal by the Páez Cabildo Association of the North, a higher court affirmed the ruling, observing that corporal punishment, even if it did no permanent physical harm, violated the defendants’ fundamental constitutional rights.

The case generated international controversy when Amnesty International accused the *cabildo* of condoning torture. It became controversial within the indigenous movement as well, particularly in the Cauca, since the murdered mayor and Gembuel belonged to rival political factions of the Consejo Regional Indígena del Cauca (CRIC) and had recently been engaged in a close electoral battle for the mayorship of Jambaló. The then-president of the CRIC, Páez leader Jesús Piñacué, publicly took the side of his political constituency in the *cabildo* against that of his rivals, disobeying the decision taken by the executive board of the CRIC (and the traditional practice of the organisation) to remain neutral and seek reconciliation in such cases. Gembuel and his followers claimed they were being persecuted because they are political rivals of the *cabildo* leadership and that Piñacué exceeded his authority by becoming involved in the capture and judgment of the accused. They accused Piñacué, a former candidate for vice president and senator, of using the issue to gain national media attention. In fact, Piñacué was elected to the national senate in 1998 with a level of electoral support that exceeded that of any prior indigenous candidate for national office. Ironically, in the summer of 1998 Piñacué found himself fighting a *cabildo* sentence of more than 100 lashes with the *fuete* as punishment for having announced his support for Liberal Party candidate Horacio Serpa in the 1998 presidential run-off without the approval of his political organisation or the Páez leadership. After negotiating with the *cabildo*, the sentence was converted to a ceremonial dunking in a pond in Tierradentro.

On 15 October 1997, the Constitutional Court upheld the *cabildo*’s

<sup>37</sup> Memorandum from Carlos César Perafán to Jesús E. Piñacué, dated 12 March 1997, subject: ‘Concepto Sentencia 001 Cabildo de Jambaló’.

determination of guilt and sentencing (T-523/1997). In his decision, Magistrate Carlos Gaviria Díaz concurred with the Páez Cabildo Association of the North that the intention of the whipping is not to cause excessive suffering but, rather, to represent the ritual purification of the offender and the restoration of harmony to the community. The extent of physical suffering was ruled insufficient to constitute torture (which would be to violate international human rights law) – an affirmation of the Court's defense of corporal punishment in Tutela-349/1996. Gaviria Díaz concluded with the observation that only a high degree of autonomy would ensure cultural survival.

The Jambaló decision strengthened the autonomy of indigenous jurisdiction beyond the Court's 1994 standard. Not only were corporal punishment and expulsion ruled constitutional, the Court in the Jambaló case applied its decision to a community whose level of cultural assimilation is high relative to more isolated, less educated communities. This would appear to lower the burden of proving cultural 'purity' on the part of indigenous authorities. The decision also contributes to the inconsistencies demonstrated by the Constitutional Court in developing and applying the constitution's ethnic rights regime – inconsistencies and contradictions that the magistrates themselves admit, and which reflect their lack of experience with the issues and categories presented by the constitution with respect to ethnic rights, the internal normative contradictions of the constitution itself, as well as the differing philosophical tendencies within the Court.<sup>38</sup> The Court has fluctuated between a vision that seeks a consensus on minimal universal norms and the restriction of the exercise of indigenous jurisdiction to a sphere of universally accepted rights, and a vision that recognises an intangible sphere of ethnic diversity whose integral nature precludes restriction. According to ex-Magistrate Ciro Angarita, this reflects a division within the Court between those who:

absolutely reject the possibility that indigenous '*usos y costumbres*' can be considered sources of law ... [and] another, which accepts, on the contrary, that respect for this alternative source of law – to the extent that it is not contrary to the Constitution and the law – constitutes an expression of the ethnic and cultural diversity of the Colombian Nation and, as such, has a firm but conditional pretext in our [normative] system.<sup>39</sup>

<sup>38</sup> C. Angarita, 'Constitución política, jurisdicción especial indígena y autonomía territorial', in '*Del Olvido surgimos para traer nuevas esperanzas*', pp. 176–7; Gaviria Díaz, 'Alcances, contenidos y limitaciones', p. 162; L. S. Mosquera de Meneses, 'Conflicto entre la JEI y la jurisdicción ordinaria', in '*Del olvido surgimos para traer nuevas esperanzas*', p. 282; Santos, 'Pluralismo jurídico y Jurisdicción Especial Indígena', in '*Del olvido surgimos para traer nuevas esperanzas*', p. 203.

<sup>39</sup> Translation by the author. C. Angarita, 'Constitución política, jurisdicción especial indígena y autonomía territorial', in '*Del olvido Surgimos para traer nuevas esperanzas*',

The larger impact of the Jambaló dispute is the alarm it generated within the indigenous community over the intrusion of the state in what were considered to be internal indigenous affairs, and the negative image of Indians, who were portrayed in the press as violators of human rights who may not be capable of managing the jurisdictional powers recognised by the 1991 Constitution. At a March 1997 conference on indigenous special jurisdiction, among the most controversial issues was whether any Colombian court has jurisdiction to review the decisions of autonomous indigenous *cabildos*, and whether indigenous jurisdiction should be restricted by some universal conception of human rights, as manifest in international law. The latter, ‘total-autonomy’ position puts indigenous organisations in the ambiguous position of rejecting the control of a constitution on which their own elected representatives left such an indelible mark, a constitution that recognises indigenous authorities as legitimate public authorities and, therefore, part of the Colombian state. It also puts indigenous organisations in the position of rejecting international human rights law, while at the same time using international human rights conventions to argue for expanding indigenous rights in national law. The human rights limitation is a serious concern for states throughout the region, since some indigenous cultures are known to have practices that offend Western sensibilities. The most common of these is the use of physical punishment or death as a sanction, but there are also cases where the community practice is to kill or abandon infant twins or babies born handicapped, female or to large families, as well as old or very sick people, because they are considered to be a burden on the community. Another community conflict concerns the practice of older indigenous men taking wives at the age of first menstruation, which countries such as Peru prosecute as statutory rape.<sup>40</sup>

A 1998 decision (SU-5 10) further developed Article 246. It required the Court to balance two fundamental rights of equal rank: cultural diversity and religious freedom. In this case, traditional Ika authorities had imposed physical punishments on evangelical protestant Indians for rejecting traditional beliefs and proselytising within the community. In this theocratic community, spiritual deviation violates community law.

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p. 111. See also Angarita, ‘Colombia: Indígenas y Constitución de 1991,’ in *Seminario Internacional de Administración de Justicia y Pueblos Indígenas* (La Paz, 176–7); E. Sánchez, ‘Conflicto entre la JEI y jurisdicción ordinaria,’ in ‘*Del olvido surgimos para traer nuevas esperanzas*’, pp. 291–2.

<sup>40</sup> Ardito, ‘The Right to Self-Regulation’, p. 10; J. Aroca, ‘El papel de la justicia en la resolución de conflictos multiétnicos: El caso peruano’, unpublished manuscript, 1999, p. 5.



The Court ruled that Ika authorities must respect the right of community members to hold different religious beliefs, but it required the dissenters to restrict religious activities such as proselytisation, and to locate the Pentacostal church outside the borders of the community.

Despite the problems discussed above, the Colombian case provides the most ambitious attempt of any Latin American state to implement legal pluralism. The singularity of the Colombian effort may be attributed both to the fact that its constitutional model of indigenous rights is among the most comprehensive and progressive to date, as well as to the fact that its indigenous population is among the smallest in proportion to its total population, presenting a more modest threat to traditional views of national identity and the interests of rural power brokers. Perhaps this explains why Costa Rica, whose indigenous population is less than one percent of the total, is second to Colombia in jurisprudence favouring indigenous peoples' rights. Costa Rica's Supreme Court has decided more than five cases concerning indigenous constitutional rights since 1992, mostly in favor of indigenous organisations.<sup>41</sup>

Other factors also may be important. Colombian Indians developed a tradition in the nineteenth century of using the legal system to defend rights and of taking legal petitions to every possible channel of redress of grievances within the state. They have enjoyed numerous successes, blocking or modifying laws detrimental to their interests and defending colonial-era privileges.<sup>42</sup> They enjoy the support of numerous human rights organisations with experience in arguing rights cases before national and international fora. Many Colombian Indians choose law as a profession or field of study – such as Senator Francisco Rojas Birry, who served in the 1991 constituent assembly. Indians have taken advantage of a culture that is particularly litigious and in which judges have traditionally played an important role in conflict resolution.<sup>43</sup>

Colombia's constitutional tradition is also unusual. Unlike most Latin American countries, Colombia retained colonial-era institutions with respect to collective rights for Indians and other corporate actors in its constitution and laws into the 1990s. Colombian jurisprudence has a tradition of recognising the source of indigenous collective rights –

<sup>41</sup> Although Costa Rica's constitution is silent on indigenous rights, the country has signed ILO Convention 169, which has the rank of constitutional law. Organización Internacional del Trabajo, 'Pueblos Indígenas, Sentencias, Fallos y Opiniones consultivas, Costa Rica, Cinco sentencias de la sala constitucional relacionadas con los derechos de los pueblos indígenas'.

<sup>42</sup> R. Roldán, 'Los convenios de la OIT y los derechos territoriales indígenas, en las políticas de gobierno y en la administración de justicia en Colombia', in *Seminario Internacional de Administración de Justicia y Pueblos Indígenas* (La Paz, 1998), pp. 53–4.

<sup>43</sup> Interview, Manuel José Cepeda, Fribourg, Switzerland, 30 April 1999.

particularly territorial rights – in the existence of indigenous peoples prior to the formation of the state, a tradition based in colonial Indian law. Colombian jurists have a longstanding tradition of recognising the duty of the state to protect indigenous communities. There is no other country in the region with such a long history of jurisprudence reflecting this commitment. The work of jurists is supported by a strong tradition of scholarly work on indigenous peoples among Colombian social scientists, which has generated a place of respect for indigenous cultures within Colombian society, despite their small proportion of the population.<sup>44</sup> Colombia also traditionally has supported international human rights conventions, particularly with respect to the rights of minorities. It was among the most active participants in the debate on ILO Convention 169, in which it pushed for a broad recognition of autonomy for indigenous peoples.

Additional explanations for the singularity of the Colombian case are the exceptionality of the country's professional judiciary and its unusual tradition of judicial activism. Colombian Supreme Court magistrates exercised judicial review in the nineteenth century, a practice that increased after 1910. Colombians became habituated to the judiciary's involvement in important political issues. The Constitutional Court has drawn its magistrates from the ranks of the country's most prestigious law professors and most experienced Supreme Court magistrates. Like other Colombian judges they are paid good salaries: Constitutional Court magistrates have among the highest salaries in the public sector, earning the same as the president and cabinet ministers.<sup>45</sup>

### *Bolivia*

Bolivia's indigenous population comprises 66 per cent of the total population of about eight million, the largest proportion in South America. The largest indigenous group is Quechua (about 35 per cent of Bolivians), followed by the Aymara (about 25 per cent). Highland indigenous organisations are descendants of peasant unions formed by the Movimiento Nacional Revolucionario (MNR) party after the 1952 revolution to control the indigenous population. These organisations began to assert their independence in the 1970s when the Banzer military government imposed economic policies less favorable to their interests; in

<sup>44</sup> F. Correa, 'El indígena ante el Estado Colombiano', in E. Sánchez (ed.), *Antropología Jurídica. Normas formales—costumbres legales* (Bogotá, 1992), pp. 93–4; Roldán, 'Los Convenios de la OIT', pp. 54–63.

<sup>45</sup> Interview, Manuel José Cepeda, 30 April 1999. Cepeda estimates that Constitutional Court magistrates earn approximately US\$7,500 per month.

1979 peasant organisations formed an independent confederation (CSUTCB) to unite the *campesino* contingent within Bolivia's militant labour movement. In the late 1980s and early 1990s, as the coherence and power of the labour movement declined rapidly, traditional *ayllu* organisations,<sup>46</sup> which had been overshadowed politically by the *campesino* federations, reasserted their authority and established large federations that now vie for the allegiance of the highland indigenous population. Organising among the lowland population began to gain momentum after 1985, reaching national attention with a massive march from the lowlands to La Paz in 1990. As in Colombia, decades of grassroots mobilisation enabled indigenous organisations to assert constitutional claims during the 1993–6 reforms.

Unlike the Colombian constitution, replaced *in toto* via a constituent assembly, the 1967 Bolivian Constitution was altered through a process of piecemeal reforms, beginning in the administration of Jaime Paz Zamora in 1993, and extending through the administration of Gonzalo Sánchez de Lozada (1993–7). The bulk of Bolivia's new constitutional regime for indigenous rights is contained in Article 171, which was adapted from the 1991 Colombian Constitution. The relevant language from Article 171 reads:

The natural authorities of the indigenous and campesino communities may exercise functions of administration and application of their own norms as an alternative solution in conflicts, in conformity with their customs and procedures, always providing that they are not contrary to the Constitution and the laws. The law will establish the coordination of this special jurisdiction with the judicial power (translation by the author).

In Colombia, President Gaviria had prioritised the implementation of judicial reform. In Bolivia, President Sánchez de Lozada's Justice Ministry prepared a comprehensive set of laws to modernise the judicial system, but few of the laws were sent to congress, owing to the greater priority placed by Sánchez de Lozada on other aspects of the constitutional reform and his efforts to diminish the growing prestige and popularity of his able Justice Minister, whom he may have perceived as a political rival. The implementation of Bolivia's 1994 constitutional reforms with respect to the judiciary also fell victim to a counter-reform drive by traditional politicians within the governing MNR party, who resisted relinquishing

<sup>46</sup> An *ayllu* is an Andean form of community organization of pre-colombian origin. It is territorially discontinuous in order to take advantage of the diverse ecological zones in the Andes, enabling a community to produce a variety of agricultural crops while raising animals suited to higher elevations. There are approximately 140 *ayllus* in Bolivia's central highlands. X. Izko, 'Etnopolítica y costumbre en los andes bolivianos', in A. Wray et al., *Derecho, pueblos indígenas reforma del estado* (Quito, 1993), p. 193.

control over the political quotas available to the ruling party under the existing system.<sup>47</sup> Implementing legislation for the judicial reform was not prepared until the end of the Sánchez de Lozada administration, and it was never introduced in the National Congress. Only the new Penal Code was approved during his term. Fulfilling a longstanding public commitment, President Hugo Banzer, who took office in July 1997, passed legislation establishing the new judicial institutions created by the 1994 reform, including the Constitutional Tribunal. That tribunal began operating only in 1999. Implementing the judicial reform is part of the Banzer government's strategy to recover from the ignominious experience of being named the world's second-most corrupt country by Transparency International.<sup>48</sup>

For the Sánchez de Lozada government, the indigenous customary law issue was part of a larger effort to accommodate Bolivia's formal legal system to the reality of a country where justice is administered mainly in informal, oral, local settings and to create a more humane system, closer to the people, that promotes reconciliation and human rights. As in Colombia, a main goal was the recuperation of legitimacy for the state by incorporating community justice systems with high levels of legitimacy.<sup>49</sup> As Justice Ministry officials argued:

the recognition of community justice is the most effective alternative for satisfying the demands for justice of the national majority, without imposing a legal order and formal justice, which are alien and ultimately ineffective for resolving conflicts.<sup>50</sup>

They contend this, because community members actively take part in the proceedings, interact with familiar community authorities, and because the decision rendered is negotiated among the parties to the conflict. In contrast, ordinary justice is handed down unilaterally by a non-community member in a formal procedure in which the parties are passive subjects.<sup>51</sup>

Due to the delay in implementing the judicial reform, legislation to implement the right of indigenous peoples to exercise their customary legal systems was unfinished at the end of the Sánchez de Lozada

<sup>47</sup> Confidential interviews in La Paz with former justice administration officials; interviews in La Paz, Luis Vásquez, 17 June 1997; Gustavo Fernández, 9 June 1997; Ramiro Molina R., 6 May 1997; *La Razón*, 11 Oct. 1996, p. 2A.

<sup>48</sup> Interview, Jorge Quiroga, La Paz, 14 Dec. 1998.

<sup>49</sup> The greater legitimacy of indigenous community authorities relative to state courts is confirmed by a 1998 poll on public support for public and private institutions, in which indigenous authorities placed second after the Catholic Church, while courts placed 13th out of 15 institutions listed. See M. Seligson, 'La cultura política de la democracia en Bolivia: 1998', unpublished study prepared for USAID, 1998.

<sup>50</sup> Translation by the author. 'Justicia Comunitaria y Jueces de Paz', Documento de Trabajo, Ministerio de Justicia, 1997, p. 9.

<sup>51</sup> Interview, Silvina Ramírez, La Paz, 7 May 1997.

administration. Preparation of this legislation has been assigned to a team of Justice Ministry anthropologists, headed by Ramiro Molina. During the last eight months of the Sánchez de Lozada administration, Molina supervised a World Bank-funded project to prepare case studies of the customary legal systems of the three largest ethnic groups, as well as two urban cases, and to draft implementing legislation to accommodate oral traditions to positive law. Due to heavy urban migration in the last decade, indigenous community justice is not confined to rural areas. Migrants typically bring their legal systems with them to urban areas, a practice facilitated by the custom of settling with fellow migrants.<sup>52</sup> The project was completed during the Banzer administration and was published in 1999. The studies are intended to serve as guidelines for judges in interpreting the constitutional right to customary law and in determining the guilt and sentencing of indigenous defendants, although in practice they barely cover the great diversity of Bolivian customary legal systems, since even within language groups there may be variations in procedures and norms.<sup>53</sup>

As in Colombia, indigenous organisations offered legislative proposals for the implementation of the right to exercise customary law. The confederation uniting most of the lowland organisations, the Confederación de los Pueblos Indígenas de Bolivia (CIDOB), proposed the establishment of an indigenous justice administration hierarchy parallel and similar to that for non-indigenous law. Justice ministry officials rejected the proposal because it imposes a system of authority on a diversity of systems that may not have the judicial figures contemplated in the CIDOB proposal – that is, the authority to administer justice may be rotated, or may lie in a group of people or an assembly rather than in a single person, as in ordinary law. In addition, the CIDOB proposal called for the codification of customs into positive law, which would strip them of their flexible, dynamic character. Thus ironically, as in Colombia, proposals prepared by the major indigenous organisations were rejected by government officials as being too restrictive of indigenous communities' constitutional rights.

It is not surprising that Bolivians faced similar problems in creating a law coordinating indigenous and national jurisdictions, since the ambiguous and vague language contained in Article 171 is almost identical to that of the Colombian Constitution's Article 246. Bolivian Justice Ministry staff observed that this language may recognise an indigenous jurisdiction that is entirely separate from the national system, or one that is subordinate to it. As in Colombia, it is unclear whether

<sup>52</sup> Interview, Esteban Ticona, La Paz, 16 Dec. 1998.

<sup>53</sup> Interviews in La Paz, Lorena Ossio, 18 Dec. 1998; Ramiro Molina, 6 May 1997.

Indians have the right to choose indigenous jurisdiction over that of the state, or whether indigenous jurisdiction is mandatory. This issue was resolved in the 1999 revised Code of Penal Procedure, which gives defendants the option of choosing *either* state *or* community jurisdiction. Penal action is extinguished in cases where the community has resolved the issue. It remains unclear whether indigenous customary law has broad territorial or functional scope, or whether it is restricted to internal, cultural matters not regulated by the state.<sup>54</sup> It is possible to interpret the limits of indigenous jurisdiction as either ‘fundamental rights’ or as the constitution and other laws. The scope of indigenous autonomy in the administration of justice is restricted in Bolivia by the absence of constitutional recognition of the territorial autonomy of indigenous peoples. Whereas the Colombian Constitution clearly extends jurisdictional, politico-territorial authority to indigenous communities, in Bolivia indigenous organisations and their advocates had to settle for collective property rights. The greater resistance of Bolivian elites to recognising a territoriality for indigenous authority is understandable, given the implications of extending this recognition to more than 60 per cent of the population.

The most difficult conceptual question the Justice Ministry team is struggling with is that of limits to customary jurisdiction. Anthropologist Ivan Arias, a consultant on the customary law project, argues that, although there are many positive aspects of *campesino* justice – such as the use of strong moral sanctions, the prominence of orality and dialogue in the development of consensus among the accused and the community, and the ultimate aim of achieving harmony within the community – there are a number of problems in the treatment of women and children that violate constitutional, statutory and international law that the state and non-indigenous Bolivians should not be expected to tolerate. The difficulty will be excising these practices and norms from traditional legal systems without doing violence to the culture.<sup>55</sup> The team is leaning toward identifying the constitution as the only limit, since international conventions are not well integrated into Bolivian law, as they are, for example, in Colombia and Costa Rica. With a view toward promoting a dialogue on this key point, the team devised a strategy to engage the public, lawyers, judges and indigenous communities, and undertook a training project with the Judicial Counsel.<sup>56</sup>

To fend off resistance from the older legal establishment, the Justice Ministry team studied historical texts revered by the legal establishment

<sup>54</sup> Interview, Silvina Ramírez, La Paz, 7 May 1997.

<sup>55</sup> Interview, Ivan Arias, La Paz, 16 Dec. 1998.

<sup>56</sup> Interview, Lorena Ossio, La Paz, 18 Dec. 1998.

for language that would support an interpretation of customary law as potentially public, formal, and positive in nature.<sup>57</sup> They also looked at the experience of constitutional courts in other countries as interpreters of this law, with particular interest in the Colombian case, since Bolivian politicians and elites are accustomed to adopting norms and practices that have international prestige. Some politicians and congressional deputies have questioned the very concept that indigenous and *campesino* communities practice anything that could be called justice, pointing to practices such as physical punishment to demonstrate their ‘savageness’ and ‘barbarity’. Nevertheless, the Banzer government’s indigenous affairs office has encountered enthusiasm for the project among the younger generation of judges and law clerks, who have participated in government-sponsored training programmes.<sup>58</sup>

These educational programmes are important because Bolivia’s legal education tradition is fundamentally positivist, and has denied the existence of legal pluralism. It offers no training in indigenous legal systems and has produced no lawyers or judges who understand the topic. During the Sánchez de Lozada administration, the government sponsored a variety of fora to educate the country’s senior judges about the issues involved in recognising indigenous justice systems, including an international conference on the administration of justice in indigenous communities. Through the participation of Colombian constitutional magistrates and juridical anthropologists, the Bolivian government became familiar with the Colombian experience.<sup>59</sup> It was the first time that indigenous justice systems were discussed at such a high level of judicial power. Despite the existence of numerous laws on these matters, the Bolivian Supreme Court has never issued a ruling on indigenous rights or on the issues of diversity or multiculturalism.<sup>60</sup>

The Bolivian government and courts have continued the pre-reform policy of staying out of indigenous community justice administration. For example, the government responded only weakly to a 1991 case of reported witch-burning in the Guaraní-Izozog community of Alto y Bajo Izozog, in the lowland department of Santa Cruz, where it is the custom for authorities to expel community members judged to be witches and, if they return, to execute and burn them. When the aunt of Capitán Grande Bonifacio Barrientos and her husband – both declared to be witches and expelled from the community of Cuarirenda – were shot upon returning to the community and their bodies burned, the municipal authorities of

<sup>57</sup> Interview, Lorena Ossio, La Paz, 18 Dec. 1998.

<sup>58</sup> Interviews in La Paz, Esteban Ticona, Ernesto Muñoz, 16 Dec. 1998.

<sup>59</sup> Interview, Rene Orellana Halkyer, Santa Cruz, 18 July 1997.

<sup>60</sup> Interview, Jorge Luis Vacaflor, La Paz, 13 May 1997.

Charagua sent the police to arrest the perpetrators. However, the police left without making an arrest after the entire community claimed responsibility for the murders. A nearby army post also attempted to intervene, but was rebuffed. The matter is currently not being pursued by the state.<sup>61</sup> The prosecution of witches by indigenous communities is perhaps the archetypal case of indigenous customary law, severely punishing behaviour that is not considered unlawful under positive law. Normative conflicts between the two justice systems are likely to emerge on this issue throughout the region, where numerous indigenous communities sanction witchcraft, often with execution.

Beginning in 1994, in an effort to protect their new constitutional rights to customary law against possible state intervention, the Guaraní–Izozog worked with anthropologists to write down their statutes and regulations. They are the only indigenous people in Bolivia with written norms of administration of justice. To avoid conflicts with constitutional and international law, these written statutes formally prohibit execution. The most severe penalty that may be applied is expulsion from the community. Anthropologists working with the group believe that communities may continue the practices of expulsion and witch-burning clandestinely to avoid the intervention of human rights organisations, since the state is disposed to intervene in cases where the right to life is considered to be violated.<sup>62</sup>

There are four possible explanations for the Bolivian state's lesser intervention in indigenous community justice issues. First, unlike Colombia, expelled witches have not sought legal action to protect their constitutional rights, despite the existence of a significant community of expelled witches in the city of Santa Cruz. Indigenous communities – including the families of the executed witches – have maintained solidarity on the issue of customary law in the few cases in which authorities have been challenged. As Orellana explains,

The authorities are not obeyed out of fear of their power; rather, there exists a broad participation and acceptance on the part of the communal society, such that a great degree of legitimacy and validity is bestowed on the administration of justice.<sup>63</sup>

Perhaps there is greater community solidarity behind the administration of justice by indigenous authorities because the factionalism that comes with electoral participation has not yet generated community divisions –

<sup>61</sup> Interviews in Santa Cruz, René Orellana Halkyer, 18 July 1997; Isabelle Combes, 18 July 1997.

<sup>62</sup> Interviews, Silvina Ramírez, La Paz, 7 May 1997; René Orellana, Santa Cruz, 18 July 1997; Isabelle Combes, Santa Cruz, 18 July 1997.

<sup>63</sup> Translation by author. Orellana, 'Un derecho sobre muchos derechos', p. 27.



as occurred in the Páez community of Jambaló. Partisan politics did not enter indigenous communities in a major way until the 1995 municipal elections. Greater community-level solidarity may also explain the absence of a key role for zonal and regional indigenous organisations in resolving intra-community disputes over the administration of justice. As opposed to the situation obtaining in Colombia and Peru, there does not appear to be a tradition of referring intractable community disputes to zonal or regional organisations, even though such organisations do exist in Bolivia.<sup>64</sup>

Secondly, according to Ramiro Molina, Bolivian indigenous law has been consistently and autonomously practiced and is well known and understood within the communities. Over the centuries, ethnic and Western norms adapted to each other and to changing political conjunctures. This may be more the case in Bolivia due to the more centralised and rural nature of the country, and the greater dispersion of its population. Although the Colombian and Bolivian territories are approximately the same size, the Bolivian population is hardly larger than the population of Colombia's capital city (seven million), and 36 per cent of the population lives in communities of 250 people or fewer. Bolivian courts have been a largely urban phenomenon. As a result, in much of the country there has been little challenge to indigenous law from the state, not to mention the guerrillas, military units and paramilitaries that compete for norm-making authority with indigenous authorities throughout Colombia. In addition, according to Molina, in Bolivia judicial authority is exercised democratically and rotated, ensuring that punishments are fair and widely accepted. Thus, occasions do not emerge, as in the Jambaló case, where one sector of elites within the community challenges another's interpretation of indigenous law.<sup>65</sup>

Thirdly, the tradition in Bolivia is to negotiate rather than adjudicate conflicts, a preference that arose out of necessity. Courts are inaccessible to most of the population due to their concentration in urban areas, which limits access for the 42 per cent living in rural areas, who must invest considerable time and expense to visit the local provincial capital. Bolivian courts commonly impose user fees – 25 per cent of the judicial budget – which are beyond the reach of the 70 per cent living in poverty. Other barriers are the predominant use of Spanish and written procedures in a country where many are illiterate and do not understand Spanish, the insufficient supply of legal advisors for the indigent, and the slowness of the judicial process, due in part to the scarcity of judges. A decade ago a total of 424 judges served a population of about seven million, a ratio of approximately one to every 16,000 inhabitants – a low rate of judges/

<sup>64</sup> Orellana, p. 25.

<sup>65</sup> Interview, Ramiro Molina R., 6 May 1997.

population even for Latin America.<sup>66</sup> Courts are distrusted more than any other Bolivian institution with the exception of political parties and the police, due to the permeation of judicial appointments by partisan politics and corruption.<sup>67</sup> In contrast to the situation in Colombia, judges lack professionalism, enjoy low public prestige and are poorly paid. Where conflicts between indigenous rights and the state have occurred, lawyers negotiate these with the appropriate authority, rather than filing suit. Thus, no tradition ever emerged of defending indigenous rights in the courts.<sup>68</sup> And, again in contrast to Colombia, no non-governmental organisations emerged devoted to defending rights in courts. Bolivia's lively NGO sector and social science professionals have traditionally worked on economic development and cultural issues rather than on the issue of rights *per se*.<sup>69</sup> Due to the far lower incidence of political violence and human rights violations in Bolivia, there is no battery of attorneys' organised to defend human rights comparable to that existing in Colombia.<sup>70</sup>

### *Conclusion*

Political elites in both countries understand the urgency to provide a cheaper, more accessible, more face-to-face form of justice administration, particularly in rural areas, in order to legitimise the authority of the state and extend the presence of the rule of law throughout the territory. This goal was the principal reason that they were willing to recognise indigenous customary law. The fact that neither country was able to codify the coordination of the two systems does not imply that this is impossible. Other states have imposed an interpretation of this term. The jurisdiction of tribal courts in the United States, for example, is well settled. In our cases, however, both states' democratic legitimacy is fragile and both have made public commitments to recognise diversity. Neither seems willing to impose its vision of legal pluralism on authorities that enjoy greater popular support and legitimacy than the state. It is better to muddle through without a statutory law than to risk impugning the regime of rights and the legality that the recent constitutional reforms were intended

<sup>66</sup> For example, according to Gamarra, Colombia has one judge for every 8,000 inhabitants. Eduardo Gamarra, *The System of Justice in Bolivia: An Institutional Analysis*, Monograph 4 (Miami, 1991), p. 92.

<sup>67</sup> Seligson, 'La Cultura Política de la Democracia'.

<sup>68</sup> Interviews, Jorge Luis Vacaflor, 13 May 1997; Silvina Ramírez, 7 May 1997.

<sup>69</sup> The exception to this rule, the Santa Cruz-based CEJIS, operates primarily through negotiations with the executive rather than the courts.

<sup>70</sup> On the observations made here about the Bolivian justice system, see D. L. Van Cott, 'The Role of Justice in Conflict Resolution in Multiethnic Countries: The Bolivian Case', paper presented at the Workshop on Multiethnic Nations in Developing Countries: Colombia as a Latin American Case, Fribourg, Switzerland, April 30, 1999.

to construct. In practice, the formal demarcation of jurisdictions has not been a major source of conflict, since in both countries informal coordinating mechanisms have been created and adapted as state and indigenous legal systems have developed over time. As Iturralde observes with respect to Latin America in general, in virtually all cases customary law is practised in interrelation with positive law, depending on the problem the community is addressing. Many communities, particularly in the Andes, often choose to refer disputes to the state rather than to handle them internally.<sup>71</sup> Although indigenous organisations in Latin America claim a broad scope for the exercise of autonomous judicial authority as part of a larger effort to assert political autonomy, in practice the bulk of the scope of indigenous customary law has to do with disputes over the use of community lands, family law (abandonment of minors, relations between married people, inheritance), and a number of minor crimes such as petty theft and assault. Normally customary law is applied only to those persons identified by community authorities, and who identify themselves as community members.<sup>72</sup>

In Colombia, more conflicts over the jurisdiction of customary law have erupted than in Bolivia because of factionalism within indigenous communities; the greater level of urbanisation in Colombia and, thus, the lesser geographic isolation and privacy for community practices; the more pronounced tradition of claiming rights before Colombian courts, particularly within the indigenous movement; and the failure of the Colombian congress to pass legislation establishing the Indigenous Territorial Entities that were to provide the politico-territorial basis of indigenous jurisdiction. These problems are balanced by the unusual propensity of a sector of Colombia's professional judiciary to permit a wide scope of autonomy for indigenous special jurisdiction and by the persistent efforts of regional and national indigenous organisations to gain public support for their interpretation of indigenous autonomy. The indigenous movement has been able to maintain public interest in, and government attention to, cultural diversity through high-profile mobilisations, and by steadily increasing its representation in government office.<sup>73</sup> In Bolivia, indigenous autonomy is facilitated in the absence of sustained governmental support and of a judiciary interested in or

<sup>71</sup> D. Iturralde, 'Movimiento indio, costumbre jurídica y usos de la ley' in R. Stavenhagen and D. Iturralde (eds.), *Entre la ley la costumbre. El derecho consuetudinario indígena en América Latina* (México, 1990), pp. 43, 58; Iturralde, 'Usos de la Ley y usos de la costumbre', pp. 136–7; A. Wray, 'El problema indígena y la reforma del Estado', in Alberto Wray et. al, *Derecho, pueblos indígenas y reforma del Estado* (Quito, 1993), p. 33.

<sup>72</sup> Ministerio de Justicia, 'Justicia Comunitaria y Jueces de Paz', p. 23.

<sup>73</sup> Indigenous political parties hold three senate seats, two seats in the lower chamber, one governorship, 12 mayorships, and more than 100 municipal council seats.

knowledgeable about legal pluralism or multiculturalism, largely through the geographic cultural isolation of indigenous communities, the lack of interest on the part of the state and the historical weakness of justice administration.

In both countries, the multicultural zeitgeist of the 1990s has sensitised the general public to the status of indigenous peoples and has created a public mood at least passively hospitable to indigenous rights claims. The disposition to tolerate indigenous customary law despite the existence of practices that offend Western sensibilities is reinforced by the international discourse on multiculturalism and the growing acceptance of legal pluralism in constitutions and international human rights law.<sup>74</sup> The most important challenge today is that of allocating sufficient resources to educate judges and attorneys about indigenous legal practices and the new national and international norms on indigenous rights, and to train Indians from all language groups as judges, advocates and translators.

<sup>74</sup> See the literature cited in note 4.