INDIGENOUS AND STATE JUSTICE IN LATIN AMERICA

COOPERATION OR COEXISTENCE?

Susanne Käss / Christian Steiner

In 2007, in the Mexican state of Oaxaca, Eufrosina Cruz Mendoza stood for the position of mayor in her Zapotec home community. Although the majority of citizens voted for her, the election outcome was not accepted by traditional authorities in the village because women had traditionally not enjoyed active or passive voting rights in Santa Maria Quiegolani. Although Eufrosina was able to convince the majority of people in her community of her suitability, she could not convince the courts that had jurisdiction in the area. Reason being, when she attempted to exercise her individual rights, the courts decided that the collective right of the indigenous community to autonomy had priority over the political rights of the individual. It was therefore lawful for Eufrosina to have been discriminated against on account of her gender in spite of the fact that she was a Mexican citizen.

There are over 500 ethnic groups in Latin America, whose members speak approximately 900 languages from over 100 language families. 40 to 50 million people in Latin America are of indigenous descent, making up eight to twelve per cent of the total population.[1] The ethnic diversity of the continent represents a unique cultural treasure, but also presents major challenges to Latin-American societies. After centuries of cultural, social, economic and political marginalisation of indigenous peoples, awareness grew amongst these societies in the second half of the 20th century that there was a need to acknowledge and maintain

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1 | United Nations Children's Fund (UNICEF), *Atlas Sociolingüístico de Pueblos Indígenas en América Latina,* FUNPOEIB Andes, Cochabamba, 2009.

Diversity is seen as valuable. But in practice, clashes between world views and traditions are giving rise to complex sociocultural, political and legal questions.

the cultural heritage of the original inhabitants. Today, this diversity is seen as an opportunity and as valuable. But in practice, clashes between world views, traditions and ways of life are giving rise to complex sociocultural, political and legal questions. Inevitably, conflicts arise. On the one hand, these have functional implications. How can different legal traditions and systems and the associated responsibilities be delimited and coordinated within the borders of a country? On the other, there are fundamentally different views about the universal applicability of human rights, not least in situations where collective indigenous rights potentially clash with the civil liberties of the individual.

One aspect that should not be underestimated is that these problems are further complicated by historic claims relating to the need to come to terms with the past. Occasionally these are laced with revanchist overtones (key phrase: cultural and legal decolonisation), and an underlying tendency to criticise globalisation in societies which, following the Spanish-Portuguese colonisation and preservation of European forms of government (even after gaining independence in the early 19th century), have over the past several decades frequently been subject to liberal economic policies that were incapable of ensuring that large sectors of the population would benefit from economic progress. The situation has been exacerbated by the fact that, unlike in Europe, the democratic constitutional states modelled on the European nation state, which were formally established in the 1980s and 1990s, have not been successful in achieving social stability and prosperity for the majority of the populace including the indigenous population. The European idea of the democratic and social constitutional state thus has a credibility problem, not so much because its fundamental beliefs could not possibly flourish in Latin America, but because they were not implemented effectively on the first attempt.

This lack of credibility is producing an interpretational vacuum amongst marginalised groups (and the intellectuals representing them). In their search for the "right" social and state structures, they proved receptive to the influence of new, partly populist leadership figures, whose neo-socialist policies appeared to defend indigenous

interests. It is true that demands for greater indigenous autonomy, legal pluralism and intercultural interpretation of human rights, which have already been recognised in instruments of international law, have been incorporated into the constitutions of the Andean countries in particular. But governments once again lack the will or at least the capability to enforce these pluralist demands in practice because they appear to run counter to economic development along Western lines. It therefore appears that the efforts of the continent's indigenous movement towards restructuring the social, political and economic order may once again be thwarted.

RISE OF PLURI-ETHNIC SOCIETIES IN LATIN AMERICA[2]

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After Columbus' discovery of the American continent, the existing indigenous empires as well as tribal and segmentary societies were decimated by the wars of conquest in the 15th and 16th centuries. During colonial rule up to the 18th century, the indigenous peoples were considered vassals of the Spanish Crown. The application of their own legal traditions was condoned as long as only indigenous people were involved and there was no open opposition to the enacted laws and doctrines of the Catholic Church.

Following their independence in the 19th century, the original inhabitants were intended to become integrated into existing societies as their cultures were considered backward. The aim was to build nation states with a common culture, language and jurisdiction. From the middle of the 20th century onwards, the poverty that was rife amongst the indigenous population was recognised as a serious problem and became the subject of various political strategies. With a view to their integration and assimilation, attempts were made to integrate the indigenous peoples into the markets,

2 | On the subject of the development of indigenous politics and on legal pluralism cf. for instance: Bartolomé Clavero, "Geografía Jurídica de América Latina: Pueblos Indígenas entre Constituciones Ladinas"; Raquel Yrigoyen Fajardo, "Hitos del reconocimiento del pluralismo jurídico y el derecho indígena en las políticas indigenistas y el constitucionalismo andino", in: Mikel Berraondo (ed.), *Pueblos indígenas y derechos humanos*, Universidad de Deusto, Bilbao, 2006, 537-567.

thereby offering them a way out of poverty. However, the original legal traditions persisted during this period as well, which was mainly due to the state lacking the resources to penetrate into the huge and mostly unexplored territories. For centuries, indigenous and state legal systems existed side by side with hardly any intersection; as of the second half of the 20 century, however, massive migrations to the cities resulted in increased clashes of different traditions. Confrontations forced the states to address the "otherness" of the indigenous cultures and to develop potential solutions for people coexisting in plural societies.

WORLD VIEW: HARMONY AS THE GUIDING PRINCIPLE

Although the indigenous cultures on the subcontinent are quite diverse, there are basic elements which share striking similarities. For instance, most of the peoples refer to their world view, on which they base their human interaction and legal traditions, as cosmovision: the way they view, feel, understand and project the world. Their cultural identity arises from a strong connection to the environment, particularly to nature, which is referred to as Mother Earth. The ultimate objective is *vivir bien*, which means something like "living well" and is derived from the terms *sumak kawsay* in Quechua and *suma quamaña* in Aymara. These terms describe striving for harmonious coexistence, first and foremost between man and nature. Nature and its elements (animals, rivers, forests, etc.) as well as humans within their community have both rights as well as responsibilities. *Vivir bien* therefore encompasses the idea of the common good, but includes explicitly all life and nature. Belief that nature possesses an animate quality is an important element of indigenous spirituality.

In communities characterised by the coexistence of humans and nature collective rights apply. The ultimate goal of conflict resolution is to retain or restore harmony. Decisions are made in community assemblies by consensus, not majority decision. There is no tradition of competition between different fundamental viewpoints, an essential characteristic of Western democracies, and it is most often unwanted. Of course there are also numerous conflicts in traditional indigenous communities. But traditionally, conflict resolution is based on the above-mentioned guiding

principles. The idea is for the jurisdiction to restore balance within the community. During the resolution process, collective rights frequently run counter to the rights of the individual. Due to increasing contact with liberal legal tradition, which is based on the rights of the individual, these tensions are now arising more frequently.

Convention of the Zapotec in Ayoquezco de Aldama in Oaxaca, Mexico: community assemblies deliver their mandate to the traditional authorities. | Source: © KAS Bolivia.

ORGANISATION OF INDIGENOUS COMMUNITIES

Indigenous communities are structured differently depending on their ethnic composition. The descriptions below therefore represent examples and are not universally applicable. The customs and conventions of each indigenous people vary from one community to the next.

In most cultures, the community assembly is of prime importance. This is where all important decisions are taken. In some cultures, only men are entitled to attend community assembly meetings, in others women are allowed to attend but are not permitted to be involved in discussions, and in yet others women do play a part in the decision-making. In many cultures the community assembly gives the traditional authorities their mandate. Frequently, a person must have progressed through a hierarchy of positions before being allowed to hold high office. This is true among the Zapotec and Mixtec in Mexico, for instance. In the culture of the Quara Quara Suyu in Bolivia, this

is referred to as *thakhi*, which is equivalent to "path" in Quechua. People embark on this path by holding positions of modest responsibility before going on to positions of greater responsibility. Each post can only be held once, and they are honorary and unpaid. The rotation of positions is meant to prevent cronyism and corruption. Only those who have proved themselves in simple roles are honoured by being allowed to hold a public office entailing greater responsibility. In other cultures, the head of the community is determined for life. This applies to the *longko* among the Mapuche in Chile. Only a person who is respected by the entire community and has already rendered good services can hold this high office. The candidate must undergo a number of physical, spiritual and intellectual tests. He must prove his knowledge of the history of the Mapuche people, for instance, the history of his own family and his eloquence in the *mapudungun* language. In the culture of the Guarani in Bolivia, the highest office of the Capitán Grande can be held both by women and men. Originally it was conceived as a position for life that was passed down within the family; however, this tradition is currently in flux.

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Respect for the wisdom of old age is a further common element of indigenous cultures. Many communities consult a council of elders before taking decisions. In many cultures, the organisational structure is restricted to the particular community; in others, however, there is a national administrative structure. The Guna people in Panama, for instance, have a General Congress, which acts as a representative body of all Guna and thus as the highest-ranking body of administration and political decision-making.

In many areas, indigenous traditions and state structures have become enmeshed. In 418 communities of the Mexican federal state of Oaxaca, the mayor is elected according to local customs and conventions. This avoids conflicts of competence and coordination such as those occurring in numerous communities of the Bolivian highlands, where structures of state administration exist in parallel with indigenous office holders.

CUSTOMS AND CONVENTIONS AS A BASIS OF INDIGENOUS JUSTICE

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In indigenous cultures, the community plays a prominent role. Each member must serve the community and individual members of the community. Land is generally owned collectively and managed jointly. The Zapotec in Oaxaca practice *tequio*. When there is work to be done, all citizens are called upon to contribute on a voluntary basis within limits of their physical capabilities. They participate in the construction of public infrastructure, play in bands or teach crafts and other skills. Anybody who refuses to contribute is fined in minor cases or threatened with expulsion from the community in the most extreme cases. All members of the community contribute to making traditional celebrations a success by donations in kind or of money and by performing some of the work involved. For the Guarani in Bolivia, the *faena* is of great importance. The entire community helps on a voluntary basis, for instance with the construction of a house or preparation of a piece of agricultural land of a member of the community, who repays them with food and chicha, a traditional fermented maize drink. Serving on the community assembly and holding public office also comprise the duties of members of the community. Refusal to perform these duties is punishable.

Following this logic, the purpose of indigenous jurisprudence is to restore balance and harmony within the community after breaches of the rules. It is usually the responsibility of the highest authority to dispense justice. In some cultures, decisions about sanctions are made in the community assembly. By tradition, indigenous justice deals with all violations, which is partly due to the fact that the state justice system did not reach most of the indigenous communities until sometime in the 20th century and still has no presence in some isolated cultures. The indigenous justice systems deal with cases of neighbourly dispute, marital dispute and infidelity, conflicts over land and boundaries, theft as well as bodily harm, rape and murder. Over the last few decades, the justice systems of the state and of the indigenous peoples have become increasingly enmeshed. Since the passing of legislation on the coordination of state and indigenous justice systems in Bolivia in

2010, for example, certain criminal cases (such as murder and rape) must be handed over to the state justice system. There are defined procedures to be followed, for instance with respect to the questioning of suspects and hearing of witnesses.

Yampara people dancing in Tarabuco, Bolivia: All members of the community contribute to traditional celebrations by donations in kind or of money. | Source: © KAS Bolivia.

Any sanctions are aimed at rehabilitating the perpetrators to reintegrate them into the community. According to this traditional concept of justice, physical and psychological damage to the community or the victims (and their family) requires restitution. In many cultures, adultery is thus punished harshly as it damages the structure of the family and thereby of the community. But reconciliation between the spouses remains the principal aim in many cultures to ensure that the children continue to be well cared for. The spreading of rumours is also punished heavily as it can be very detrimental to harmony within the community.

To avoid expulsion, the perpetrator must show remorse and the will to reform. Recidivism results in considerably harsher sanctions. There are economic, physical and moral punishments. Fines are imposed for minor violations. The most common sanction is community service. Physical labour is meant to be cleansing for the soul. Corporal punishment such as beating and flogging is also thought to have a purging effect and to act as a deterrent at the same

time.[3] Many cultures still have the death penalty for particularly serious offences. Moral punishments include some that expose the perpetrator to humiliation by the community. A cattle thief from the Quehue-Quechua community in Peru was thus made to parade around all the communities with the animal's hide around his neck, which bore the inscription: "I am a cattle thief".[4] Members of the Marka Yaku in the La Paz Department in Bolivia who have committed serious crimes are locked up in burial houses with the remains of their ancestors.[5] Anyone among the Achuar people in Ecuador who has wrongly accused a fellow member of the community is regarded as worthless, shunned from that time onwards and no longer allowed to perform any community services, which is considered one of the worst possible penalties.[6] In all cultures, the most severe sanction is expulsion from the community.

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The above-mentioned legal traditions predominantly represent customary law, which is generally not set down in writing. This allows the indigenous justice systems to adapt to changing traditions. But due to intensified contact with other cultures, and in particular Western culture, members of indigenous communities are increasingly demanding their individual rights. In many communities, active political rights for women have thus been introduced over the last few years. In Santa Maria Quiegolani, Eufrosina Cruz's village, women now have voting rights. Increased interaction with the Western legal tradition is probably also the reason why acceptance of corporal punishment is slowly diminishing. This type of punishment is gradually being replaced by fines and community service.

3 | Oswaldo Ruiz Chiriboga, "Indigenous Corporal Punishments in Ecuador and the Prohibition of Torture and Ill-Treatments", in: *American University International Law Review*, No. 4, Vol. 28, 2013, 976-1016.

4 | Jean-Jaques Decoster and Eliana Rivera Alarcón, "Estado del relacionamiento en Perú", in: Eddie Cóndor Chuquiruna (ed.), *Estado de relación entre justicia indígena y justicia estatal en los países andinos. Estudio de casos en Colombia, Perú, Ecuador y Bolivia*, Comisión Andina de Juristas, Lima, 2009, 88.

5 | Eduardo Rodríguez Veltzé and Farit Rojas Tudela (eds.), *Pensar este tiempo: Pluralismo jurídico,* Konrad-Adenauer-Stiftung, La Paz, 2010, 83.

6 | Fernando García Serrano, "Estado del relacionamiento en Ecuador", in: Chuquiruna (ed.), n. 4, 116.

TENSIONS BETWEEN COLLECTIVE AND INDIVIDUAL RIGHTS

Women's rights are a good example to illustrate the conflicts between individual rights guaranteed under the constitution and equally protected collective rights of indigenous peoples. In many cultures, women have no rights or only indirect rights to political participation. The cultures of the Aymara and Quechua in the Bolivian highlands apply the principle of dual office holding, the *chacha-warmi*. Only married men can hold offices and they exercise their duties in collaboration with their wives. While the wife is present in public meetings, the man has the sole right to speak. In many communities in Mexico and Guatemala, women hold offices on behalf of their husbands or sons who have emigrated to the USA.

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Violence against women is a common occurrence in many cultures, but by no means restricted to the indigenous groups. Among the Triqui in Mexico, young girls are forced into marriage at the age of around twelve. Among the Matsiguenga in Peru, repeated adultery by a woman is punished by death.[7] If a man from the Achuar people in Ecuador does not kill his adulterous wife and her lover, he becomes the laughing stock of the community.[8] In various indigenous communities of the Bolivian highlands, the sanction for an unmarried man raping an unmarried woman is for the two to be married. That way, both the honour of the woman's family and harmony in the community are restored and a child potentially produced by the rape is taken care of. Among the Quehue-Quechua, domestic violence against women was not covered by indigenous justice until several years ago as a husband was accorded the right to chastise his wife. In many cases there is thus a contradiction between women's rights guaranteed by the constitution and by international law and the reality of everyday life. Indigenous women suffer double discrimination on account of their ethnicity and their gender. Draconian sanctions that are occasionally carried out within

7 | Jean-Jaques Decoster and Eliana Rivera Alarcón, "Estado del relacionamiento en Perú", in: ibid., 66.

8 | Fernando García Serrano, "Estado del relacionamiento en Ecuador", in: ibid., 118.

the framework of indigenous justice, such as corporal punishment resulting in death, are in clear contradiction to human rights enshrined in international law.

THE RIGHT TO EXISTENCE AND OFFICIAL RECOGNITION OF LEGAL PLURALISM

Particularly where issues of corporal punishment, discrimination against women or legal sanctions to punish violations of moral codes are concerned, indigenous justice immediately rouses indignation among advocates of liberal civil rights – human rights for which Western cultures spent centuries fighting at great cost. However, while criticism of excesses may be justified, examination of the matter is imperative and appropriate if done in a careful manner and need not be subjected to the accusation of boundless cultural relativism. For a start, one must not overlook the fact that over the centuries the indigenous communities have probably implemented their customs and conventions for the purpose of resolving internal conflicts, for instance, with no more or less awareness and acceptance of violating the rights of the individual than the state justice systems did. Occasional cases of conflict between collective and individual rights are outweighed by generally consensual and effective conflict resolution. This is also the reason indigenous communities have survived for centuries: They were able to develop and maintain appropriate rules of behaviour and mechanisms for conflict resolution. Not least, the indigenous communities have undergone some development, for instance in the area of political participation of women.

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One must also bear in mind that Western values, which have become enshrined in the protection of human rights in constitutions and international law, were negotiated predominantly without the involvement of the indigenous communities of (not just) the Latin-American continent. These cultural communities asking the question as to why they must conform to these sets of values, which are held to be universal, is therefore not altogether unjustified in light of democratic principles or the concept of social contract. Added to this is the fact that international law and national constitutions do not only protect the civil liberties

of the individual but also the collective rights of indigenous societies. The right to social, economic, political and institutional autonomy, to the preservation and maintenance of their traditions and methods of conflict resolution and therefore also to an interculturally modulated interpretation and application of (Western) state justice can thus be found in articles 1 I, 2 I, 4 I, 5, 6 I, 8 I, 9 I of the 1989 ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries, which the majority of the continent's states have ratified.[9] Essential recommendations for action in line with the recognition of plural – including legal – structures in the relationship between the states and indigenous communities can also be found in articles 4, 5, 20, 34 of the United Nations Declaration on the Rights of Indigenous Peoples from 2007. Also, several states have enshrined pluralism and corresponding rights relating to autonomy including the right to autonomous conflict resolution according to the communities' own customs and conventions in their constitutions[10] and developed them further in their legal decision-making on constitutional matters.[11] The Inter-American Court of Human Rights has also dealt repeatedly with the rights of indigenous groups and demanded an intercultural interpretation of the rights protected by the American Convention on Human Rights, for instance by expanding the protection of private property to the communal property of indigenous communities.[12]

9 | The following individual countries have ratified the agreement: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, Venezuela; by contrast, the following countries have not: Cuba, El Salvador, Haiti, Panama and the Dominican Republic. The ratification is not necessarily an indication of the progressiveness of policy on indigenous matters. Practices in Panama, for instance, are far more cooperative and constructive than those in Guatemala.

10 | Cf. for instance article 75 of the Argentinian constitution; articles 1, 2, 11, 26, 30, 98, 178, 179, 190-192, 289-292 of the Bolivian constitution; articles 1, 7, 246, 330 of the Columbian constitution; article 2 of the Mexican constitution as well as articles 16, 112 of the constitution of the Mexican federal state of Oaxaca; article 90 of the constitution of Panama (where the extensive autonomy of the indigenous peoples was mainly implemented via legislation and government decrees); articles 89 and 149 of the Peruvian constitution; article 171 of the Ecuadorian constitution; article 260 of the Venezuelan constitution.

11 | A precedent in this area was set by judgement T-523/97 (15 Oct 1997) of the Colombian Constitutional Court.

12 | Cf. Oswaldo Ruiz Chiriboga and Gina Donoso, *Sección Especial. Pueblos Indígenas y la Corte Interamericana,* in: ▸

The cultural contextualisation of human rights does not represent a backward step in terms of the values and principles that continue to be observed by westernised sectors of the population. Instead, it represents a necessary concession, taking into account the legally acknowledged fact that various cultures are living together as collectives – and not just as congregations of individuals who feel bound to a particular culture – within the territory of a single state, whose world views and ways of life have developed differently through human history. To the degree that the state and society (or societies) acknowledge and respect this diversity as a fundamental value and wish to ensure its continued existence, a certain degree of tension and asymmetry must be accepted as well.[13] Such differences are in actual fact not unknown in the European cultural landscape either. The acknowledgement of cultural diversity is expressed in the subsidiarity principle, for instance, which is an attempt to organise the regulating and administrative responsibilities within the European Union in such a way that decisions are taken as sensitively to the needs of the citizen as possible and by no means uniformly in all cases. In the area of human rights protection, the European Court of Human Rights affords the Member States of the European Council a certain amount of leeway at national level where the interpretation and application of the European Convention on Human Rights is concerned in order to allow for the special cultural makeup of each country.

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STRIKING A BALANCE IN INDIVIDUAL CASES

The question is therefore not as to "whether" cultural differences are permitted, but as to "how" matters are handled within borderline areas. There are two such areas. Firstly, there is the question of how to manage conflict situations in the cultural grey areas, that is in the areas where different

Christian Steiner and Patricia Uribe (eds.), *Convención Americana sobre Derechos Humanos Comentada,* Suprema Corte de Justicia de la Nación and Konrad-Adenauer-Stiftung, Mexico City, 2013 (in press).

13 | On the phases of the recognition of legal pluralism in Latin-America cf. "Introducción y explicación previa", in: Eddie Cóndor Chuquiruna (ed.), *Los Derechos Individuales y Derechos Colectivos en la Construcción del Pluralismo Jurídico en América Latina*, Konrad-Adenauer-Stiftung, 2011, 10 et sqq.

cultural traditions clash, for instance when members of one cultural community move temporarily or permanently into the territory of another. This frequently happens in the course of the rural exodus, which results in the meeting not only between people from indigenous cultures and members of a westernised cultural community in the cities but also between members of different indigenous communities. Maintaining the ideal of consistent legal pluralism in this scenario, i.e. treating everybody according to their own customs and conventions, would demand enormous resources and be the nightmare of any judge. The principle applied in practice in these situations is that of territoriality, which is already provided for under some constitutions or coordination laws, whereby the reach of the jurisdiction of the indigenous authorities is restricted to the territory of the particular community or people. While academics regard the principle of territoriality as viable (assuming the territories of the indigenous groups are clearly delimited), as an alternative they also propose the establishment of inter-cultural bodies of jurisprudence of mixed composition.[14] In keeping with the personnel principle – and on the basis of current coordination legislation[15] – one could envisage cases where even a legal dispute between two indigenous persons arising far from their communities could be decided by authorities from their communities.

In practice, however, legal disputes more usually relate to conflicts on indigenous territory between indigenous customs, traditions and collective rights on the one hand and the basic civil liberties of Western tradition on the other. These situations can arise when non-indigenous citizens enter the territory of an indigenous community or when indigenous people themselves attempt to claim the rights of the individual enshrined in the constitution. There has been a rise in the latter cases as contacts between members of indigenous groups and Western culture have been on the increase. When dealing with the ensuing fluid transitions between culturally totally unaffected indigenous people and those who can no longer be regarded as indigenous due to continuous or prolonged contact with Western

14 | Juan Carlos Martínez, "La jurisdicción", in: Juan Carlos Martínez, Christian Steiner and Patricia Uribe, *Elementos y técnicas de pluralismo jurídico. Manual para operadores de justicia,* 39 et seq.

15 | See also references p. 30.

culture, the Columbian Constitutional Court grants the indigenous community a large degree of autonomy, which the rights of the individual must cede to if this is necessary to maintain the conditions underpinning the existence of the people's culture. The idea is that the stronger the cohesion and self-control of the ethnic group the greater the permitted degree of autonomy needs to be to ensure that their customs and conventions are protected. In the event of conflict between the legal tradition of an indigenous group and the standards of public order, the former need not automatically cede; it only needs to do so if rights protected under constitutional law are deemed to be of greater value than ethnic diversity and the integrity of the indigenous group.[16] With respect to the claim of the universal applicability of human rights, the Constitutional Court does, however, maintain the proposition that the country's constitution adopts neither an extremely universalist attitude nor one of uncompromising cultural relativism.[17]

Even though both the instruments of international law for the protection of the rights of indigenous groups and the national constitutions link indigenous conflict resolution to basic rights, internationally recognised human rights and partly even to common law,[18] the resolution of potential conflict situations is not as simple as the principle of priority of fundamental rights would suggest if one takes into account the demands for pluralism and interculturalism that are also enshrined in international and constitutional law. Knowledge about the scope and content of indigenous autonomous rights, including the right to autonomous conflict resolution based on the communities' own customs and conventions, has not yet found its way into many state institutions and courts of law. Consequently, decisions by indigenous authorities are being ignored, with the result, for instance, that a perpetrator already punished by the

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16 | Rosembert Ariza Santamaría, "Derecho aplicable", in: Martínez, Steiner and Uribe, n. 14, 51 et seq.

17 | See Rosembert Ariza Santamaría, *Teoría y práctica en el ejercicio de la jurisdicción especial indígena en Colombia,* in: Rudolf Huber and Juan Carlos Martínez, *Hacia sistemas jurídicos plurales,* Konrad-Adenauer-Stiftung, 2008, 262.

18 | Cf. the overview in José Antonio Regalado, *De las sanciones y las penas en la justicia indígena,* in: Martínez, Steiner and Uribe, n. 14, 106 et seq.

appropriate indigenous authorities is sentenced a second time (in a state court) in contravention of the principle of *ne bis in idem*. Also, indigenous authorities themselves are occasionally prosecuted for unlawful assumption of authority.[19]

Indians of the Ngäbe tribe in Panama: the Supreme Court conducts regular coordination meetings with indigenous authorities. | Source: © KAS Bolivia.

That said, some of the highest legal bodies of several countries have begun to address the highly complex task of devising a functional system of legal pluralism over the last few years, including for instance the administrative chamber responsible for the dispensation of justice at the Supreme Court of Colombia, a country that has a high degree of diversity with 102 (!) different indigenous groups.[20] Another undertaking in this country, which is considered exemplary, consists of efforts made by the state justice system to coordinate its activities with those of the Superior Indigenous Tribunal of Tolima, the Tule people and the Regional Association of Indigenous Authorities AZCAITA; this involves training opportunities for both state and indigenous representatives as well as regular

19 | Cf. the examples for Guatemala: "Introducción y explicación previa", in: Chuquiruna (ed.), n. 13, 15; for Peru: Mirva Aranda Escalante, "La coordinación entre sistemas de justicia en Colombia, Ecuador y Perú", in: ebd., 136 et seq.

20 | Cf. Sala Administrativa del Consejo Superior de la Judicatura, "Acuerdo No. PSAA12-9614 (19 Jul 2012) por el cual se establecen las medidas de coordinación inter-jurisdiccional y de interlocución entre los Pueblos Indígenas y el Sistema Judicial Nacional".

coordination meetings.[21] The Mexican Supreme Court has also addressed this problem area by drawing up a protocol for the observance of the rights of the indigenous peoples.[22] The Supreme Court of Peru has been making intensive efforts to enhance the coordination between state and indigenous justice systems and published a roadmap for "intercultural justice"[23] in 2012; the Supreme Court of Panama similarly conducts regular coordination meetings with the country's indigenous authorities.

These and other state institutions have not only realised that maintaining their own legal traditions by indigenous groups is an undeniable reality. They also see an opportunity here to allow constructive cooperation with the indigenous authorities to relieve the burden on a state justice and court system that to date has been largely inefficient and ineffective. In frequently remote areas, where there is neither a judge nor public prosecutor, the indigenous justice system generally represents the only available mechanism for conflict resolution. It is also fast, effective and tailored to the concrete needs and circumstances of these communities.[24]

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21 | This is described by Rosembert Ariza Santamaría, *Coordinación entre sistemas jurídicos y administración de justicia indígena en Colombia,* Instituto Interamericano de Derechos Humanos, San José, Costa Rica, 2010, 43 et sqq.

22 | Cf. Suprema Corte de Justicia de la Nación, "Protocolo de actuación para quienes imparten justicia en casos que involucren derechos de personas, comunidades y pueblos indígenas".

23 | Cf. Corte Suprema de Justicia de la República (Peru), "Resolución Administrativa No. 499-2012-P-PJ que aprueba la Hoja de Ruta de la Justicia Intercultural del Poder Judicial". See also the experiences of the public prosecutor's office of Canas, Cusco (Peru): Eddie Cóndor Chuquiruna, Mirva Aranda Escalante and Leonidas Wiener (eds.), *Experiencias de coordinación y cooperación entre sistemas jurídicos en la Región Andina,* Comisión Andina de Juristas, Lima, 2010, 38 et sqq.

24 | See practical examples of the dispensation of indigenous justice on Colombia: Esther Sánchez Botero, "Principios básicos y formas de funcionamiento de la justicia que se imparte entre los paeces y los wayú como forma cultural adecuada, legítima y viable para resolver conflictos y coaccionar a sus sociedades particulares", in: Huber and Martínez, n. 17; on Guatemala: Guillermo Padilla, "La historia de Chico. Sucesos en torno al pluralismo jurídico en Guatemala, un país mayoritariamente indígena", in: Huber and Martínez, n. 17; on Panama: Aresio Valiente López, "La jurisdicción indígena en la legislación panameña", in: Huber and Martínez, n. 17; on cases of collisions between communal property and private ▸

The Colombian Constitutional Court established benchmarks for the resolution of specific cases of intercultural conflict back in the nineties, which are gradually being accepted in the other countries. Initially, the Court derived two fundamental principles for the relationship between the state and indigenous justice systems from the state goal of cultural plurality and the indigenous peoples' rights to autonomy. According to these principles, indigenous justice enjoys maximum autonomy. The state has very limited rights to overrule in the indigenous system for the purpose of safeguarding legally protected rights deemed to be of greater value, while always giving priority to that of several possible interpretations best matched to the circumstances and the cultural situation of the indigenous group and the individual.[25] With respect to potential conflicts between the collective right to autonomous conflict resolution and the curtailment of the rights of the affected individual that this might entail (due to an obligation to perform community service, corporal punishment, limitation of the freedom of religion), the Court has set up a catalogue of absolute restrictions to the interference with individual rights. Such restrictions are derived, in the opinion of the Court, from an international and ideologically universal consensus where specific rights cannot even be curtailed in a state of emergency. According to this catalogue, life is inviolable. Torture, mutilation and slavery are prohibited, and proceedings to impose sanctions must satisfy the principle of legality. In addition, the Court is of the view that human dignity demands that the indigenous authorities should not be allowed to violate the essence of the basic rights of the members of the indigenous community.[26]

Within these absolute limits, the Colombian Constitutional Court grants the indigenous groups extensive freedoms in how they structure their conflict resolution mechanisms. As the great diversity would make it impossible for state judges to be familiar with the particular traditions involved,

property in Paraguay and Surinam see Oswaldo Ruiz Chiriboga, "Propiedad comunal vs. propiedad privada e intereses estatales", in: Huber and Martínez, n. 17.

25 | Cf. Rosembert Ariza Santamaría, "Teoría y práctica en el ejercicio de la jurisdicción especial indígena en Colombia", in: Huber and Martínez, n. 17, 263.

26 | Cf. ibid., 263 et seq. with references to the court decisions.

expert reports by anthropologists assume a special significance in the evaluation of individual cases.[27]

The absolute limits to the dispensation of indigenous justice set by the Colombian Constitutional Court may seem far too generous to some liberals, seeing that they permit the unequal curtailment of the civil liberties of citizens within a state. Others question even this minimum catalogue, pointing out that the supposed universal consensus does not in fact exist. These people maintain that the indigenous groups in Latin America had not been able to participate in the drafting of the instruments of international law for the protection of human rights and that the Colombian Constitutional Court had not consulted the indigenous people to find out whether they did indeed share these convictions. The proponents of the two extreme positions try to assert their respective pure tenet, but this is simply not feasible in a country with a plural cultural reality. However, the situation does not preclude rapprochement and learning processes taking place within a genuine intercultural dialogue between these cultures with the potential to enrich Western culture as well as effecting changes in indigenous traditions which are essential from the perspective of universal human rights. In exactly the same way as Western cultures had to and were able to progress in small steps through the centuries, particularly where non-discrimination against certain groups of the population was concerned, the customs and conventions of indigenous communities should not be set in stone either. But cultures need to undergo such processes by their own efforts. Members of other cultural circles, particularly the majority culture, can only provide impulses and support the actors of internal change. Attempts at forcing cultural adaptation have little likelihood of success; as history has shown, they actually tend to be counterproductive.[28]

Western cultures had to progress in small steps through the centuries, so the customs and conventions of indigenous communities should not be set in stone either.

27 | Cf. for instance Cécile Lachenal, "Las periciales antropológicas, una herramienta para la hermenéutica intercultural y la justicia plural", in: Huber and Martínez, n. 17, 187 et sqq.

28 | Interesting on this topic: Michael Pawlik, "Wie allgemein sind die Menschenrechte?", *Frankfurter Allgemeine Zeitung*, 27 Nov 2009, 11.

In the majority of the continent's societies, the impressive cultural diversity invariably entails ideological differences in political, economic, social and moral questions, for which socially acceptable solutions need to be found by legal means in order to facilitate social peace and "living well" within and between the cultural communities. This is an immensely complex task for several reasons.

CLIMATE OF DISTRUST

As was already mentioned at the beginning, the search for solutions is characterised on the one side by the indigenous groups' distrust of the descendants of the "discoverers" and conquerors and their power structures, whose historic guilt has not yet been forgotten. But neither has the more recent offering of Columbus's heirs in the form of the democratic but culturally homogenous constitutional state been able to fully convince the continent's original inhabitants. This is because they have enjoyed little of the promised benefits of a globalised market economy and because the current development model, based on the mining of natural resources mostly located on their territories, is even having negative impacts, to the point where it has posed a threat to their cultural and physical existence.

On the other side, i.e. on the side of the white immigrants and even among children of mixed marriages, the so-called mestizos, contempt for the indigenous cultures and ways of life, which are regarded as "primitive" and "backward", is rife. Indigenous justice is incorrectly equated with lynch-justice.[29] And the opposition of indigenous communities to major infrastructure projects or the mining of natural resources on their ancestral lands, which are protected formally by legal title, elicits little sympathy from the rest of the population. A genuine and constructive dialogue aimed at mutual cultural enrichment, delimitation of responsibilities and agreement on coordination mechanisms is difficult in such a climate.

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29 | Cf. Eddie Cóndor Chuquiruna, "Introducción y explicación previa", in: idem (ed.), n. 13, 16 et sqq.

REGULATING LEGAL PLURALISM – A PARADOX

While indigenous interests may currently still be able to count on the support of the majority of the indigenous groups in most cases, this is based mainly on a post-colonial or anti-imperialist discourse, where people wish to distance themselves from the prevailing (power) relationships of previous decades and centuries. But even this cannot totally hide the diverging, and sometimes even opposing, interests that obviously exist with such a large number of peoples and communities on the continent and even within individual countries. The spectrum ranges from the Indian tribe in the Amazon Basin numbering a few dozen members, which is still totally isolated, to well organised peoples with complex structures in the Andean highlands (e.g. the Aymara in Bolivia) to communities such as the Nasa in Colombia, who hardly differ from the mostly Western urban population in appearance and way of life. And there are also some indigenous communities that seek to rule over others to which they are superior in terms of organisation and numbers.

This anthropological and social heterogeneity is reflected in the fact that some communities are more intent on autonomy than others and in the complexity of the legal standards, traditions and customs as well as the internal organisation. Any efforts to establish a universal set of rules to delimit responsibilities are therefore unlikely to succeed unless they wish to dispense with the central demand for pluralism. That is, because legal pluralism in its ideal form, as envisaged by experts in legal theory, does not consist of numerous independent legal systems existing in isolation from each other. Instead, what is needed is an overall system of varying sets of rules capable of undergoing constant adaptation and change.[30] It is therefore not surprising that staunch legal pluralists and indigenous

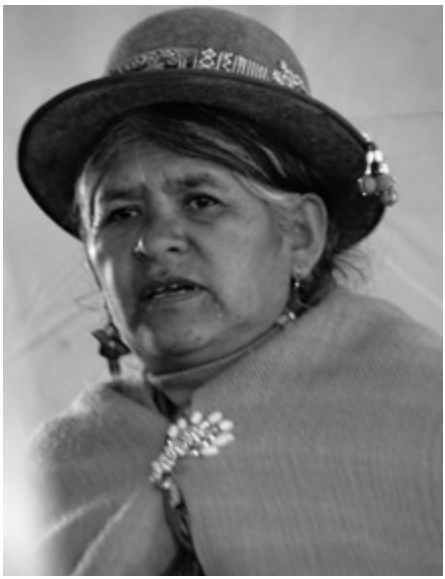
30 | See the description in Farit L. Rojas Tudela, "Del monismo al pluralismo jurídico: interculturalidad en el estado constitucional", in: Chuquiruna (ed.), n. 13, 29 et sqq.; Alfredo Sánchez Castañeda, "Los Orígenes del Pluralismo Jurídico", in: Nuria González Martín (ed.), *Estudios jurídicos en homenaje a Marta Morineau. Derecho romano. Historia del derecho*, Vol. 1, Mexico City, 2006, Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México (UNAM), 2006, http://biblio.juridicas.unam.mx/libros/4/1855/29.pdf (accessed 4 Sep 2013).

Since the Colombian constitution came into force in 1991, indigenous associations have fought successfully against any attempt to curtail legal pluralism via the law.

people consider the Bolivian 2010 law to delimit the justice systems (*Ley de Deslinde Jurisdiccional*) as a step backward compared to the ambitious regulatory framework of the Bolivian constitution. In Ecuador, a similar draft law has been awaiting approval for several years.[31] A few aspects, however, have been regulated by legislation on judicial authority.[32] In Venezuela, the scope of indigenous jurisdiction and coordination with the state justice system have so far only been regulated by a general law dealing with indigenous peoples.[33] Specific legislation on coordination is currently being drafted.[34] Since the Colombian constitution, which envisages coordination legislation, came into force in 1991, indigenous associations have fought successfully against any attempt to curtail legal pluralism via the law. Nevertheless, representatives from the state justice system and indigenous associations have developed various mechanisms to further indigenous justice and its coordination with state institutions.[35]

To a legal positivist, a generally applicable system to regulate the delimitation of responsibilities by subject matter, person and territory and to determine applicable law in the manner of international civil law can hardly be avoided if legal certainty is to be ensured. But developing collaboration and coordination between the different legal systems further on the basis of case orientation and constitutional principles might also work. That would be more akin to the Anglo-Saxon legal tradition. One could also interpret the survival of the indigenous legal traditions over the last 500-plus years as indicating that they do not require any legal embodiment at all, and that an attempt to regulate them may even spell their demise.

31 | See Ecuadorinmediato.com, "Proyecto de Ley de Coordinación entre Justicia Indígena y Justicia Ordinaria será una de las prioridades de la Comisión", 31 May 2013, http://ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=198089 (accessed 4 Sep 2013).
32 | Art. 343 et sqq. of the Código Orgánico de la función judicial.
33 | See "Ley Orgánica de Pueblos y Comunidades Indígenas", article 133 et sqq.
34 | Cf. Agencia Venezolana de Noticias (avn), "Estiman presentar Ley de Jurisdicción Especial Indígena ante la AN el próximo año", 4 Dec 2012, http://avn.info.ve/contenido/estiman-presentar-ley-jurisdicción-especial-indígena-ante-próximo-año (accessed 4 Sep 2013).
35 | Cf. detailed Ariza Santamaría, n. 21.



Coordination of state law and indigenous law: As Vice Minister for Indigenous Justice, Isabel Ortega worked on the legal pluralism in Bolivia. | Source: © KAS Bolivia.

INDIGENOUS PEOPLES AND INTERNATIONAL LAW OF NATION STATES

It is no secret that the borders between Latin-American states have little or nothing in common with the ancestral spheres of the continent's original inhabitants. But even the new constitutions with their distinctly pluralist rhetoric do not question the territorial integrity of its states. Neither the enigmatic right to self-determination in international law (as applicable to nation states) nor the pluralist constitutions emphasise the right of the ethnic collective to autonomy to the extent that this might result in sovereign national borders being questioned. This does not prevent indigenous peoples whose members straddle national borders from debating this aspect of the colonial heritage. It makes it all the more urgent for the state and its institutions to answer the question as to what added value the state provides to the asymmetrical conglomerate of peoples and communities on its territory. Based (loosely) on a federal model, it will be necessary to integrate indigenous communities, autonomous areas and self-governed units into the central state administration so as not to lose track of the common project in spite of all the diversity.

One has to acknowledge, though, that after centuries of forced cultural homogenisation and exclusion from the power structures of the state, the search for common interests does not figure very highly on the list of priorities of the indigenous groups. In view of this, the societies in Latin-America have a long way to go before they will achieve the aim of peaceful coexistence in mutual respect and recognition of the other parties even in these days of pluricultural statehood. After centuries of living separate lives, the prejudices against "the other" are still deeply rooted in the socio-historic consciousness. To allow a rapprochement between the cultures will require tolerance and respect as well as the willingness and courage to learn from one another. And that goes for both sides.