Access to Justice and Indigenous Communities in Latin America

Paper prepared for the ABA World Justice Forum, Vienna, July 2-5 2008

(This paper is still in draft form and I would therefore be grateful if you treat it as such. Please note also that the references are incomplete)

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Indigenous communities in Latin America are among the poorest, most excluded and socially discriminated groups in the region. Their present economic predicament has been brought about by centuries of plunder and economic oppression, which originally benefited colonial powers and today contributes towards enhancing the wealth and profits of local and international elites. Political and legal marginalization complements and sustains the exploitation of indigenous communities. While in the past political exclusion was concealed by the policy of assimilation, legal marginalization has been less subtle, since courts and other legal institutions consistently take the side of local bosses, large landowners or foreign companies, thus neglecting communities’ rights to their culture, land and natural resources. Given these circumstances, the indigenous communities’ views about legal institutions bear little resemblance to liberal views about law. Instead of seeing them as friendly institutions that empower and liberate individuals they regard them as the cause and symbol of their longstanding economic and political oppression. Developments during the past three decades suggest, however, that, at long last, the vicious circle of economic, political and legal exclusion of indigenous communities may be coming to an end. From Chiapas in Mexico to Temuco in Chile, and including virtually all the countries in Central and South America, indigenous communities are beginning to make their voices heard. In some countries, such as Bolivia and Ecuador, they are beginning to have a decisive impact in shaping national policies (Postero, Speed, etc). In general, these encouraging developments can be attributed to the complex interaction of two processes: democratization at the national level and globalization at the international level. The combined effect of these two processes has pushed the issue of indigenous rights to the top of national and regional political agendas and has greatly enhanced the capacity of indigenous communities to demand that state institutions protect and respect their rights. Recent developments in international law are also contributing to legitimising indigenous communities’ demands for political autonomy, control and restitution of ancestral land and greater access to justice.

Most countries in Latin America have responded to indigenous peoples’ demands for greater autonomy by inserting in their new or existing constitutions special clauses that recognize indigenous peoples as distinct groups with specific rights, including the right to govern themselves in accordance with their own traditional laws. This process of constitutional recognition has been relatively easy since, traditionally, Latin American states have been keen to keep their constitutional texts up to date with contemporary international trends. Some countries have taken these constitutional clauses seriously while others have, in practice, either ignored them or applied them only partially. Yet, there is little doubt that the inclusion of
these constitutional clauses has made a significant contribution towards furthering the political, social and economic demands of indigenous communities. Although these constitutional changes are recent, there are strong indications that they are beginning to have a major effect on the way state and social institutions in Latin American states relate to indigenous communities.

The objective of this paper is twofold: to highlight the small, but significant contribution that the new constitutional norms are making towards improving the legal and political status of indigenous communities in the region; and, to identify the persistent and formidable obstacles that indigenous communities continue to face in their attempts to secure full and effective recognition and respect of their individual and collective rights. In order to achieve these objectives the paper is structured around two main themes: the right of indigenous peoples to their ancestral land and the right of indigenous communities to administer justice applying their own normative and cultural standards. The paper is structured into three main parts. The Introduction provides background information on the social, political, legal and economic conditions of indigenous people in Latin America. The second and third parts address, in turn, the issue of land and administration of justice.

I

Background

The estimated number of indigenous people in Latin America is around 50 million (CEDLAS 2005:18, CEPAL 2004: 162). This figure represents just over 10% of the population of Latin American and Caribbean countries. The distribution of the indigenous population in the region is uneven. Bolivia, Guatemala and Perú have the largest proportion of indigenous people with 62%, 41% and 32 % respectively, while in Costa Rica, Paraguay and Argentina the indigenous people account for less than 2% of the population (CEPAL 2004: 161). In absolute terms Perú has the largest indigenous population, 8.5 million, followed by Mexico, 6.1 million, and Bolivia and Guatemala with about 5 million each. Although as a proportion of the total population indigenous communities in Mexico only account for 6.4%, they are heavily concentrated in three states, Chiapas, Guerrero and Oaxaca (CEPAL 2004:162).

The linguistic diversity of the indigenous people in Latin America is remarkable. Altogether, there are 400 indigenous languages in the region. Perú, for example, has 140 ethnic groups that speak 14 different languages (Ruiz-Molleda 2007: 139 (Justicia Viva). Despite their diversity, indigenous communities share two features: poverty and a traditional attachment to the land. Everywhere in the region indigenous people are among the poorest groups. Exact statistical figures are not readily available since until recently national and international statistics had not distinguished indigenous communities from the rest of the poor. Because of the official policy of assimilation practiced until recently by most Latin American states, indigenous communities were generally classified under the category of peasants and thus concealed from official statistics. In terms of poverty, the position of indigenous communities in Guatemala is perhaps extreme, but not atypical. According to a recent United Nations Report, almost 40% of indigenous people in Guatemala live in extreme poverty and close to 80% are classified as poor. Nearly one-third of indigenous people aged between15 and 24 are illiterate. The illiteracy of women is higher, reaching 90% in some communities. Boys in indigenous communities rarely complete more than three years of education and girls rarely complete one year. More than half of indigenous communities have no access to water or electricity and more than 80% are not connected to sewerage systems (Commission on Human Rights 2003: 7-8).
The root cause of the poverty of indigenous communities dates back to colonial time when colonial powers took possession of their land and established an oppressive political and economic regime. The emergence of independent states in Latin America did not end the pillage of their land. Indeed, the elites now controlling the new nation states continued to regard the land still occupied by indigenous people as a target for occupation—as was the case of the usurpation of the land of the Mapuche during the nineteenth century in Chile. The new national elites also continued to disdain the political and cultural practices of indigenous communities. After independence, however, contempt for indigenous institutions and culture was disguised by the discourse of republicanism, which purported to treat members of indigenous communities as equal citizens fully assimilated to the recently established nation states. In reality, however, indigenous communities continued to be marginalized, both socially and politically. During the twentieth century, the economic policies pursued by nation states continued to discriminate against indigenous people. Indeed, whether under the aegis of import substitution, as was the case in the early and mid-twentieth century, or, under current neo-liberal policies, governments in Latin America have single-mindedly promoted large scale mining, oil exploration, forestry projects and large infrastructure developments without any regard for the interests, property and cultural values of indigenous communities. Thus, today, it is not surprising that the struggle over the restitution of land and political control over their territory are the two main factors that drive the struggle of indigenous communities (CEPAL 2004: 163; Stavenhagen and Iturralde 1990:39).

Denying Discrimination

The policy of assimilation pursued by most Latin American states went hand in hand with policies designed to make indigenous communities invisible. In countries where the indigenous population is relatively small, official policy has denied them a separate ethnic identity, as is the case of contemporary Chile; or, has treated them as legally incompetent, as was the case, until recently, in Brazil. In countries where the number of indigenous people is large in proportion to the total population, the official policy has been to regard them as peasants and to avoid referring to them as indigenous since the term was deemed pejorative. Thus, in Perú for example, indigenous people are called peasants (campesinos) and their institutions are described in the constitution and other legislation as ‘peasant communities’, rather than indigenous communities. The determined efforts to ignore indigenous people and to make them politically, socially and economically invisible were reinforced by the ideology of ‘mestizaje’, which was dominant in many countries, especially in those with a large indigenous population. This ideology, though based on the fact that the majority of the population in Latin America has mixed Indigenous and European ancestry, provided further justification for ignoring the rights and interests of indigenous communities.

From a legal point of view, the main consequence for indigenous communities of the policy of assimilation was that, until recently, governments and political elites behaved as if they believed that the constitutional and legal rights of indigenous communities were fully respected. Indeed, such was their belief that they were oblivious to the fact that indigenous communities in their countries were the victims of the most severe and widespread forms of discrimination. This attitude is well documented and substantiated in reports filed by Latin American governments with the United Nations Committee on the Elimination of Racial Discrimination. In 1974, for example, the Peruvian representative to the United Nations expressed doubts as to whether his government had anything to report since in his country there was no
discrimination. The Venezuelan representative made a similar argument in 1976. This self-delusion was evident even as recently as 1989—the year the ILO Convention No. 169 on Indigenous and Tribal Peoples was adopted—when the governments of Chile, Colombia, Mexico and Venezuela still claimed that they had nothing to report to the UN Committee because discrimination was not an issue in their countries (Banton 1996: 94-95).

The persistent concealment of ethnic diversity by the elites and governments in the region went hand in hand with their outright refusal to acknowledge that indigenous communities could have systems of governance that were not created or subsequently validated by the state. The irony, however, is that, in practice, and due largely to the failure of the policy of assimilation, many indigenous communities in the region retained their traditional forms of governance, despite having been removed from their ancestral territories. Thus, although official legal culture proclaimed the unity of the legal system, in practice, indigenous communities resolved their own disputes and organised their local affairs in accordance with their traditions, despite the peremptory prescriptions of prevailing legal ideology.

International Recognition of Indigenous Rights

As multiculturalism became widely accepted throughout the world, many countries in Latin America formally abandoned the policy of ethnic assimilation and acknowledged that their inhabitants were ethnically and culturally diverse. A major source of inspiration for this policy shift was ILO Convention 169 on Indigenous and Tribal Peoples, which by 14 May 2008 had been ratified by 19 countries, 13 from Latin America, 4 from Europe, plus Fiji and Nepal (www.ilo.org/ilolex/cgi-lex/ratifce.pl?(C169). This Convention places special emphasis on the critical link between indigenous peoples’ cultural values and their land (Article 13). Thus, in order duly to respect indigenous peoples’ cultural and spiritual values, as required by Article 5, the Convention (Article 14) requires States to recognize indigenous peoples’ rights of ownership and possession over land they have traditionally occupied. The Convention (Article 15) also requires states to safeguard the right of indigenous people to natural resources in their ancestral land, but does not take a view on the ownership of mineral and sub-surface resources. It does, however, provide that where the state retains ownership of these rights, governments cannot authorize the exploration or exploitation of these resources without first consulting the indigenous communities that own, or are in possession of, the land. The Convention also provides that, wherever possible, indigenous peoples should participate in the benefits of these activities and receive compensation for any damage it may cause.

An important consequence of the Convention’s acknowledgement of the critical relationship between indigenous peoples’ land and their culture is contained in Article 8, which requires States to recognize indigenous peoples’ practices and institutions. This obligation has two complementary dimensions: the obligation to recognize indigenous peoples’ customary law; and the obligation of all state institutions to exercise their power with due regard and respect for indigenous peoples’ customs and customary laws. The recently adopted UN Declaration on Indigenous Peoples (UN General Assembly A/RES/61/295, 2 October 2007) restates and further elaborates the main principles of ILO Convention No.169. This resolution underlines the importance of the right of indigenous people to autonomy and self-government (Article 4) and is especially emphatic in its recognition of their rights to “maintain and develop their own indigenous decision-making institutions” (Article 18), including the right to develop and maintain their juridical systems or customs (Article 34).

II

RIGHT TO LAND

Constitutional Clauses

The constitutional provisions on the right of indigenous communities to their ancestral land vary from country to country. As expected, most of these provisions are general and, in constitutional jargon, programmatic, leaving it to the legislature to elaborate and develop the rights it recognizes.

The provisions of the Colombian Constitution are perhaps the most explicit and coherent provisions on the rights of indigenous people to land and self-government. Indigenous peoples have the right to land they have traditionally occupied. Their territorial units are called resguardos. The right of indigenous communities to their land is of a collective nature, is inalienable and third parties cannot acquire it by prescription. The constitution of Brazil also contains strong provisions recognizing the rights of indigenous communities to the land they have traditionally occupied, stating that such lands are intended for their permanent possession (Article 231 #2). The right of indigenous people to land includes the right to use the wealth of the soil, watercourses and lakes. It does not include rights to authorize prospecting, exploration or exploitation of energy and mineral resources, but indigenous communities affected by these activities have the right to be consulted and to retain a share of the profits derived from these activities. In sharp contrast to the elaborate provisions of the Colombian and Brazilian constitutions, the provisions of the constitutions of Argentina, Guatemala, Paraguay and Venezuela are more concise and less explicit regarding the nature of the rights they recognize. Although they recognize that indigenous communities have rights over land, they are either silent or ambiguous as to the nature and scope of these rights. The constitution of Argentina (Article 67) recognizes the rights of indigenous communities to land they have traditionally occupied, but notes that the state should make available to these communities land suitable for their human development. A similar social-welfare type of approach is evident in the case of Guatemala. While Article 67 of the Guatemalan constitution provides that the state shall respect communal lands held by indigenous communities, Article 68 provides that the state shall make state land available to indigenous communities. Thus, this provision seems implicitly to deny the right of indigenous communities to reclaim their ancestral lands.

The Struggle for Land

Latin American countries have a poor record of compliance with constitutional rules, even though their political elites are accomplished drafters of constitutional documents. Indeed, it is often the case that many constitutional provisions, especially those that embody lofty objectives for greater equality and social justice, are never implemented and are only noticed when a new regime discards them and replaces them with equally unrealistic provisions that are destined to practical oblivion. Contrary to expectations, however, the elites have not completely ignored the constitutional provisions on indigenous communities, especially in countries where
indigenous communities are politically strong. Yet, although some governments have made serious efforts to comply with the new constitutional provisions on indigenous communities, powerful economic and social interests stand in the way of their implementation.

Colombia, which has one of the most progressive constitutional texts on matters relating to indigenous peoples, provides perhaps the best illustration of the obstacles that indigenous people face in achieving recognition and respect of their human rights, especially their rights to ancestral territories. Following the adoption of the 1991 Constitution, the state took effective steps towards legal recognition of the traditional lands and territories of indigenous communities. By the end of 2004, the state had recognized some 647 indigenous reserves (resguardos) covering an area of 31,066,430 hectares, comprising nearly one-third of the national territory and benefiting just over 400,000 people (UN GA Commission on Human Rights 2004: 6). These figures conceal, however, unresolved problems, of which two are critical: the impact of warfare between the government and rebel groups; and the government’s inability to protect the indigenous communities from lawless investors in search of agricultural land.

The military conflict has had a devastating impact on indigenous communities, and many people have been forced to abandon their land under pressure from armed groups. According to the UN Special Rapporteur on Indigenous Peoples nearly 30,000 indigenous people were forcibly displaced between 1995 and 2003. In 2002 alone the number of internally displaced indigenous people was more than 10,000. During this same period, more than 100 indigenous people were murdered. The Government’s strategy of equating war against the guerrillas with the fight against drug trafficking, and regarding them both as the “war on terror” has greatly increased the vulnerability of indigenous communities. The government sees their opposition to militarization as support for terrorists (UN Report: 14). Indigenous people in Peru faced a similar problem during the war against Shining Path, the infamous terrorist organization. Indeed, according to Peru’s Truth and Reconciliation Commission, three-quarters of the 70,000 people killed or disappeared as a result of this conflict were quechua speaking indigenous people (www.cverdad.org.pe/ifinal/disco02.php). In Guatemala, an estimated 200,000 indigenous people were killed during the armed conflict that came to an end in 1996. It is thus not surprising that the UN Rapporteur on Indigenous Peoples has characterized the consequences of this conflict as genocide (UN Rep, 22). In Colombia, the devastating impact of the military conflict on indigenous communities in Colombia is further aggravated by the fact that the state is unable to protect their communal property from land invasions or fraudulent practices by unscrupulous outsiders (UN: 15). Equally worrying is that although indigenous communities have recovered a large proportion of their land, their economic prospects remain bleak. A recent study of the Department of Cauca, an area where nearly 20% of the population belong to one or another indigenous community, indigenous people control 20% of the land, while 4.5% of the non-indigenous population control 40%. Moreover, while the land recovered by indigenous people has low agricultural potential, the land controlled by large agribusiness concerns has greater potential for cattle ranching and for crops such as sugarcane, soya, rice and beans (Hristov 2005: 95-96).

The case of Colombia may seem extreme because of the severity of the military conflict and the intensity of the fight against drug trafficking. The plight of indigenous communities in other countries, however, is not greatly different. In Brazil, for example, although just over 85% of indigenous territories have been
demarcated the state has proved unable or unwilling to enforce demarcated lands. (Valenta 2003: 644). A recent study estimates that miners, cattle ranchers and loggers are illegally occupying more than 40% of land that belongs to indigenous people. This illegal occupation is having a devastating impact on the survival of some of the smaller indigenous communities in the Brazilian rainforest (Valenta 2003: 656).

In Ecuador indigenous people are also affected by the government’s failure to protect their property. Indeed, although the state has returned nearly 4 million hectares to indigenous peoples of the coastal and Amazon regions and has acknowledged that indigenous communal lands in the highland regions are inalienable and not subject to seizure, the prevailing legislative framework does not adequately protect the interests of indigenous people, especially in matters concerning the management of natural resources (UN Rep 12). The indigenous communities accuse the government of failing adequately to regulate oil companies involved in oil prospecting or oil exploration. Of special concern is the fact that members of the armed forces, operating under contractual arrangements with oil companies for the provision of law and order, are accused of committing serious abuses and acts of violence against members of indigenous communities. According to a recent UN Report, these contractual arrangements have ceased, but the Report notes that indigenous people continue to complain of serious violations of human rights such as torture, persecution and illegal detention of community leaders (UN: Ecuador 24).

The complaints of the Sarayaku community in one of the Amazonian provinces of Ecuador illustrate the continuing problems faced by indigenous communities. In 1992 the State recognized the ancestral lands of the Sarayaku. Four years later, however, and without consulting the authorities of the Sarayaku community, the Government authorized oil exploration and development activities in an area that included part of their ancestral lands. Since then, members of the community have complained to the Inter-American Commission on Human Rights and to the UN Special Rapporteur on Indigenous People that the activities of the oil company are polluting rivers in the region and are detrimental to the health of the local communities. Members of the Sarayaku community have also complained about human rights abuses perpetrated by private security services hired by the oil company. The Inter-American Commission on Human Rights ordered provisional measures (upheld on two occasions by the Inter-American Court of Human Rights) to protect the community.

The problems discussed in this subsection, though specific to each of the countries and communities concerned, are typical of those faced by indigenous communities throughout the region. While the policies of the states reviewed in this subsection—Brazil, Ecuador and Colombia—reveal a degree of commitment towards complying with the constitutional mandate calling for the recognition of the rights of indigenous communities to the land they have traditionally occupied, their compliance has only been partial, and, as such, is no guarantee that the property rights of these communities will be fully respected.

The Inter-American Court and Indigenous Communities: Judicial Protection and Property Rights

Indigenous communities seeking enforcement and respect of their constitutional rights to their ancestral lands often face three problems common to most countries in the region. Firstly, governments often fail to enact the required implementing legislation so the constitutional provisions remain dead letter. Secondly, even when implementing legislation is adopted, the administrative and judicial institutions of the
state often fail to provide a timely response to those seeking to assert their rights. And thirdly, because most indigenous communities are not in possession of their lands, they are confronted with the problem that their claims to ancestral territories often overlap with recently established property rights over the same land. In order to overcome these problems some communities have approached the Inter-American Commission on Human Rights, claiming a violation of their rights under the American Convention of Human Rights. After investigating these claims and attempting to persuade governments to comply, the Commission has, on several occasions, requested the Inter-American Court of Human Rights to decide whether failure to recognize and effectively protect the rights of indigenous communities over ancestral land violates the American Convention of Human Rights. In this section I focus on the way the court has interpreted two Articles of the Convention: the right to judicial protection and the right to property.

The issue of the failure of a state to take seriously the constitutional provisions that recognize the rights of indigenous communities to ancestral lands came to the attention of the Court in 2001 in the celebrated Mayagna (Sumo) Awas Tigni Community case (hereafter Awas Tigni). The Awas Tigni community is located on the Atlantic coast of Nicaragua, and their subsistence is derived from family farming, community agriculture, fishing and hunting. The constitution of Nicaragua (Articles 89 and 180) recognizes their communal rights to the land and its natural resources. The government, however, failed to secure National Assembly’s approval for implementing legislation to give effective recognition of their rights. Moreover, the government granted a thirty-year concession to a foreign company to manage and exploit an area of 62,000 hectares of forest located within the traditional territory of the Awas Tigni community without consulting community members. Despite petitioning the government and employing the available judicial remedies, the members of the community were unable to persuade the government effectively to recognize their constitutional rights to land. According to the Court, the government’s failure to create an effective mechanism for delimiting and titling the property of the Awas Tigni community members of the violated Article 25 of the Convention. This Article guarantees citizens the right to effective protection by a court or tribunal against acts that violate fundamental rights recognized by the constitution or the law (#137). In two recent cases—the Axa and the Sawhoyamaxa cases—the Court has reaffirmed that, under the American Convention, states have an obligation to give effect within their legal systems to the constitutional rights of indigenous communities (See Axa # 63 and Sawhoyamaxa #143 cases). According to the Court, unless the lands of indigenous communities are delimited, titled and effectively protected, constitutional provisions that recognize their land rights are meaningless (Sawhoyamaxa #143).

The Court has also made a major contribution to defining the nature of the right of indigenous communities to their ancestral land and interpreting the scope of the property clause in the American Convention on Human Rights. In the Awas Tigni case, the Court—noting the close ties between indigenous people and their land—defined the concept of property in indigenous communities as “a communal form of collective property of the land, in the sense that ownership is not centred on an individual but rather on the group and its community”(#149). In the recent Yakye Axa Indigenous Community and Paraguay Case (hereafter Axa Case), the Court unequivocally acknowledged the intimate link between land and indigenous culture. Land, according to the Court, “is closely linked to their oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and
practices in connection with nature, culinary art, customary law, dress, philosophy, and values” (#154). Thus, the Court concludes that disregarding indigenous peoples’ rights to land could have a serious detrimental effect on other basic rights and even on the very survival of the indigenous communities and their members (#147). Hence the Court’s unequivocal conclusion that indigenous rights to land are covered by the property clause (Article 21) of the American Convention on Human Rights (Awas # 149, and Axa # 146).

The recognition that property rights of indigenous communities are protected by the American Convention on Human Rights, raises several complex questions including whether mere possession of the land gives indigenous communities the right to obtain recognition by the state; whether indigenous peoples who are not in possession of their land retain ancestral rights; whether indigenous communities have the right to demand full reparations for the violation of their rights; and whether the state can invoke treaty obligations to decline restitution of ancestral lands. The Court has answered all these questions. In the Awas Tigni Case it held that mere possession of the land was sufficient for indigenous communities to claim from the state formal recognition and registration of their property (Awas Case # 151). In the case of the Moiwana Community (Surinam), the Court held that although the members of Moiwana community were not in possession of their land they remained its legitimate owners because they had been forcibly dispossessed (#134). In the Axa case (#179-181), the Court reaffirmed the traditional international legal principle that any violation of international law entails the duty to provide appropriate reparations: either full restitution, if possible, or payment of compensation for the damages caused. The Court has further clarified that the right to the restitution of traditional lands lasts indefinitely, provided indigenous communities maintain their unique and traditional relationship with their land. “As long as said relationship exists, the right to claim lands is enforceable, otherwise it will lapse” (Sawhoyamaxa #131). In the Sawhoyamaxa case, the Court rejected Paraguay’s argument that it could not return the land to the Sawhoyamaxa people because of its bilateral treaty obligations with Germany. According to the Court, a multilateral treaty on human rights, such as the American Convention, prevails over bilateral treaty obligations. Thus, the American Convention on Human Rights “stands in a class of its own…and does not depend entirely on reciprocity among States” (#140).

III

STATE AND INDIGENOUS JUSTICE SYSTEMS

Indigenous People and State Justice System

Indigenous communities’ views about state justice systems is largely unfavourable. In common with the views of most citizens in Latin America, they regard state courts as slow, inefficient and expensive. They also have little respect for lawyers, regarding them as selfish professionals more interested in their fees than in contributing to the prompt resolution of disputes. This negative perception is well-founded and consistently confirmed in Reports prepared by UN appointed Observers and in papers and books written by legal academics and country specialists (REFS). In the case of Mexico, for example, the Special Rapporteur on the independence of judges and lawyers expressed grave concern about the lack of access to justice for member of indigenous communities, the absence of interpreters to enable indigenous people to understand proceedings in local courts and the lack of sensitivity displayed by the court system regarding the legal tradition of indigenous communities (Report Mission to Mexico, p.5). In Guatemala, one of the most frequent complaints made to the UN Special Rapporteur is that courts prohibit the use of indigenous language in judicial
proceedings, even when both parties to the litigation are indigenous. The resentment generated by this prohibition is exacerbated by the fact that courts generally fail to provide interpreters, even though they are required to do so by law. Thus, indigenous persons who face trial often do not understand the charges brought against them. Their rights are further undermined by the shortage of qualified public defenders to represent them. (Stav, p.15). Thus, it is not surprising that both in Guatemala and Mexico the UN Special Rapporteur found that state courts are involved in widespread human rights violations against indigenous persons. These violations include the detention of suspects without arrest warrants, pretrial detention periods that exceed statutory limits, securing confessions through torture, using torture to get prisoners to sign blank sheets of paper, illegal house searches and even theft of suspects’ personal property (UN mex, 32, Stav Mex 11). A further problem identified by most studies and reports on the impact of state justice on indigenous communities is that, in general, judges openly disregard the practices and customs of indigenous communities (Oaxaca p. 48, 85). This is the case, for example, of the enforcement by the judiciary of environmental legislation in Mexico, where indigenous persons have been convicted of criminal offences for possessing turtle eggs or hunting iguanas, without community traditions being taken into account (Oaxaca 92).

Continuing Relevance of Indigenous Justice Systems

Given the perception that indigenous communities have about state justice systems, it is not surprising that, in most countries in the region, they are determined to ensure that states recognize their constitutional right to administer justice. This determination stems not only from their interest in preserving their culture and traditions, but also from their need to compensate for the shortcomings of prevailing state institutions. The following two examples, one from Perú and the other from Mexico, illustrate how the inability of the state to maintain law and order in remote areas of the countryside has led indigenous communities to take a more active part in maintaining law and order, especially in the area of criminal law. The community institutions that have evolved into non-state justice mechanisms are the Rondas Campesinas, in the Department of Cajamarca in Northern Perú (Faunderz 2005: 191-197) and the Policía Comunitaria (community police) in the state of Guerrero in Mexico (Sierra 2005: 58-60, 63-65).

The Rondas Campesinas originated in Cajamarca in the mid-1970s. They were established by small farmers who were victims of cattle rustling carried out by gangs from another region. The victims had denounced these crimes to the authorities but neither the police nor the local courts provided any support, either because they feared reprisals or because they were in collusion with the criminals. They thus decided to establish vigilante groups (Rondas Campesinas) to protect their cattle. Their initial intention was to surrender any suspect to the police. Yet, because of the failure of the police and the courts to try the suspects, they soon began to administer justice, subjecting alleged cattle rustlers to trial before an assembly of local neighbours. The type of punishment ordered by the Assembly generally involves community service, but also flogging. As Rondas became successful in preventing cattle rustling, members of the local community began to request Ronda Assemblies to resolve other local disputes. The expansion of the judicial jurisdiction of the Rondas went hand in hand with an expansion of their governance functions. News about the success of the Rondas of Cajamarca soon reached other rural communities, and Rondas Campesinas began to crop up in several localities in rural Perú.
The Policía Comunitaria of the state of Guerrero—established in 1995 by a local community (Santa Cruz del Rincón) in the municipality of Malinaltepec—was also prompted by the failure of the local state police and local courts to control crime. Unlike the Rondas, whose original purpose was to deal with cattle rustling, the Policía Comunitaria was established to deal with a general breakdown of law and order created by the operation of criminal gangs that systematically assaulted, raped and robbed members of the local indigenous community. During its first year of operation, the Policía Comunitaria regularly surrendered the people arrested to the relevant state authorities. Yet, either the police or the courts generally released these people because of insufficient evidence. In 1997, frustrated by the lack of effective response by state authorities members of the Policía Comunitaria, which by then had expanded to include similar organizations in more than 60 communities in the vicinity, established a new institution, the Coordinadora Nacional de Autoridades Comunitarias (CRAC), to put on trial those arrested by the Policía Comunitaria. The newly established CRAC, working in close contact with the various Policias Comunitarias, has been enormously successful in reducing crime and violence in the region. After 10 years of operation, CRAC and the Policía Comunitaria have reduced crime in the region by 92% (Sierra 2005: 58).

There are interesting similarities in the response of state authorities in Perú and in Mexico to the success of the Rondas and the Policía Comunitaria. At first, local state authorities, and in particular the police, welcomed their establishment as they regarded them as mechanisms that would act under their authority and so assist them in their functions. As the Rondas and the Policía Comunitaria, dissatisfied with the police and local courts’ behaviour, began to administer justice, state officials claimed that they were usurping state authority and showed little or no respect for basic human rights. But since state authorities could not fail to notice that these community institutions enjoyed enormous legitimacy and were effective in controlling crime and maintaining law and order they tried to incorporate them into the state system, either by attempting to transform their members into salaried municipal functionaries, as was the case in Mexico, or by politicising them so as to use them against guerrilla groups, as was the case in Perú during the Fujimori administration. Both the Rondas and the Policía Comunitaria have, so far, resisted attempts by the state to co-opt them. The main reason for this is their profound distrust of local state institutions. What these community institutions want from the state is not recognition, but respect. The offer of a municipal salary does not compensate for the loss of independence. In Perú, attempts to regulate the Rondas have gone further. The Peruvian constitution refused to accept that Rondas could have any judicial function. Indeed, Article 149 of the Constitution simply refers to the Rondas as institutions that may assist comunidades campesinas (peasant communities) in the administration of justice. The National Congress has also enacted several laws that purport to regulate the activities of the Rondas. In reality, however, the objective of all these laws has been to curb the power of the Rondas, rather than to regulate them. So far, these laws have not achieved their objective.

Constitutional Provisions

Virtually all the provisions in Latin America constitutions relating to indigenous communities acknowledge that they can govern their own affairs and, as a consequence, have the authority to exercise judicial functions. The nature and scope of this recognition, however, is not uniform. Some constitutions, such as the case of Venezuela, acknowledge their right to exercise judicial functions only indirectly, as
they recognize the right of indigenous communities to retain their culture, practices and customs (Article 119). The constitution of Bolivia is also restrained. It acknowledges that indigenous communities play a role in the resolution of local disputes, but describes it as a form of alternative dispute resolution, thus placing them under the authority of the judiciary and implicitly reducing the scope of their jurisdiction. The constitution of Colombia is more explicit. Article 246 of the Constitution of Colombia provides as follows: “The authorities of indigenous peoples may exercise jurisdictional functions within their territories in accordance with their norms and procedures, provided they are not inconsistent with the Constitution and the laws of the Republic. The law shall regulate the way this special jurisdiction will relate to the national judicial system.” Similar provisions are found in the constitutions of Ecuador, Nicaragua, Perú, Paraguay and Brazil. The provision in the Peruvian constitution is interesting since Article 149 acknowledges the right of indigenous communities (comunidades campesinas) to exercise judicial functions in accordance with customary law, but does not add the rider that they should be exercised within the limits of the constitution and the laws. Instead, Article 149 merely states that in the exercise of their judicial functions indigenous communities must respect fundamental human rights. Thus, it is arguable that this provision enhances the political autonomy of indigenous communities. In practice, however, the Constitutional Tribunal in Perú has followed an orthodox approach to the interpretation of this Article, stating that in the exercise of their judicial functions indigenous communities must respect not only fundamental human rights, but also the constitutional and the law (Court Perú).

The implementation of these constitutional provisions has been painfully slow, despite the continued relevance of indigenous justice systems in many countries of the region. In some cases the legislature has failed to enact the required implementing legislation (Perú). In cases where the necessary legislation has been enacted, the judiciary, the police and the legal profession have shown themselves reluctant to accept the validity of judicial decisions taken by indigenous institutions (Mexico). Given the long history of discrimination against indigenous communities, it is not surprising that constitutional provisions have not instantly changed the plight of indigenous communities.

Legal Pluralism—A Steep Learning Curve

Given the persistent concealment of ethnic diversity, it is not surprising that, today, seemingly insurmountable obstacles emerge when governments and elites give effect to constitutional provisions acknowledging indigenous communities’ right to exercise judicial functions within their territories. Indeed, while it is easy to accept the principle of legal pluralism in the constitution, applying it and developing it in a hostile environment is not. Thus, so far, with the notable exception of the Constitutional Court of Colombia, most courts and state institutions in the region have not taken this principle seriously. Some simply cannot accept that indigenous communities have the capacity to administer justice without committing serious breaches of human rights. Others, however, despite accepting that role of indigenous community institutions in the resolution of minor disputes, do not accept that these institutions can exercise any form of judicial power unless it is validated by a state court or by an administrative agency. Thus, indigenous justice is rejected on the ground that indigenous people are either barbarians who do not respect international human rights or are technically incompetent and, as such, their institutions can only
be tolerated if placed under the supervision of state courts. Thus, for example, in Ecuador, state courts often decide cases that have already been resolved by the institutions of indigenous communities. The President of the Supreme Court has acknowledged that this problem stems from the fact that state courts do not regard indigenous customary law as real law. In his view, what is lacking is implementing legislation that regulates the relationship between state and indigenous justice systems (UN Rep: 18). The problem, however, is that most countries have failed to develop such legislation, either because they are unable to find a solution to an issue that is both complex and novel, or simply because the political elites do not regard it as a problem. Thus, in practice, indigenous customary law is either tolerated because, in general, it does not interfere with the interests of non-indigenous individuals; or it is discarded on the ground that it is inconsistent with the constitution, state law or fundamental human rights. The case of the justice system of Calahuyo in Perú, which I discuss below, is an example of a relatively remote community that is allowed to carry on with its traditional functions as long as it does not threaten non-indigenous interests.

**Indigenous Justice in Rural Perú—The Case of Calahuyo**

Calahuyo, a small indigenous community (*comunidad campesina*) located in the Department of Puno, in the southwest of Perú, is one of 86 small Aymara-speaking communities around the city of Huancané (See Antonio Peña Jumpa: Justicia Comunal en los Andes – El Caso de Calahuyo). The population of Calahuyo, estimated at 372 inhabitants, is regarded as average for communities in the region. The area of Calahuyo is about 283 hectares. Land tenure consists of small family plots of between one and seven hectares and large communal spaces for grazing. Calahuyo is only five miles from the nearest urban centre, but in the absence of public transport, this is a great distance. The educational level of the inhabitants of Calahuyo is typical of other *comunidades campesinas*. Almost 60% of adults have either never attended school or have not completed their primary education. A significant majority of those who have never attended school are women. Only three adult members in Calahuyo – less than 2% - have completed secondary education. The supreme political organ of the community is the General Assembly, which, in turn, elects community officers: president, secretary and treasurer. Community authorities run their own governance structures, which regulate a variety of communal activities, including the use of land and water resources (Peña Jumpa: 203).

The authorities in Calahuyo also administer justice, as they have done since before Spain colonized their territory and are today allowed to do so by Article 249 of the Peruvian Constitution. Private family conflicts, such as marital disputes, separation of spouses, disputes over personal property and small money claims, are generally resolved by the extended family, parents, and godparents, or by what is generally described as the council of elders. These disputes are generally resolved through conciliation—applying principles of social harmony and restorative justice. In these cases, either party may request that the settlement be recorded in Spanish in the community’s registry book. This formality is not always followed, as, often, parties wish to avoid publicizing their problems. On the rare occasions that these disputes are left unsettled, they are referred to the political organs of the community.

The political organs of the community deal with conflicts and disputes of wider community interest. These include cases of rape, adultery, domestic violence, fights, physical injuries, failure to take part in communal duties and disputes involving the replacement of community authorities. The procedure generally begins when the aggrieved party contacts a community representative who, in turn, sets out
to establish the facts of the case. The method employed to establish the facts is rudimentary and often ruthless (Peña Jumpa: 210). The main objective is to seek a confession, and the accused is often under considerable social pressure to do so. After a confession is obtained, the matter is referred to the General Assembly where the defendant has a chance to address community members. As supreme political organ of the community, the General Assembly has exclusive jurisdiction to impose punishment. The flexibility of the Assembly in the selection of punishment varies, depending on the nature of the offence. Where the accused has committed a serious breach of community relations the punishment is severe as the interests of the community are not negotiable (Peña Jumpa: 210). In cases involving less serious offences, the General Assembly applies more directly the principles of restorative justice and community harmony. These cases usually involve matrimonial disputes that are not resolved at family level, cases of assault and disputes over property.

Punishment generally involves reparation, either in the form of special community service or a fine. This sanction is often combined with the threat of more severe punishment in the event of non-compliance or repetition of the offence. One such threat is to refer the case to the authorities of the official justice system. In recent years, according to Antonio Peña Jumpa, fines have become the most commonly used punishment. They are often heavy, especially in cases involving the theft of cattle. The imposition of severe penalties is rare, although when imposed they attract considerable media attention. Peña Jumpa’s description and assessment of the administration of justice in Calahuyo is consistent with reports of justice systems in indigenous communities in Bolivia (Ministerio de Justicia y Derechos Humanos (Bolivia), Ecuador (García, Fernando) and Colombia (Sánchez).

Resolving Conflicts of Jurisdiction
Coordination between indigenous and state justice systems is an issue that has not been satisfactorily resolved anywhere in the world, despite enormous efforts by Law Commissions in countries such as Australia, Canada, New Zealand and South Africa. In general, what indigenous communities resent is that most approaches seeking to reconcile indigenous and state justice systems tend to give priority to constitutional and legal rules enacted by the state, thus instantly placing indigenous justice systems in a subordinate position. Thus, it is often the case that when decisions such as those reached by community authorities in Calahuyo are challenged, state courts frequently overturn them, either because they are inconsistent with state laws or general principles of human rights. A typical example of this type of conflict is a complaint brought to the attention of Mr. Rodolfo Stavenhagen, the UN Special Rapporteur on indigenous people, by Mr. Genaro Cruz-Apóstol, President of the Assembly of the Amuzgo indigenous community in Mexico (UN A/HRC/4/32/Add.1: 78). On 2 May 2004 the local indigenous Assembly heard a case against NG, a member of the Amuzgo community, who was accused of having illegally occupied 12 hectares of land that belonged to the community. NG attended the public hearing, but after vehemently denying that the land in question was communal property refused to continue to take part in the hearings. The Assembly continued to discuss the case and placed NG in detention for 12 hours in an effort to persuade him to vacate the land. During the detention, NG was allowed to communicate with his family and was given food and water. Upon his release, NG immediately filed a complaint at the Office of the Public Prosecutor, who, in turn, on 18 June brought criminal charges against Mr. Genaro Cruz-Apóstol, accusing him of false imprisonment. On 20 July, the court found Cruz-Apóstol guilty and sentenced him to a short period in prison. There is
nothing in the UN Report on this case to suggest that the state-appointed judge made any effort to understand the nature of the indigenous community’s legal and cultural systems. The state court’s approach seems to have been solely based on the fact that the decision by the Amuzgo Assembly was inconsistent with state law. This approach, which is typical of most state courts in the region, makes a travesty of the constitutional provisions that proclaim legal pluralism and respect for cultural and ethnic diversity.

**Taking Legal Diversity Seriously**

In a region where most state judicial institutions fail to uphold constitutional provisions on legal and cultural diversity, the case law of the Constitutional Court of Colombia stands out as a remarkable exception. Indeed, this Court is making a major contribution to the development of a coherent conceptual framework that genuinely seeks to reconcile legal and political autonomy of indigenous communities with constitutional and legal rights.

The 1991 Constitution of Colombia contains the standard clause (Article 246) recognizing the right of indigenous communities to exercise judicial functions in accordance with their norms and procedures, provided they do so in accordance with the Constitution and the laws of the Republic. It also provides that the law shall regulate the way indigenous justice systems relate to the national judicial system. Delays in approving this law did not deter the Court in accepting jurisdiction in cases concerning the nature and scope of indigenous justice systems. Indeed, not long after the approval of the Constitution, the Court indicated that the judicial jurisdiction of indigenous institutions could not be suspended until the legislature had enacted a law regulating the relationship between indigenous and state justice systems since the existence of the former did not depend on the will of the legislature. (C-139:1996). While accepting the challenge of interpreting Article 246 of the Constitution, the Court has also rejected the feasibility of developing a single set of rules that, once and for all, would resolve every problem of coordination between indigenous and state justice systems. Instead, the Court has followed an inductive approach that takes into account the specific features of each case (T-428: 1992). It has thus followed two interpretative principles: the first principle is that indigenous institutions should always respect fundamental constitutional rights; and the second is that the degree of political and legal autonomy enjoyed by indigenous communities depends on the extent to which they have preserved their customs and practices (usos y costumbres) (T 254, 1994).

The Court has narrowly interpreted the principle that provides that indigenous justice systems must respect the constitution and the law. According to the Court, such a narrow interpretation is required in order to respect the equally important constitutional principle that proclaims respect for cultural diversity. Indigenous justice systems are thus not required to observe every single constitutional or legal norm, but are always required to respect fundamental constitutional rights. Fundamental constitutional rights are those that protect human life, prohibit torture, prohibit slavery and require compliance with minimum standards of due process. According to the Court, these fundamental rights are binding on indigenous communities because there is an intercultural consensus over their status, as evidenced by their universal acceptance in numerous international human rights treaties and instruments (T 349/1996).

The second interpretative principle applied by the Court takes into account the customs and practices of an indigenous community. The better preserved the customs and practices, the greater the political and legal autonomy granted to the community.
Indigenous communities that have preserved most of their cultural attributes have a greater claim to demanding respect from the rest of society for their customs and practices. Conversely, those that have abandoned their culture cannot claim the same degree of political and legal autonomy. Therefore, under this interpretative principle provisions of state law do not always prevail over customs and practices of indigenous communities. In the event of a conflict between the customs and practices of indigenous communities and binding legal norms (normas legales imperativas), there is no automatic presumption that the latter prevail over the former. According to the Court, the constitution needs to balance the relative importance of the values protected by binding legal norms with the constitutionally recognized values of diversity and legal pluralism.

The Court places special emphasis on the requirement that indigenous communities should observe minimum standards of due process (legalidad del procedimiento). According to the Court, the constitutional provision (Article 246) that authorizes indigenous communities to exercise judicial functions in accordance with their own norms and procedures presupposes that they are widely known and are fairly and uniformly applied, although the norms and procedures need not be the same as those applied by state courts. By applying the due process standard, the Court declared unconstitutional a banishment order decreed by an indigenous council against one of its members because it had not properly investigated the allegations against the accused, had not given the accused the opportunity to defend himself and had failed to follow the procedure required by its own internal rules and regulations (T-048: 2002). In an earlier case, the Court also found a banishment order imposed on a man who convicted of theft was unconstitutional because the punishment was disproportionate to the nature of the offence. Moreover, since the banishment order was extended to members of the convicted man’s family, the Court found that it was inconsistent with elementary standards of due process (T 254:1994).

In a case in the Department of Cauca, involving a more serious offence—conspiracy to murder—the Court upheld banishment orders imposed by an indigenous community, pointing out that the constitution only prohibits banishment from the territory of the Republic, not banishment from the territory of the community (T-523: 1997). More significantly, however, in this case the Court also upheld the right of the community to apply a mild form of corporal punishment because the objective of the punishment—according to the Court’s interpretation of the cultural values of the community—was not to inflict pain, but to purify the offender. The Court pointed out that although corporal punishment was inconsistent with the views of the majority of non-indigenous persons in Colombia, a genuine pluralist society had no right to impose Western values on indigenous communities. Since, according to the Court, the corporal punishment envisaged was mild, it did not constitute torture and, as such, was not prohibited by the Constitution (T-523: 1997). The Court has also upheld the right of indigenous communities to impose prison sentences that are more severe than those established by Colombia’s Criminal Code. Two indigenous communities in the Department of Cauca had tried a person for the crime of homicide and had convicted him to a prison term of 40 years (T-1294: 2005). The claimant did not challenge the jurisdiction of the indigenous community over the offence, but argued that it was unfair and unreasonable because it exceeded the punishment set by the criminal code for the same offence. The Court disagreed. After examining the indigenous community’s customs and practices, it concluded that, although the punishment exceeded the prison term envisaged by the Criminal Code for the same offence, it was nonetheless constitutional as it was not inconsistent with fundamental rights.
The Colombian Constitutional Court is, undoubtedly, making a determined effort to take seriously and give content to the constitutional recognition of cultural diversity and legal and political pluralism. Contrary to the tendency of courts in most countries in the region, which regards indigenous justice as second-class justice suitable only for the resolution of minor offences, the Colombian Court acknowledges that indigenous communities have jurisdiction over a wide range of disputes and criminal offences. Thus, for example, the Court has decided that indigenous courts have the right to decide labour law disputes even though these disputes would otherwise fall within the jurisdiction of specialised labour courts (T-009: 20007). The Court has also accepted that indigenous communities can restrict freedom of religion, if they do so in order to preserve traditional values. In this type of case, the Court has held that maintaining the cultural integrity of indigenous communities overrides the right of certain religious groups to preach within the territories occupied by indigenous communities (T-1022: 2001;SU-510: 1998).

Some of the Colombian Constitutional Court’s decisions are, undoubtedly, controversial, in particular those that uphold certain forms of corporal punishment or restrict freedom of speech. Yet, there is no doubt that the Colombian Court is making a courageous and intellectually interesting attempt to take seriously the constitutional provisions on cultural and legal diversity.

IV

Conclusion

Few would expect improvements in access to justice for indigenous communities in Latin America to be achievable by formal changes in the constitution or the law. Indeed, experienced legal reformers are well aware that focusing exclusively on legal norms and court behaviour without addressing underlying social and economic issues is futile. Yet, it is also generally accepted that combining improvements in the technical operation of the legal system with policies aimed at changing social and economic conditions is difficult to achieve. Thus, those seeking to improve access to justice for indigenous communities in Latin America seem to face a bleak choice: if they focus their efforts on the technical aspects of the law they soon realise that their enterprise is futile; if they attempt to address wider economic and political problems they are soon reminded that the task is unrealistic and, perhaps, even dangerous. Thus, not surprisingly, many legal reformers soon become disenchanted.

The unpromising choice outlined above is based, however, on the assumption that indigenous communities are deprived passive recipients of enlightened access to justice policies designed by national governments, international NGOs or intergovernmental organizations. Fortunately, this is not the case. Indeed, indigenous communities in many indigenous communities in Latin America countries have become actively involved in overcoming their social and economic problems and in improving access to justice. Although the 1994 rebellion of indigenous communities in Chiapas (Mexico) undoubtedly served as the inspiration for indigenous communities elsewhere, self-assertion and combativeness were present in indigenous communities long before these events. Indeed, demands for a reconfiguration of political and economic power as a means of access to justice have been mounting in Latin America since the 1980s and have now spread to most indigenous communities. The impact of these developments is reflected in new constitutional provisions discussed in this paper. Indeed, today, most constitutions in Latin American acknowledge the multicultural and multi-ethnic composition of their population. The objective of this paper has been to explore whether these new constitutional provisions have had any impact on the behaviour of courts, governments and legal
institutions in the region. The evidence suggests that the impact of these provisions is mixed. On the one hand, it shows that some governments have been impeded in carrying out these provisions either by investors in search of resources in territory that belongs to indigenous communities, or by domestic political problems caused by guerrilla warfare and drug trafficking. On the other hand, the evidence shows that some courts in the region have responded favourably to the new constitutional provisions. Indeed, the case of law of the Inter-American Court of Human Rights and the Colombian Constitutional Court reveal a commitment to legal pluralism and ethnic diversity that would have been unthinkable only a few years ago. But the case law of these two courts, though significant, is not typical. Most courts and institutions in the wider justice sector in the region behave as if the new constitutional provisions had never been adopted and thus continue purposely to discriminate against members of indigenous communities and to ignore the rights recognized by the new constitutional provisions.

Obstacles for improving access to justice for indigenous communities in the region are formidable, but the constitutional changes adopted in recent years have not been meaningless. Whether or not political elites take seriously the constitutional recognition of the rights of indigenous communities, these constitutional provisions have not been totally ineffective. Some governments are now complying with their obligation to recognize the rights of indigenous people to their ancestral lands. Also, state institutions can no longer ignore decisions taken by the authorities of indigenous communities. These new constitutional provisions have also enabled the Inter-American Court of Human Rights and the Constitutional Court of Colombia to develop a remarkably progressive case law, which, though at odds with the prevailing conservative legal culture, provides indigenous communities with a platform to further their struggle for improved access to justice and meaningful political, social and economic equality.