The Status of Traditional Indian Justice[1]

Agustin Grijalva[2]

INTRODUCTION

Traditional Indian law is experiencing a worldwide renaissance. In Ecuador and elsewhere in Latin America several national constitutions already recognize traditional Indian law and traditional Indian authorities.[3] However, the recognition of traditional law is still just nominal and no legislation has been enacted to enforce such recognition on the prevailing majoritarian government. Recognition of traditional law generates new challenges due to its differences from western law or even the western-style law enacted by Indian peoples themselves. Traditional Indian law is based on Indian cultures, and for that reason, is an actual expression of Indian societies and ways of government.

This article will approach the administration of Indian justice in Ecuador and Latin America from two angles. The first considers the intersection of the law and anthropology. Today, legal scholars and anthropologists must build creative bridges between themselves to effectively and concretely contribute to the wave of constitutional reforms of Indian rights in Ecuador and Latin America. The second discusses experiences and reflections regarding the judicial administration of the Ecuadorian Indian peoples.

This article is divided into three sections. The first section presents the background of the last constitutional reforms regarding Indian rights in Ecuador. The second section outlines the appearance of a new type of Indian legislation that has the potential to transform the current judicial administration. It emphasizes how the structure of the collective Indian rights will transform classic liberal judicial concepts and give way to new relationships between Indian peoples and Ecuadorian government. Finally, the third section explores the Ecuadorian experience, exposing some key problems that should be considered in a law of Indian judicial administration.

I. Historical Background

This section presents a brief overview of the legal history of Ecuadorian Indian rights. This history serves as a conceptual mark to analyze the actual insertion of the administration of Indian justice in the Ecuadorian constitutional reforms of 1998.

Like other Latin-American countries once the Spanish colonial term ended in Ecuador, the national state was more the political protector of a minority of powerful people than a true national state. The national state in the nineteenth-

---

[1] This paper was translated from Spanish by Dianna Ortiz, Administrative Assistant, Clinical Law Program, of the University of New Mexico School of Law.

[2] Professor of Law at Universidad Andina Sede Ecuador (Andean University - Ecuador Campus). Part of this article is based on the author's work for a paper by Julio César Trujillo, *El Estado Plurinacional en Ecuador: las reformas constitucionales, in* PUEBLOS INDIOS, ESTADO Y DERECHO 167 (Jorge Ortega ed. 1992). Section three of this article summarizes ideas expressed in the First Workshop regarding Administration of Justice and Indian Peoples organized by Universidad Andina Simón Bolivar Sede Ecuador. Symposium, *UASB-Pro-Justice Regarding Administration of Justice and Indian Peoples*, (March 10, 2000) (on file with author) [hereinafter Project UASB-Pro-Justice]. A former Spanish version of this paper was presented at 12th International Congress on Customary Law and Legal Pluralism, Arica (Chile), March, 18—22, 2000. I welcome comments at agustin@uasb.edu.ec

[3] *See* ECUADOR CONST. art. 191. *See also*, PERU CONST. art. 149; VENEZ. CONST. art. 119.

century unified the fragmented economic, social, regional and cultural forces of the country. Ecuador was a landowner state that defined itself as one nation and exercised authority over Indian people creating an internal colonialism.[4] The internal colonialism[5] in Ecuador developed in two phases. The first phase extended from the independence from Spain to the withdrawal of the Indian tribute in 1857. The second phase lasted from 1857 to the promulgation of the constitutional reforms of 1998.

In the first phase, there were clear similarities between the internal colonialism and the Spanish colonization. Both systems used domination and exploitation when dealing with Indian peoples, segregating them from mainstream Ecuadorian society. Both systems recognized the existence of Indians to effectuate the same domination. In this period the national state maintained a special tax for the Indian peoples and also particular privileges. Indians were a differentiated group and in various cases the ethnic governance authorities were recognized. Communal lands and Indian authorities formed social spaces of relative autonomy, similar to the "Republics of Indians Peoples" of the colonial period.[6]

The second phase, an integrationist period, was initiated in 1857 with the abolition of the tax on Indians. The respective decree abolishing the tax would presume to leave individual Indians equal to the rest of the Ecuadorians as to the debts and rights that the constitution imposes or concedes to everybody. The Ecuadorian government eliminated the Indian town hall and questioned other forms of Indian authority. The government also suppressed communal property rights of those town halls. Additionally, the Ecuadorian government created special jurisdiction for the transport of Indian merchandise and excluded Indians from enlisting into the military service.

Indian peoples tended to be legally invisible. Although at the end of the nineteenth century and the first part of the twentieth century, especially during the term of the liberal President Eloy Alfaro[7], the Ecuadorian government enacted protection decrees to better the condition of the "Indian race." The predominant tendency in the Ecuadorian Constitution was to declare the necessity of government protection of Indians but in all other respects ignore the very existence of indigenous peoples. In 1937, the government enacted the Law of Communities (Ley de Comunas). This law failed to recognize the ethnic identity of the Indian people and, as a practical matter, defined them only as any other community of peasants. In 1964 and 1973, the laws of Agrarian Reform consolidated the omission of all ethnic diversity in Ecuadorian laws. In terms of legal ideology, Indian people were reduced to peasants in general and there was no governmentally recognized status of Indians; political, racial or otherwise.

---

[4] Currently, Ecuador does not have a law regulating Indian judicial administration, however, its constitution supports the enactment of such a law. *See* ECUADOR CONST. art. 84 § 7, art. 191. The author participated in the design of a first draft project of this law.

[5] *See* Manuel Chiriboga, *La Fuerzas del Poder Durante el Periodo de la Independencia y la Gran Colombia in* 6 NUEVA HISTORIA DEL ECUADOR 263, 276 (Enrique Ayala Mora ed. 1983).

[6] *Id.*

[7] In Ecuadorian history, liberals, as opposed to conservatives, supported free trade, local education and complete separation of the Catholic Church and the state.

The constitutional reforms of 1998 clearly established the multicultural and multiethnic character of the Ecuadorian State[8], the condition of collective rights of the Indian peoples[9], and the existence of Indian territorial circumscriptions.[10] These reforms, introduced by the National Constituent Assembly ended, in legally formal terms, the integrationist phase. It is within these reforms that the 1998 Constituent Assembly introduced in the Constitution the right of the Ecuadorian Indian peoples to their own administration of justice.[11]

II. Between New Laws and Custom:

In the Ecuadorian Constitution, Indian rights are viewed as the collective rights[12] of peoples that self define themselves as nationalities. For example, the right of justice and proper authorities established in article 191, is a concretion of article 84, section seven, which recognizes the Indian collective right to "conserve and develop their traditional forms of coexistence and social organization, [and] of creation and exercise of authority."[13]

The characterization of Indian rights as *collective rights* is not purely formal, but implies that right-holders are not individuals but entire peoples. This characterization corresponds with International Labor Organization ("ILO") Convention 169, which recognizes Indian peoples as holders of the rights of education, health, culture and their own systems of justice.[14]

While collective rights diverge from individual human rights, they are not in opposition to these individual rights. In fact, collective rights make it possible to exercise individual rights. For example, the collective right of Indian peoples to preserve their own culture implies protection of the individual right to preserve the culture for each Indian individual. Without protection to Indian culture as a social reality created by the group, the individual right is unrealizable. In contrast, the *collective rights* of a society cannot be broken into individual rights: the rights belong to the group and to each one of the individual members, but never to just

[8] *See* ECUADOR CONST, art. 1 ("Ecuador is social state of law, sovereign, unitary, independent, democratic, multicultural and multiethnic").
[9] See id. at arts. 83-85. (including the collective rights concerning culture, territory, participation and other Indian issues).
[10] *See id.* at art. 224 ("There shall be indigenous and Afro-Ecuadorian territorial districts that will be established by law.").
[11] For instance, the Ecuadorian Constitution establishes that: [t]he authorities of the indigenous peoples shall exercise functions of justice, applying their own norms and procedures for the resolution of internal conflicts in conformity with their customs or customary law, as long as these are not in conflict with the Constitution and the law. The law shall make these functions compatible with the national judicial system. *Id*. at art. 191.
[12] Collective rights are rights where the right-holders are groups, not individuals, i.e., the rights of Indian peoples.
[13] ECUADOR CONST. art. 84 § 7. Additionally, in May 15, 1998 Ecuador ratified Convention 169 of the International Labor Organization, which also recognizes these Indian collective rights.
[14] *See* ILO Convention 169, art. 8, § 1-2. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

one individual or group of individuals. Collective rights should not be confused with diffuse rights. Diffuse rights are broad based, belonging to all in the whole society as opposed to collective rights, which are held by a discernable group.

The Latin American procedural systems are not designed to protect collective rights. As an inheritor of Roman law and European civil law, Latin American law is designed to defend individual rights. In order to protect the collective rights of Indian people, Latin American countries need to design new legal institutions. In order for Indian constitutional rights to be concrete, substantive and procedural changes need to be made, such as the legal recognition of Indian authorities, Indian penalties and Indian traditional and customary law.

Indian people in Latin America function between national government law and their traditional customs within a dynamic symbiosis where each modifies the other. Constitutional recognition of traditional Indian law is one of the highest expressions of the political fight of Latin American Indian organizations.[15] This recognition in Latin American constitutions is a new phenomenon that questions national law as well as traditional Indian law.

Until recently, the Ecuadorian legal system did not recognize the existence of Indian peoples based on the idea that all are equal before the law. The situation is different today. Legislation regarding Indians will be integrated throughout the institutions of the Ecuadorian Constitution applicable to the Indian peoples. The ILO's Convention 169, ratified by Ecuador, and the various laws regarding Indian issues that Ecuadorian government can approve in the future will change the face of the Ecuadorian legal system.[16] Prior legal systems denied any rights to Indians beyond purely formal constitutional rights. The 1998 constitutional reforms allow for recognition of new indigenous rights through the enactments of the Ecuadorian legislature. Additionally, the adoption of the ILO Convention 169 further recognizes indigenous rights of Indians.

Proposed Ecuadorian legislation concerning Indians have new structural characteristics compared to the laws applicable to Indian peoples in other Latin American states. These characteristics include Indian organizations participating or aspiring to participate in the legislative process, which will augment the legitimacy of these laws. Furthermore, proposed legislation recognizes, protects and coexists with a wide and diverse number of Indian traditional law systems and traditional Indian authorities. In contrast, former government legislation usually did not recognize, and sometimes even prohibited, Indian customs and authorities. Moreover, this legislation articulates relationships between the Ecuadorian state and Indian peoples. Although it crystallizes power relations, these relations are different than a dominant government law above a subordinate Indian law.[17]

---

[15] *See* Diego Iturralde, *Usos de la Ley Y Usos de la Costumbre: La reivindicacion del derecho indigena a la modernizacion, in DERECHOS, PUEBLOS INDIGENAS Y REFORMA DEL ESTADO* 125 (Juan Carlos Ribadeneira ed. 1993).

[16] Currently, in Ecuador there are several law projects about Indian peoples affairs such as: the law of Indian peoples and Indian nationalities, the law of Indian communities, the law of Indian territorial circumscriptions, the law regarding official use of Indian languages, the law of administration of Indian justice and proposals of reforms about Indian issues in the current Law of Education and the Code of Health.

[17] *See* Rudolfo Stavenhagen, *Derecho Consuetudinario Indigena en America Latina, in* ENTRE LA LEY Y LA COSTUMBRE 27, 37 (Rudolfo Stavenhagen & Diego Iturralde eds., 1990).

The emerging characteristics of Ecuadorian law pose new challenges for legal anthropology, because it is not only the national state and its law that are being questioned, Indian traditional law systems will be profoundly transformed in light of formal recognition by the government. Traditional Indian law will have to legally coexist with specific new government legislation concerning Indians. In fact, in some indigenous groups, customs are being reduced to a written document, reinterpreted by new statutes and are evaluated by government judges and officials.

Criminal law reveals clear examples of the new challenges to Indians and the government when traditional Indian Law is constitutionally recognized. Some traditional Indian penalties could be considered contrary to human rights from a western point of view. In fact, ILO Convention 169 and the Latin American Constitutions[18] while recognizing traditional Indian law also limit it. For example, Article 8 of the Convention, establishes that Indian peoples have the right to maintain their customs and proper institutions, which have to be made "compatible with the defined fundamental rights through the national legal system and with the internationally acknowledged human rights.[19]"

In Ecuador, the Constitution establishes that:

> "[t]he authorities of the indigenous peoples shall exercise functions of justice, applying their own norms and procedures for the resolution of internal conflicts in conformity with their customs or customary law, as long as these are not in conflict with the Constitution and the law. The law shall make these functions compatible with the national judicial system."[20]
>
> Therefore, the recognition of traditional Indian law also implicates its subordination to and compatibility with the fundamental rights established nationally and internationally. On one hand, too broad of an interpretation of the human rights limitations to Indian jurisdiction will weaken traditional Indian law. On the other hand, Indian sanctions that implicate the death penalty or extremely strong physical punishment generally contradict human rights and violate constitutional rights. Therefore, each case should be judged considering the implied culture, values, and constitutional rights.

In Ecuador, cultural rights of Indian peoples to maintain and develop their traditional laws are also part of collective human rights recognized internationally and constitutionally. Therefore, in each specific situation it is necessary to determine if the affected human right is fundamentally violated by a ritual sanction or penalty applied by the Indian authority. It is necessary to evaluate if the affected human rights deserves greater protection than the right of the community to apply its traditional penalties in order to maintain cultural identity or social cohesion.[21] It

[18] *See supra* note 1.
[19] International Labour Organization Covenant 169, art. 8.
[20] ECUADOR CONST. art. 191.
[21] *See* Donna Lee Van Cott, *A Political Analysis of Legal Pluralism in Bolivia and Colombia*, 32 J. LATIN AM. STUD. 207, 217-224 (2000). The Colombian Constitutional Court has balanced the importance of indigenous community tradition against the individual defendant's rights. *See id.*

is also clear that traditional Indian law is transformed when Indian and state authorities are compelled to evaluate certain community sanctions and determine if traditional penalties should prevail over certain individual or constitutional human rights.

III. Considerations for a Law of Administration of Indian Justice[22]:

In the Ecuadorian Constitution, the collective right of the Indian peoples to solve their internal conflicts applying their own traditional laws constitutes an exception to the constitutional principle of jurisdictional unity. Jurisdictional unity establishes that all the authorities that administrate justice belong to the judicial function of the Ecuadorian Government. However, Indian authorities are not created by the Ecuadorian Constitution but rather recognized by it. These Indian authorities are socially generated by the proper practices of the Indian justice systems. The main problems related to these justice systems are: 1) Indian identity of individuals and its relationship to Indian jurisdiction; 2) Indian sociopolitical organization and its relation to the Indian authorities of the administration of justice; 3) the type of conflicts which should be solved by Indian jurisdiction and; 4) the constitutional limits of Indian justice.

A. Ethnic Identity of Individuals and Indian Jurisdiction

In Ecuador and Latin America, there is not a legal identification system equivalent to the United States' system of identifying who is Indian. Identification as an Indian is purely social and cultural. One of the problems making identification less than clear is having an extended mixed population.

The problem of Indian identity of individuals is legally relevant because it is linked to the determination of jurisdiction. For example the issues of: Who is Indian? Who can or should be judged by the Indian authorities? Which are the values and traditional customs? Who are the Indian authorities with authority to judge?

Identity is dynamic and is always defined in relation to others. It emerges within complex inter-ethnic relations. Furthermore, permanent changes exist in the norms and values and in cultural parameters of Indian peoples, many of which are not the original cultural norms but rather have been assumed and re-created by the Indian population in the form of cultural loans. Multiple ethnic identities can exist and coexist, for example, the identity of an Ecuadorian who is both Quichua and Cayambí.[23] The problem of individual identity is also complicated by Indian immigrants who lose connection with their Indian communities, when they move to the cities.

In various law projects drafted by Ecuadorian Indian organizations,[24] Indians are allowed to either self-identify as Indians or the

[22] This section is partially based on expressed opinions by the participants in the Administration Workshop of Justice and Indian Peoples. Project UASB-Pro-justice, *supra*note 1. The workshop consisted of various Indian representatives of communities of the Ecuadorian highlands.
[23] The Cayambis are a division of the Quichuas: Indian peoples living in the Ecuadorian highlands.
[24] Law projects of Nationalities and Indian Peoples of Ecuador and the Law project of Ecuadorian Indian Communities.

community is allowed to identify its members. Problems of identification arise in relation to those who are not Indian, identifying who is an Indian, from the outside.

B. Indian Sociopolitical Organization and its Relation with Indian Authorities of Administration of Justice.

The Ecuadorian Constitution does not create Indian authorities or traditional Indian law, but simply recognizes it. These customs and traditional Indian authorities have existed long before the Constitution and have varied largely from one Indian community to another. The Indian town hall is one example of a long-standing traditional Indian authority. The Indian town hall in the Ecuadorian highlands, exercises more power in communities where all other organizations are subordinated to it than it does in other Indian communities where the role of the town hall has been diminished. The presence of other institutions and internal and external organizations to the community, such as cooperatives, associations, clubs, churches, non-governmental organizations has limited the authority exercised by the Indian town hall. Therefore, the functions of justice within individual town halls also vary.

In the Ecuadorian highlands, some Indian communities are rebuilding the Indian town hall to be the justice administration authority. By administering their own justice the community increases its own political power while reducing the power of the national state. An illustrative example is the testimony of the Pijal community, which is located in the province of Imbabura, in the northern portion of the Ecuadorian highlands. The Pijal community stated the following ideas,

[W]e have been fortifying and defending our capacity to resolve our internal problems, taking into account our customs and our own authorities to resolve conflicts…We can observe these changes regularly in our community. Such [as], for example, when robberies occur, matrimony problems and others we always think about making justice in the community, this way of thinking is very fixed in the members of the community. We solve our daily problems in the town hall meetings and during the general assembly of the community. In our reunions there is no mention of *the teniente politico* [25] he was mentioned thirty or forty years ago. According to our elder Cleto Bautista, the *teniente politico* and the police were always present in the meetings of the community, and many times he even directed the sessions.[26]

Traditional proceedings of administration of Indian justice vary from one community to another. These proceedings can vary in some degree in judgment and sanctions even in the same community where they judge the same type of conflict or crime. Judgment and punishment are not mechanical but rather decided on a case-by-case basis. However, the application of customary law to similar cases makes decisions by authorities progressively foreseeable.

[25] The teniente politico is the direct representative of the central government at the local level. This political official has been historically a tool of domination and social control over Indian peoples.
[26] Project UASB-Pro-Justice *supra* note 1 (testimony taken at Pijal community, Imbabura province 1998).

C. Indian Jurisdiction

Jurisdiction is the main problem facing Indian judicial bodies. It is necessary to determine which Indian authorities can judge specific conflicts. However, concepts like judge, jurisdiction and law are western concepts. Traditional Indian law may have a very different version or no version at all of these legal concepts.

Moreover, Indian judgments are applied to different kinds of conflicts but always take into account the social origins of the parties and the effects of breaches of the law on the community. In the Ecuadorian highland communities, in the province of Cotopaxi, the Quichuas Indian communities solve conflicts as diverse as heritage issues, robbery by younger community members against other members or attempts of assassination against another member of the community. In each case, Indian authorities consider the correspondent social dimension of these conflicts, such as the division within the community or the inconvenience of the confrontation between communities.

The testimony of Manuel Calazacón, Governor of the Tsachila,[27] clearly illustrates the Indian conscientiousness about the origins and social effects of conduct that they consider crime:

> [F]or us… adultery is a crime, would think [sic] more [sic] than an assassination, … Why do we say this? We assume a comparison, I have my wife, I abandon my wife, say, with four sons, With the second wife I have 3 or 4 more sons, who will be responsible for my sons from the first marriage? My first wife desires another commitment, and where do those 4 children stay, who takes care of them, where are they going to go? If it is a girl, she will go to prostitution for necessity, if it is a boy he will rob… that is why we take care of this problem. For us adultery is very serious.[28]

Ecuadorian Indian communities exert their jurisdiction and apply traditional law in the following areas: criminal issues, land problems, property conflicts, etc. However, the actual capacity to exercise jurisdiction depends on the level of organization of the community and level of effective control over territory and population. In criminal issues for example, the Indian community may capture and hand over non-Indian delinquents so state authorities can judge them. In certain situations Indian communities recognize the jurisdiction of the national state. However, the credibility of the state justice is reduced when the delinquents are liberated due to the corruption of the state judges. In such a case, if the repeat offenders are again captured by the community, the prosecution is much more drastic in its sanctions, and can even include death. Thus, there is a narrow relation between Indian and state justice. The errors of ordinary state justice distort Indian justice. Reform of state justice is necessary to protect the application of Indian justice.

[27] Indigenous people in the Pichincha province.
[28] Project Pro-Justice, *supra* note 1, (Interview of Manuel Calazacón, Governor of Tsáchila people).

D. Sanctions Within Traditional Indian Justice

There can be conflicts between the application of traditional Indian sanctions and civil and political human rights, especially when the physical integrity or the life of the perpetrator is at stake. Administration of Indian justice involves the exercise of cultural rights of the Indian peoples and their political rights of participation in government through the involvement of the community in the judgment. It is important to consider that sanctions have a different meaning within Indian populations than the dominant Ecuadorian society. Sanctions are more than a mechanism for punishing the perpetrator; they are preventative measures and serve as an example for the community. The community, including family members of the perpetrator, participates in the judgment and also helps determine the sanction. Sanctions are oriented towards the reparation for the damage caused to the victim, the purification and punishment of the perpetrator and even the reconciliation between the victim and victimizer through the mediation of community intervention and the Indian authorities.

IV. Conclusion

Today in Ecuador, the administration of Indian justice under the Constitution is a collective right. The Constitution itself requires a law that defines the indigenous forms of administering justice as well as the concomitant role of the Ecuadorian state. This law in conjunction with others will constitute a new type of Indian legislation that influences both communal customs and traditional law. In spite of ample diversity, traditional Indian justice systems are characterized by the goals of repairing and conciliating. These systems also involve the participation of the community and perpetrator as well as an educational process to heal the community. Marked by these characteristics, the imminent development of new government legislation about Indians poses new questions regarding the complicated relations between national government law and traditional Indian law.