

Indigenous Community Justice in the Bolivian Constitution of 2009

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ABSTRACT

The Bolivian constitution, debated in a Constituent Assembly in 2006 and 2007 called by the country's first indigenous president, Evo Morales, was adopted in a referendum in 2009. Among many other important provisions recognizing the country's majority indigenous population, it legitimizes the practice of indigenous community justice. Indigenous justice differs in important ways from the national justice system and from the international human rights regime but it expresses a legitimate assertion by the country's indigenous peoples of their cultural integrity.

I. INTRODUCTION

On 25 January 2009, the Bolivian people approved a new constitution in a referendum with 61 percent voting in favor.¹ The constitution emerged from the indigenous movement that had grown in the country during the previous decades and propelled Evo Morales into the presidency, the first indigenous

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1. Corte Nacional Electoral, República de Bolivia, *Referéndum Nacional Constituyente 2009*, available at <http://www.cne.org.bo/ResultadosRNC2009/>.

president in the country's history, in 2006. The constitution enacted some of the major demands of that movement, affirming the status of the country's indigenous majority and ratifying the legitimacy of indigenous cultural practices. Among them, it recognizes the practice of indigenous community justice alongside the state justice system.

Indigenous community justice poses many challenges to the ordinary justice system (as the state system is called). It has a fundamentally different philosophical basis. Its rules, procedures, norms, and (frequently) outcomes are different from those of the ordinary system. Those who demand recognition for indigenous cultural practices claim legitimation from the international human rights regime, which affirms the right of culturally distinct groups within a state to practice their own culture. But some practices, and in particular community justice, depart from that regime's norms in important respects.

In this article I will examine the workings of indigenous community justice (also known as *derecho consuetudinario* or customary law) and its incorporation into the new constitution. First, I will discuss the growth of indigenous consciousness that gave rise to the demand for the recognition of community justice. Second, I will compare the claims of indigenous rights to the conceptions of rights in Bolivian ordinary justice and the international human rights regime. Finally, I will assess the potential of community justice to fulfill Bolivia's indigenous communities' demand for justice.

II. BOLIVIA: AN INDIGENOUS MAJORITY COUNTRY

Sixty-two percent of Bolivians are indigenous, the largest proportion of any Latin American country.² Bolivia is the poorest country on the South American continent.³ The poor indigenous majority has been oppressed throughout its history and although indigenous people have offered episodic resistance, the organization of a movement has been gradual and uneven. Following the 1952 revolution, developmental governments attempted to organize the indigenous population from above on a non-ethnic basis—to identify them as peasants and treat them as a social class. The assumptions that the dominant culture is superior and that the indigenous population should be assimilated to it went unquestioned. Thus the revolution's project

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2. *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen*, U.N. GAOR, Hum. Rts. Council, 11th Sess., Agenda Item 3, at 5, ¶ 8, U.N. Doc A/HRC/11/11, (2009) [hereinafter *Stavenhagen Report*].
 3. *Countries and Territories, Bolivia*, N.Y. TIMES, 31 Jan. 2011, available at <http://topics.nytimes.com/top/news/international/countriesandterritories/bolivia/index.html>.

reproduced the colonial pattern of domination.⁴ But the project failed when the revolution's developmental policies collapsed. In the 1970s, an ethnic consciousness began to arise among the indigenous population, which rejected assimilation and called for the decolonization of the country.

Two decades of brutal neoliberalism, beginning in 1985, accentuated the deprivation. Indigenous communities were vulnerable to its fiscal austerity, promotion of a market for land, and commercial exploitation of natural resources. Mines, the country's principal natural resource, were privatized, driving thousands of mostly indigenous miners into unemployment. Neoliberal legislation also devolved administrative responsibilities to localities, however, bringing new opportunities to organize.⁵ A further stimulus to indigenous organizing throughout the continent was the 1992 quincentenary of the European discovery of the Americas. A massive popular movement arose in Bolivia to demand recognition of the aspirations of the long-oppressed indigenous majority.⁶

Indigenous people, making common cause with others in popular movements, joined to protest neoliberal austerity and, in particular, to demand that the government reassert control of the country's natural resources. They periodically paralyzed the country, drove two presidents out of office, and then won the election of their own candidate, Morales. He won a striking victory with 54 percent of the vote, the first time in recent history that a president had won an outright majority.⁷ Thus the indigenous and popular

4. Silvia Rivera Cusicanqui, *Liberal Democracy and Ayllu Democracy in Bolivia: The Case of Northern Potosí*, 26 J. DEV. STUD. 97, 98–99 (1990).

5. DEBORAH J. YASHAR, *CONTESTING CITIZENSHIP IN LATIN AMERICA: THE RISE OF INDIGENOUS MOVEMENTS AND THE POSTLIBERAL CHALLENGE* (2005); DONNA LEE VAN COTT, *FROM MOVEMENTS TO PARTIES IN LATIN AMERICA: THE EVOLUTION OF ETHNIC POLITICS* (2006).

6. The definition of "indigenous" is not precise. The United Nations Working Group that formulated the Declaration of the Rights of Indigenous Peoples used as a basis the definition proposed by José Martínez Cobo:

Indigenous communities, peoples and nations are those which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of societies.

JOSÉ MARTÍNEZ COBO, *STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS, FINAL REPORT SUBMITTED BY THE SPECIAL RAPPORTEUR, MR. JOSÉ MARTÍNEZ COBO*, U.N. Doc. No. E/CN.4/Sub.2/1986/87 (1986), available at <http://www.un.org/esa/socdev/unpfii/en/spdaip.html>. This definition incorporates descent, historical priority to colonialism, and identification. It leaves open that descendants of indigenous people may identify with other groups; in Bolivia many such descendants consider themselves mestizos because of either mixed ancestry or cultural assimilation. Though the definition is subjective, in the polarized situation of contemporary Bolivia, most people embrace a clearly marked ethnic identity.

7. Robert Albrow, *The Culture of Democracy and Bolivia's Indigenous Movements*, 26 *CRITIQUE OF ANTHROPOLOGY* 387 (2006); FORREST HYLTON & SINCLAIR THOMSON, *REVOLUTIONARY HORIZONS: PAST AND PRESENT IN BOLIVIAN POLITICS* (2007); BENJAMIN KOHL & LINDA C. FARTHING, *IMPASSE IN BOLIVIA: NEOLIBERAL HEGEMONY AND POPULAR RESISTANCE* (2006).

movement represented the convergence of two struggles: one against five centuries of domination by Europeans and their descendants, and the other against two decades of neoliberalism.⁸

Morales and his supporters saw the victory as the opportunity to break dramatically with past oppression and to achieve a new, enhanced role for indigenous people in governing the country. Morales spoke of “refounding” the country.⁹ This refoundation was to find expression in a Constituent Assembly to write a new constitution, a longstanding demand of the indigenous movement. A constitution is the foundational document of a polity and society, and countries undergoing profound transformation have often adopted a new one to give structure and definition to that transformation. Though Bolivia has had many constitutions, usually scrapped and rewritten in response to a change in power holders without fundamental structural alteration, the movement had great hopes that the conjuncture foreshadowed a real change that the constitution would ratify. One of Morales’s first acts as president was to submit to the Congress a bill calling for the election of a Constituent Assembly, which was held on 2 July 2006.¹⁰

Many non-indigenous Bolivians resented the unprecedented visibility that the indigenous movement had achieved, not only as delegates to the assembly and in the provisions of the constitution, but in the appointment of cabinet officers and the practice of traditional indigenous rituals on official occasions. Bolivia’s politics are organized around ethnic and geographic divisions. The 62 percent of its people who identify as indigenous are divided into thirty-six ethnically and linguistically distinct groups. The two largest groups, the Quechua (30 percent of the total population) and the Aymara (25 percent), are concentrated in the highlands.¹¹ The people of the highlands are densely settled agriculturalists.

The remaining groups, mostly in the lowlands, are quite small, ranging from a few dozen to under 200,000.¹² Many of them have had only limited contact with the national culture and institutions until very recently. These

8. HYLTON & THOMSON, *supra* note 7.

9. See, e.g., John Crabtree, *Bolivia’s Controversial Constitution*, OPENDEMOCRACY.NET (10 Dec. 2007) available at http://www.opendemocracy.net/article/bolivia_s_controversial_constitution; Raúl Zibechi, *Indigenous Movements: Between Neoliberalism and Leftist Governments*, AMERICAS PROGRAM (3 May 2006), available at <http://www.cipamericas.org/archives/705>.

10. Keith G. Banting & Richard Simeon, *Introduction: The Politics of Constitutional Change*, in *REDESIGNING THE STATE: THE POLITICS OF CONSTITUTIONAL CHANGE 1* (Keith G. Banting & Richard Simeon eds., 1985); Luis Tapia, *Constitution and Constitutional Reform in Bolivia*, in *UNRESOLVED TENSIONS: BOLIVIA PAST AND PRESENT 160* (John Crabtree & Laurence Whitehead eds., 2008); DONNA LEE VAN COTT, *THE FRIENDLY LIQUIDATION OF THE PAST: THE POLITICS OF DIVERSITY IN LATIN AMERICA 4–16* (2000).

11. *Stavenhagen Report*, *supra* note 2, ¶ 8.

12. *Pueblos Indígenas de Bolivia*, AMAZONIA, 28 Apr. 2011, available at <http://www.amazonia.bo/pueblos.php>.

lowland groups draw their livelihoods from the vast territories they occupy. The four lowland departments of eastern Bolivia have a much lower proportion of indigenous people and a much sparser population overall than the rest of the country. The non-indigenous former elite are powerful in those same four departments, which constitute Bolivia's richest region, thanks to extensive agriculture and resource extraction. Their governors, all opposed to Morales's government, have threatened to secede.

The president's supporters won 145 of 255 seats in the Constituent Assembly (56 percent), falling short of the two-thirds majority that would be necessary to carry key votes,¹³ due in part to the electoral system's overrepresentation of the minority.¹⁴ The assembly produced a draft constitution offering unprecedented recognition of the "plurinational" character of the country and recognizing the rights of the indigenous majority in particular.

The constitution seeks to bridge western liberal human rights and the affirmation of indigenous cultures, and has been described as an effort to preserve the values of liberalism but overcome the formalism of liberalism, which precludes combating racism and achieving social justice.¹⁵ But that reconciliation is fraught with tension, no more so than in the implementation of community justice.

Writing the constitution was a tortuous process. The assembly met in Sucre, Bolivia's judicial capital, from August 2006 to December 2007. Even though the opposition had a voice in the assembly out of proportion to its popular support, it organized massive protest demonstrations in Sucre and attempted to shut the assembly down. Demonstrators physically assaulted many deputies, especially women in indigenous dress.¹⁶ The assembly therefore relocated to Oruro, in the friendlier highlands, where, boycotted by the opposition, it proclaimed the new constitution on 14 December 2007.

But the work was not done. The enabling legislation gave the national Congress the authority to amend the draft text before it was subjected to ratification in a popular referendum. During 2008, the amendments became the subject of intense negotiations, concluded only after polarization esca-

13. *Bolivia Country Update: July 2006*, AMERICAS SOCIETY AND THE COUNCIL OF THE AMERICAS 1 (July 2006), available at http://www.as-coa.org/files/PDF/pub_166_105.pdf.

14. The electoral system favored the opposition to Morales in two ways: first, the least populous departments, including those in the east, were overrepresented; second, the complicated two-tiered representation formula guaranteed that in 70 multimember districts, one candidate would be elected from the party with the second largest number of votes, no matter how small the party's vote. Miguel Centellas, *Forging a New Social Contract? Bolivia's 2006 Constituent Assembly Election* 20–22 (paper presented at the 65th annual meeting of the Midwest Political Science Association, 12–15 Apr. 2007), available at http://www.allacademic.com/meta/p199120_index.html.

15. Nancy Postero, *The Struggle to Create a Radical Democracy in Bolivia*, 45 *LAT. AM. RES. REV.* 59 (2010).

16. *Stavenhagen Report*, *supra* note 2, at ¶ 70.

lated and led to violent confrontations. The secessionist departments held referendums to demand autonomy. A referendum to recall Morales was held on 10 August 2008. However, he won a decisive endorsement with 67 percent of the vote.¹⁷

Further confrontations, apparently provoked by the governor, broke out in Pando department following the recall referendum in September.¹⁸ Between eleven and thirty pro-government demonstrators were killed.¹⁹ These killings and the danger that civil war might engulf the eastern part of the country significantly discredited the opposition. But the campaign against the constitution continued, and the opposition-controlled Senate refused to schedule a referendum on the constitution until thousands of supporters, joined by the president, marched on La Paz in October.²⁰ When the referendum was finally held, it was easily approved.²¹

The constitution fulfills several historic demands of the indigenous people. It declares Bolivia to be a "unitary, social, plurinational, communitarian state governed by the rule of law" (*Estado Unitario Social de Derecho Plurinacional Comunitario*). It recognizes the thirty-six indigenous languages, along with Spanish, as official languages. The constitution also guarantees respect for all religions and *cosmovisiones* (referring to traditional indigenous religious beliefs, discussed below), and allows for autonomy for regions predominantly populated by indigenous "nations and peoples."²² It guarantees to the whole population broad social rights, access to public services such as health care and education, and the inviolability of public ownership of natural resources. It calls for an upper limit on the size of *latifundios* (set at 5,000 hectares in a referendum simultaneous with the referendum on the constitution); larger properties can be expropriated.²³

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17. *Bolivian President Censures United States*, CNN, 23 Sept. 2008, available at http://articles.cnn.com/2008-09-23/world/bolivia.morales_1_evo-morales-first-indigenous-president-nationalization?_s=PM:WORLD.
 18. *Bolivia: Events of 2008*, HUMAN RIGHTS WATCH, available at <http://www.hrw.org/en/node/79338>.
 19. NACIONES UNIDAS, INFORME PÚBLICO DE LA OFICINA DEL ALTO COMISIONADO DE LAS NACIONES UNIDAS PARA LOS DERECHOS HUMANOS EN BOLIVIA SOBRE LOS HECHOS DE VIOLENCIA OCURRIDOS EN PANDO EN SEPTIEMBRE DE 2008 (Mar. 2009, La Paz, Bolivia), available at <http://bolivia.ohchr.org/docs/Informe%20Pando.pdf>; *Massacre of 30 Campesinos by "Civicos" in Pando, Bolivia*, BANK INFORMATION CENTER (15 Sep. 2008), available at <http://www.bicusa.org/en/Article.3895.aspx>.
 20. *Bolivians to Vote in January*, IRISH TIMES, 10 Oct. 2008, available at <http://www.irishtimes.com/newspaper/world/2008/1022/1224454452918.html>.
 21. EUROPEAN UNION ELECTION OBSERVATION MISSION, BOLIVIA: FINAL REPORT: CONSTITUTIONAL REFERENDUM 31 (25 Jan. 2009), available at http://eeas.europa.eu/human_rights/election_observation/bolivia_2009/final_report_eu_eom_en.pdf.
 22. It also allows for departmental and municipal autonomy, creating a potential for conflict since the territories occupied by indigenous groups do not generally correspond to civil divisions.
 23. NUEVA CONSTITUCIÓN POLITICA DEL ESTADO DE BOLIVIA [CONSTITUTION] (2009).

But in negotiating the amendments, the government made major concessions to the opposition. The most important changes had to do with presidential re-election and agrarian reform. The Oruro draft had allowed for indefinite re-election. The final text, agreed on in Congress, limits the president to two successive terms.²⁴ The limit on the size of *latifundios* is to be applied only in the future, so that any already existing property that exceeds the 5,000 hectare limit is not subject to expropriation.²⁵

The rights granted to indigenous communities include the right to practice indigenous community justice. These provisions too were changed between the draft and the final version. In fact, indigenous community justice, though far from the most contentious issue in the debate, was a polemical target for the constitution's opponents. I discuss the campaign and the issue of community justice in the 2009 referendum below, after discussing community justice generally and the history of Bolivia's constitutional provisions on the issue.

III. INDIGENOUS IDENTITY AND COMMUNITY JUSTICE

Rooted in the historical practices of indigenous communities, indigenous community justice represents an alternative model to that of individual rights on which western legal systems are grounded. The demand to maintain and legitimize distinct and culturally rooted forms of administration of justice, common to the indigenous communities of Bolivia, is part of the communities' resistance to domination and assimilation. Thus, the demand proceeds from the same political process of affirmation of indigenous identity that brought Morales to power. But legitimizing indigenous community justice is not a political demand narrowly conceived—rather, it is part of a broader tradition of indigenous community organization and indigenous culture. Indeed, one of its hallmarks is its inseparability from that tradition. Unlike modern, rational law in the Weberian sense, under community justice the law is not a separate institution administered by specialists but an integral part of community structures.²⁶ In this sense, the affirmation of community justice must be understood as proceeding from the assertion by indigenous peoples of a right to their own culture and to self-determination.

An ethnic identity movement deploys cultural claims to affirm its legitimacy and entitlement to inclusion. For that reason the movement's demands

24. NUEVA CONSTITUCIÓN POLÍTICA DEL ESTADO DE BOLIVIA, título 2, capítulo 1, art. 169 (2009).

25. And the measure appears unlikely to have much effect because a property can be structured to fall below the limit by dividing it among different legal owners.

26. MARCELO FERNÁNDEZ OSCO, LA LEY DEL AYLLU: PRÁCTICA DE JACH'A JUSTICIA Y JISK'A JUSTICIA (JUSTICIA MAYOR Y JUSTICIA MENOR) EN COMUNIDADES AYMARAS 1 (2004).

are often symbolic as much as material, and the symbols it deploys derive from important aspects of culture. Though the cultures of Bolivia's many indigenous groups vary considerably, they share important characteristics that distinguish indigenous movements from other movements important in Latin America today. Bolivia's indigenous cultures are based on a holistic vision of the cosmos and are intimately related to land and territory. These ethnic identity movements are rooted in communities and seek to preserve cultures that are under assault from the dominant culture and economy.

First, the indigenous holistic vision of the cosmos (*cosmovisión*) asserts a unity with nature. This unifying vision guides everyday activities. Though not common to all indigenous populations, it provides a unifying element for those who maintain indigenous identity, even when living in cities and engaging in urban occupations.

Second, land and territory are a focus of indigenous demands. The terms "land" and "territory" have different connotations, with different practical implications for the people of the highlands and of the lowlands. Land is the primary economic resource of the indigenous of the highlands, who traditionally are farmers on small plots. In the lowlands, land is not scarce and cultivation is not the primary source of livelihood for most of the diverse and spread-out indigenous people. Lowland indigenous groups draw their pre-agricultural economic livelihoods from vast territories that they wish to protect against environmental threats and encroachment by land grabbers and developers of mineral wealth. In both regions, however, the physical space they occupy is not only an economic resource but the fundamental basis of their community life. According to Lee Swepston, "the loss of their lands is the major reason for indigenous and tribal peoples losing their identities, their cultures, and their lives."²⁷ Even more, the geographically identified community is a source of identity and the locus of the traditions that indigenous groups struggle to protect. Similarly, indigenous communities oppose rampant exploitation of natural resources both to protect the environment that sustains their material life and to express their unity with nature.

The collective orientation of Bolivian indigenous groups is related to the cultural attachment to land and territory. Community ties are strong and the culture emphasizes community membership. They claim political representation as communities, rejecting liberal representation systems based on the individual. Indigenous rights are understood as protecting the community as a whole more than the individual, and community justice has been criticized for violating individual rights in the name of community.²⁸

27. Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 OK. CITY UNIV. L. REV. 677, 705 (1990).

28. Paul Havemann, *Indigenous Peoples Human Rights*, in HUMAN RIGHTS: POLITICS & PRACTICE 266, 274–75 (Michael Goodhart ed., 2009); Rodolfo Stavenhagen, *Indigenous Rights*:

Correspondingly, Bolivian indigenous movements are rooted in communities. The same organizations that mobilize for political activity have important functions in everyday life: in agricultural settings, community-based organizations organize market relations and in some cases allocate communal lands for cultivation. They conduct community rituals and festivals. They occur naturally and provide networks available for mobilization in political action when it is called for.²⁹ Community-based organizations are also the site and vehicle for the assertion of the distinct indigenous culture. In this regard they stand in strong contrast to most movements in industrialized countries and to urban movements in poorer countries, in which participation is segmental and detached from the rest of participants' lives.

Finally, the movements fight to preserve their cultures against encroachments by the dominant economy and culture that threaten their way of life. United (to a degree at least) by their *cosmovisión*, these organizations hold the preservation of indigenous culture as an important goal, embracing preservation of autonomous community governance, of indigenous languages (including indigenous-language schooling), and of community jurisdiction over criminal offenses, practiced through indigenous systems of justice.

In each of these regards, political and cultural goals merge and the sense of distinctiveness and unique shared history motivates their current activism. This is not to say that the indigenous population is homogeneous or that unity is unproblematic. The division between highland and lowland peoples remains basic. Furthermore, there are ethnic divisions within these broad regions. Individual communities are not as harmonious in reality as they are in ideology. Hereditary distinctions in some communities make some people ineligible for the highest offices. Indigenous movements have been rent by factional struggles during their rise to political office in the last three decades. Some embrace separatism while others are eager to build alliances with movements of *mestizos* and movements with no ethnic identification. But the indigenous people have scored a noteworthy success in the last decades of the twentieth century in achieving a common "indigenous" identification across cultural and ecological differences and have become a major political factor. Their newfound strength and (at least provisional) political unity have reoriented Bolivia's politics.³⁰

Some Conceptual Problems, in CONSTRUCTING DEMOCRACY: HUMAN RIGHTS, CITIZENSHIP, AND SOCIETY IN LATIN AMERICA 151 (Elizabeth Jelín & Eric Hershberg eds., 1996) [hereinafter Stavenhagen, *Indigenous Rights: Some Conceptual Problems*].

29. ANTHONY OBERSCHALL, *SOCIAL CONFLICT AND SOCIAL MOVEMENTS* (1972).

30. Xavier Albó, *And from the Kataristas to the MNRistas? The Surprising Bold Alliance between Aymaras and Neoliberals in Bolivia*, in *INDIGENOUS PEOPLES AND DEMOCRACY IN LATIN AMERICA* 55 (Donna Lee Van Cott ed., 1994); Xavier Albó, *The "Long Memory" of Ethnicity in Bolivia and Some Temporary Oscillations*, in *UNRESOLVED TENSIONS: BOLIVIA PAST AND PRESENT* 15 (John Crabtree & Laurence Whitehead eds., 2008); ÁLVARO GARCÍA LINERA, MARXA CHÁVEZ LEÓN, & PATRICIA COSTAS MONJE, *SOCIOLOGÍA DE LOS MOVIMIENTOS SOCIALES EN BOLIVIA: ESTRUCTURAS DE MOVILIZACIÓN, REPERTORIOS CULTURALES Y ACCIÓN POLÍTICA* (2005).

Community justice is practiced within these community structures. First, justice is part of a community: the judicial role is exercised not by specialists in the law but by a community's leaders, who also govern and who are elected in popular assemblies. The holistic vision of community justice makes no distinction among civil, criminal, agrarian, and other systems of justice or between the exercise of executive and judicial roles.³¹ Legal precepts reflect the *cosmovisión* and legal proceedings follow a ritualized order that imbues them with a sacred character.

Second, community justice is oral: rules are not written down and authorities are free to make judgments based more on the circumstances of a case than on abstract norms. Community members perceive these oral proceedings as more responsive than ordinary justice because they use the native language of the community. The proceedings are held to be quicker and cheaper than ordinary justice, because there are no lawyers.³²

Third, violations of community norms are summarized in the Andean precepts expressed in the Quechua saying, *ama qhilla, ama llulla, ama suwa* ("don't be lazy, don't lie, don't steal"), which is incorporated into the new constitution.³³ Though stated negatively, these precepts summarize the obligations of respect for fellow community members (their persons and their property), hard work, and responsibility to the community. The offenses most often dealt with in community justice are those of the local agricultural community: conflicts over land, destruction of crops by livestock, robbery (household or of livestock), marital conflicts, and interpersonal aggression.³⁴ Outside of indigenous communities, these same infractions can be taken up by the ordinary justice system. Community justice sometimes encounters more serious offenses, like murder and rape, but these are rare. Such serious offenses are often turned over to the ordinary justice system for prosecution.³⁵

Initial proceedings are conducted by an elected authority of the community, a male community member elected for a one-year term to an office

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31. XAVIER ALBÓ C., CIUDADANÍA ÉTNICO-CULTURAL EN BOLIVIA 57–58 (2007); Rodolfo Stavenhagen, *Derecho Consuetudinario Indígena en América Latina*, in *ENTRE LA LEY Y LA COSTUMBRE: EL DERECHO CONSUECUDINARIO INDÍGENA EN AMÉRICA LATINA* 27, 30 (Rodolfo Stavenhagen & Diego Iturralde eds., 1990).
 32. ALBÓ, CIUDADANÍA ÉTNICO-CULTURAL EN BOLIVIA, *supra* note 31, at 67; Xavier Albó Corrons, *¿Cómo Manejar la Interculturalidad Jurídica en un País Intercultural?*, in *JUSTICIA COMUNITARIA EN LOS PUEBLOS ORIGINARIOS DE BOLIVIA* 85, 90 (2003); Ramiro Molina Rivero, *Justicia Comunitaria y Derechos Humanos*, in *DEFENSOR DEL PUEBLO, AGENDA DEFENSORIAL: PENSAR DESDE LA DIFERENCIA* 39, 39 (2006).
 33. NUEVA CONSTITUCIÓN POLÍTICA DEL ESTADO DE BOLIVIA, art.8 (2009).
 34. FERNÁNDEZ OSO, *supra* note 26; RAMIRO MOLINA & ANA ARTEAGA, ¿DOS RACIONALIDADES Y UNA LÓGICA JURÍDICA? LA JUSTICIA COMUNITARIA EN EL ALTIPLANO BOLIVIANO 46–51 (2008); René Orellana Halkyer, *cited in Indigenous Local Law Fights for Its Right to Exist*, NETHERLANDS ORGANISATION FOR SCIENTIFIC RESEARCH [NWO], 28 Sept. 2004, available at http://www.nwo.nl/nwohome.nsf/pages/NWOP_658G84_Eng; Interview with Tomás Huanacu, *mallku* (head man) of the International Relations Commission, Consejo Nacional de Ayllus y Markas del Qullasuyo [CONAMAQ], in La Paz (27 June 2009).
 35. FERNÁNDEZ OSO, *supra* note 26, at 112, 189, 343; Molina & Arteaga, *supra* note 34, at 51, 56.

through which all men in a community are expected to rotate.³⁶ Evidentiary practices emphasize witnesses, confrontation of accused and accuser, sworn oaths, and in some cases reading of coca leaves. For minor offenses the authority is empowered to rule on guilt and impose sanctions on the spot. For major offenses, guilt and punishment are decided by a community assembly or by a higher-level indigenous authority.³⁷ Robbery is considered the most serious offense—in the past it was sometimes punished by death.

The sanctions are broad and under control of the community. Depending on the offense, they include fines, physical punishment including public whipping, and, very rarely, expulsion from the community. Offenders can be sentenced to work on community projects. Whipping is not regarded as a physical punishment but a moral one, seen as a way of “reforming someone who has gone astray;” a whip is among the symbols of authority that are part of a community leader’s formal regalia.³⁸

Sanctions that resolve the problem quickly are preferred to imprisonment, which is rare.³⁹ Monetary fines, once rare, are increasingly common: because the goal is not punishment but rehabilitation, however, many believe that obligating an offender to pay does not correct, but rather reinforces, people’s bad habits.⁴⁰ Just as the cost of hiring a lawyer makes ordinary justice more available to those who can afford to pay, the imposition of fines rather than moral sanctions turns community justice into a purchasable commodity. The death penalty has been imposed in the past for serious or repeated offenses, but is ruled out by the new constitution.⁴¹

Families are held jointly responsible for the offenses committed by a member. Family members and fictive kin (*padrinos*) are present to vouch for the accused and share responsibility for the infraction.⁴² They are sometimes obligated to perform community service in reparation. The parents of an offender condemned to death are sometimes obligated to execute the sentence on their own child.⁴³

36. The principle of *chacha warmi* (“man/woman” in Aymara) accords authority to both husband and wife, but in practice community justice proceedings are generally conducted by men. FERNÁNDEZ OSO, *supra* note 26, at 135.

37. FERNÁNDEZ OSO, *supra* note 26, at 55, 295; Molina & Arteaga, *supra* note 34, at 51–57.

38. FERNÁNDEZ OSO, *supra* note 26, at 88, 161, 243; Molina & Arteaga, *supra* note 34, at 51–57.

39. Except for domestic animals caught destroying the crops of someone other than their owner. They are said to be “jailed” (*encarcelados*) in a special corral.

40. FERNÁNDEZ OSO, *supra* note 26, at 107.

41. *Id.* at 107, 211, 221, 322, 329; Molina & Arteaga, *supra* note 34, at 61.

42. Fernández Osco, *supra* note 26, at 211; René Orellana Halkyer, *Prácticas Judiciales en Comunidades Indígenas Quechuas*, in JUSTICIA COMUNITARIA EN LOS PUEBLOS ORIGINARIOS DE BOLIVIA 35, 35–36 (Instituto de la Judicatura 2003).

43. Kimberly Inksater, *Resolving Tensions Between Indigenous Law and Human Rights Norms Through Transformative Juricultural Pluralism* 27 (University of Ottawa, Graduate Studies in Law, Research Paper DCL 7066T, 28 July 2006), available at http://www.justgovernancegroup.org/en/Assets/Inksater_PluralismIndigenousLaw&HumanRights.pdf.

The goal of community justice is different from that of ordinary justice. The emphasis is not on punishment, but on reconciliation, compensation, and reintegration of the violator into the community and the maintenance of social order. In a focus group interviewed about community justice, one participant commented that the point is “to live in harmony; on the other hand in ordinary justice, there is always a winner and a loser.”⁴⁴ Repeat offenders, however, may be expelled from the community, implying, in agricultural communities, loss of access to land, which is the major source of livelihood.

This characterization of community justice is not based exclusively on Bolivian sources; it is a general characterization which in broad terms, and despite significant variations, is applicable throughout the Andean countries. The concept of community justice underlying the Constituent Assembly’s provisions, presented in the final report of the Subcommittee for Community Justice of the Constituent Assembly’s Justice Commission, is quite similar to that presented here. The report describes community justice as based on a holistic, nonanthropocentric vision drawn from ancestral values; its proceedings are oral and a ritual act; its main goal is to restore community harmony; and it is rapid and uncorrupt.⁴⁵

Practices vary between regions and ethnic groups in Bolivia. A comparative study of the treatment of women in indigenous justice shows significant differences between indigenous ethnic groups.⁴⁶ Marcelo Fernández Osco’s rich ethnographic study of law in three Aymara communities demonstrates that even these three communities, relatively near each other (two in southern La Paz department, one in northern Potosí), differ in detail, though they are broadly similar.⁴⁷

Community justice survives in Bolivia because it expresses the values of the indigenous communities, and also because the dominant Bolivian society has left them significantly abandoned. The ordinary system does not reach the most geographically and culturally remote parts of the country, a situation that is both a manifestation and a consequence of that abandonment. There are judges in only 55 percent of Bolivia’s municipalities and prosecutors in only 23 percent.⁴⁸ The lack of state-sanctioned judicial institutions leaves a gap that must be filled by locally created institutions.

44. Asamblea Constituyente, Comisión Judicial, Informe de la Subcomisión de Justicia Comunitaria, Sucre: Asamblea Constituyente 9 (2007); Molina Rivero, *supra* note 32, at 41; Molina & Arteaga, *supra* note 34, at 70.

45. Asamblea Constituyente, *supra* note 44.

46. MERCEDES NOSTAS ARDAYA & CARMEN ELENA SANABRIA SALMÓN, *DETRÁS DEL CRISTAL CON QUE SE MIRA: MUJERES QUECHUAS, AYMARAS, SIRIONÓ, TRINITARIAS, CHIMANE, CHIQUITANAS Y AYOREAS, ÓRDENES NORMATIVOS E INTERLEGALIDAD* (La Paz: Nuevo Periodismo editores, con el auspicio de ASDI y la Embajada Real de Dinamarca (ERD) 2009).

47. FERNÁNDEZ OSO, *supra* note 26.

48. Defensoría del Pueblo, Sistema Jurídico de los Pueblos Indígenas Originarios y Comunidades Campesinas en Bolivia, Agenda Defensorial 9, La Paz: Defensoría del Pueblo, at 15 (2008).

IV. COMMUNITY JUSTICE IN THE BOLIVIAN CONSTITUTION

Community justice achieved constitutional recognition in Bolivia before the new constitution. It was legitimized in earlier constitutional reforms in 1994. The stimulus was the International Labour Organization (ILO) Convention 169 on Indigenous and Tribal Peoples, offered for ratification by the ILO in 1989 and ratified by Bolivia in 1991.⁴⁹ That convention, the most important international statement of indigenous rights until the General Assembly of the United Nations adopted the Declaration of the Rights of Indigenous Peoples in 2007, superseded the earlier ILO Convention 107,⁵⁰ adopted in 1957. Both conventions call for the guarantee of basic human rights and equal treatment for indigenous populations, but they have very different emphases. Convention 107 presumed as its goal the assimilation of indigenous populations into majority societies, consistent with the ideology of integration prevalent at the time. By the later twentieth century, as we have seen, indigenous people were not seeking to assimilate, but instead, to preserve their distinctive cultures. This change underlies Convention 169. Indeed, going beyond the right of indigenous people to practice their culture, Convention 169 asserts their right to control their own territory, which the convention recognizes as an important condition for cultural survival. For ratifying countries, Convention 169 superseded Convention 107.⁵¹

The language of Convention 169 regarding indigenous justice systems is presented in Table 1. The convention requires ratifying countries to respect the “customs and customary laws” of indigenous people. It therefore calls for executing legislation by the signatory countries.

Bolivia’s ratification led to a debate about the enabling legislation. In 1992 the Indigenous Confederation of Eastern Bolivia (CIDOB) presented to the Congress a comprehensive proposed Indigenous Law. The response, however, fell far short of the proposal. A constitutional amendment approved in 1994 authorized indigenous communities to “exercise the functions of administration and application of their own norms as an alternative solution to conflicts, in conformity with their customs and procedures, as long as they are not contrary to this constitution and the laws.” It called for legislation to make the indigenous system compatible with the ordinary justice system.⁵²

49. Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), *adopted* 27 June 1989, 1650 U.N.T.S. 383 (*entered into force* 5 Sept. 1991).

50. Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO No. 107), *adopted* 26 June 1957, 328 U.N.T.S. 247 (*entered into force* 2 June, 1959).

51. S. James Anaya, *International Human Rights and Indigenous Peoples: The Move toward the Multicultural State*, 21 ARIZONA J. INT’L & COMP. L. 13 (2004); LUIS RODRIGUEZ-PIÑERO, *INDIGENOUS PEOPLES, POSTCOLONIALISM, AND INTERNATIONAL LAW: THE ILO REGIME (1919–1989)* (2005); Swebston, *supra* note 27; Chris Tennant, *Indigenous Peoples, International Institutions, and the International Legal Literature from 1945–1993*, 16 HUM. RTS. Q. 1 (1994).

52. Consult Table 2, art. 171 III, for the provision of the 1994 amendment regarding community justice.

Table 1.
Provisions of ILO Convention No. 169 Regarding Indigenous Community Justice

Article 8. 1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

2. 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.

3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

Source: Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, available at <http://www.unhcr.ch/html/menu3/b/62.htm>.

Bolivia was not the only country to incorporate indigenous customary law into its constitution. At least ten Latin American countries have done so, most of them since 1990.⁵³ The initial recognition of indigenous justice was less thorough in Bolivia than in some other countries. Of the four constitutions analyzed by Raquel Yrigoyen Fajardo, the provisions in the 1994 Bolivian constitution were less explicit than those of Colombia (1993), Ecuador (1998), and Peru (1993) with regard to the scope of indigenous jurisdiction.⁵⁴

Bolivia's adoption of the provision for community justice had little effect in any case. No law to harmonize the indigenous and ordinary systems was ever passed. Even though the Penal Procedure Code was revised in 1999 to take account of community judicial proceedings, they remained subordinate to ordinary justice.⁵⁵ State prosecutors were known to initiate criminal proceedings against community authorities for carrying out their judgments.⁵⁶

53. Idón Moisés Chivi Vargas, *Pueblos Indígenas y Administración de Justicia, Justicia Comunitaria y Asamblea Constituyente*, in *SISTEMA DE JUSTICIA DE LOS PUEBLOS INDÍGENAS Y ORIGINARIOS: ASAMBLEA CONSTITUYENTE*, 75, 82 (La Paz: Programa Ciudadanos Trabajando por la Justicia, 2006); Jean E. Jackson & Kay B. Warren, *Indigenous Movements in Latin America, 1992–2004: Controversies, Ironies, New Directions*, 34 *ANN. REV. ANTHROPOLOGY* 549 (2005); Van Cott, *A Political Analysis of Legal Pluralism*, *supra* note 5, at 210; Donna Lee Van Cott, *Dispensing Justice at the Margins of Formality: The Informal Rule of Law in Latin America*, in *INFORMAL INSTITUTIONS AND DEMOCRACY: LESSONS FROM LATIN AMERICA* 249 (Gretchen Helmke & Steven Levitsky eds., 2006); YASHAR, *supra* note 5; Raquel Yrigoyen Fajardo, *Legal Pluralism, Indigenous Law and the Special Jurisdiction in the Andean Countries*, 10 *BEYOND LAW: INFORMAL JUSTICE AND LEGAL PLURALISM IN THE GLOBAL SOUTH* 32 (2004).

54. Raquel Yrigoyen Fajardo, *The Constitutional Recognition of Indigenous Law in Andean Countries*, in *THE CHALLENGE OF DIVERSITY: INDIGENOUS PEOPLES AND REFORM OF THE STATE IN LATIN AMERICA* 197, 220–21 (Willem Assies, Gemma van der Haar & André J. Hoekema eds., 2000) [hereinafter Yrigoyen Fajardo, *Constitutional Recognition*].

55. Idón Moisés Chivi Vargas, *Justicia Comunitaria, (Propuestas para su Tratamiento con Equidad de Género)* 13 (2007); FERNÁNDEZ OSO, *supra* note 26, at 26–27.

56. Inksater, *supra* note 43, at 78 n.200.

**Table 2. Provisions of the 1994 Bolivian Constitutional Amendment
Regarding Indigenous Community Justice**

Article 171. III. The natural authorities of the indigenous and peasant communities may exercise the functions of administration and application of their own norms as an alternative solution to conflicts, in conformity with their customs and procedures, as long as they are not contrary to this constitution and the laws. The law will make these functions compatible with the attributions of the Power of the State.

Source: República de Bolivia/Republic of Bolivia Constitución Política de 1967, con reformas de 1994, texto concordado de 1995, y reformas de 2002, 2004 y 2005, available at <http://pdba.georgetown.edu/Constitutions/Bolivia/consboliv2005.html>.

Idón Moisés Chivi Vargas discusses several cases reviewed by the constitutional court, which had appellate jurisdiction, between 2003 and 2005. They involved communally administered land and water rights, expulsion from a community, and the election of local officials, among other issues. In each, the constitutional court issued a writ of *amparo* (protection) upholding the individual rights of a plaintiff against the decisions of community justice, or transferred the case to a different jurisdiction. According to Chivi Vargas, the decisions showed that, for the court, community justice meant no more than a “souvenir photograph for the tourists of international cooperation.”⁵⁷

The 1994 constitutional reform was part of a package of reforms undertaken by the government of Gonzalo Sánchez de Lozada, president from 1993 to 1997, which proposed a sweeping decentralization of government functions in keeping with its neoliberal program. This decentralization included a law of popular participation, an agrarian reform law, and an educational reform law. The reforms were undertaken from the top down, however, with little participation by the indigenous communities. The law of popular participation, in particular, defined communities by existing civil divisions, so that some traditional indigenous communities had to divide themselves between jurisdictions (or unite with other communities) in order to meet its conditions.⁵⁸ Still, in many communities, indigenous candidates were able to take advantage of the popular participation law to win municipal office

57. Idón Moisés Chivi Vargas, *Justicia Indígena y Jurisdicción Constitucional: Bolivia 2003–2005*, 1 DERECHOS HUMANOS Y ACCIÓN DEFENSORIAL 45, 71 (2006).

58. Ricardo Calla, *Indigenous Peoples, the Law of Popular Participation and Changes in Government: Bolivia, 1994–1998*, in THE CHALLENGE OF DIVERSITY: INDIGENOUS PEOPLES AND REFORM OF THE STATE IN LATIN AMERICA 77 (Willem Assies, Gemma van der Haar & André J. Hoekema eds., 2000); René Orellana Halkyer, *Municipalization and Indigenous Peoples in Bolivia: Impacts and Perspectives*, in *id.* at 181, 183–86; NANCY GREY POSTERO, NOW WE ARE CITIZENS: INDIGENOUS POLITICS IN POSTMULTICULTURAL BOLIVIA 5–6, 15–17 (2007); VAN COTT, THE FRIENDLY LIQUIDATION OF THE PAST, *supra* note 10, at 136.

and to organize locally the precursors to the national parties that promoted indigenous candidates later in the decade and in the new century.

The political context that gave rise to the Constituent Assembly in 2006 was completely changed, internationally and nationally. The international movement for indigenous rights had won significant recognition, and the years-long drive for adoption of the United Nations Declaration on the Rights of Indigenous Peoples came to fruition when it was approved by the General Assembly in September 2007.⁵⁹ By that time the Bolivian Constituent Assembly had already been meeting for a year, and the Declaration does not appear to have had any significant influence on the constitution. The Declaration was incorporated into Bolivian law by an Act of the Congress on 7 November 2007.⁶⁰ For comparison I show in Table 3 the Declaration's brief mention of indigenous judicial systems "in the cases where they exist."

The deliberations of the Constituent Assembly reflected the indigenous movement's newly-won political power. The 1994 reforms, with virtually no input from the indigenous people themselves, were mostly symbolic and had little effect on the practice of community justice. The assembly that wrote the 2007 draft constitution was the product of insistent demands of the indigenous movement. Its many indigenous delegates exercised a profound influence on the result. The draft constitution contains a far more detailed statement of the role and legitimacy of indigenous community justice than the 1994 amendment. It does not spell out the underlying premises contained in the Community Justice Subcommittee's report—an appropriate omission, since the purpose of the constitutional provisions was not to dictate the substance and proceedings of indigenous justice, but to leave them up to the communities themselves.

The draft specifies the attributes of indigenous community justice:⁶¹ it is carried out by its own authorities and "enjoys equal hierarchy" with

59. Declaration on the Rights of Indigenous Peoples, *adopted* 13 Sept. 2007, G.A. Res. 61/295, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/295 (2007) [hereinafter UNDRIP].

60. Bolivian Law No. 3760, 7 Nov. 2007.

61. The 2007 draft and the 2009 definitive constitution use the phrase *justicia indígena originaria campesina* to refer to what is more commonly called *justicia indígena comunitaria*. The three words *indígena originaria campesina* appear repeatedly as a single phrase in the constitution, modifying "nations and peoples," "autonomy," and "territory," as well as "justice." The terminology is apparently meant to cover three types of communities with different statuses in previous Bolivian law: indigenous communities, *comunidades originarias*, and peasant communities, and to provide the most inclusive scope for community justice.

Originaria might be translated as "first" (as in the Canadian expression "first peoples") but it is used with varying meanings in Bolivia. Sometimes it is synonymous with "*indígena*." ALBÓ, CIUDADANÍA ÉTNICO-CULTURAL EN BOLIVIA, *supra* note 31; Fundación Democracia, Justicia, y Solidaridad (DEJUSOL) y Asociación Cristiana de Jóvenes Sopa-cachi—YMCA (2007); *Justicia Comunitaria: Realidades y Perspectivas*, in Justicia de los Pueblos Indígenas y Originarios: Estudios de Caso, 99–244, La Paz: Red Participación

Table 3. United Nations Declaration on the Rights of Indigenous Peoples

Article 34. Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Source: <http://www.un.org/esa/socdev/unpfii/en/drip.html>

ordinary justice. The draft authorizes indigenous authorities to use “their own principles, cultural values, norms and procedures,”⁶² but they may not violate the rights established in the constitution. Indigenous authorities are to execute their decisions directly, and those decisions are not subject to review by the ordinary justice system. The draft guarantees the right to a defense, something previously generally unknown in indigenous community justice, and it is not clear exactly what this will entail. A Plurinational Constitutional Court will be established and will have appellate jurisdiction over conflicts between ordinary and indigenous justice (as well as over many other matters). Its judges will be popularly elected with equal representation of the ordinary and indigenous justice sectors. The court will be the final instance of appeal for both the indigenous and the ordinary systems.⁶³

As mentioned, the negotiations in the Congress to amend the constitution led to significant modifications of the draft approved in Oruro in 2007. The language of the constitution as finally adopted and ratified by popular vote is shown in Table 5; differences between the 2007 draft and the final version are shown in italics in Tables 4 and 5. As is evident, the differences are significant. In the battle over ratification, community justice became a polemical target for the defenders of the national tradition inherited from the colonial system (though, as I have said, it was not the most significant substantive issue), and important concessions were made in the final version.

The final version places explicit limits on the jurisdiction of community justice, restricting it to matters affecting indigenous communities. It omits the

y Justicia. Sometimes it refers to divisions within highland indigenous communities. Molina & Arteaga, *supra* note 34, at 38–39; FERNÁNDEZ OSO, *supra* note 26, at 74–76, 130–32; Rivera Cusicanqui, *supra* note 4. Sometimes it refers to communities that have maintained indigenous traditions. FERNÁNDEZ OSO, *supra* note 26, at 131, 169, 270. Sometimes it refers to highland as opposed to lowland people. Chivi, *supra* note 55, at 76. *Campesino* means “peasant” but is also frequently used as a synonym of *indígena*.

I translate the phrase *indígena ordinaria campesina* as “indigenous original peasant” when quoting the constitution. Elsewhere in this article I have generally used the more common terms “indigenous community justice” or simply “community justice.”

62. See Table 4, art. 191.1.

63. See Table 4 for the provisions of the draft constitution.

Table 4.
Provisions of the 2007 Draft (Oruro) Constitution
Regarding Indigenous Community Justice*

Article 116. I. *Every person will be protected in a timely and effective manner by the judges and tribunals in the exercise of his/her rights and legitimate interests.*

II. *The state guarantees the right to due process, to defense and to justice which is plural, prompt, timely, opportune, free, transparent, and without delays.*

Article 179. *The power to impart justice derives from the Bolivian people and is based on the principles of juridical pluralism, interculturality, equity, juridical equality, independence, juridical security, service to society, citizen participation, social harmony, and respect for rights.*

Article 180 I. *The judicial function is unique. Ordinary jurisdiction is exercised by the Supreme Court of Justice, the departmental courts of justice, the courts of sentence and the judges; the agroenvironmental jurisdiction by the agroenvironmental Court and judges; the indigenous original peasant jurisdiction is exercised by its own authorities; there will be specialized jurisdictions regulated by law.*

II. *Ordinary jurisdiction and indigenous original peasant jurisdiction will enjoy equal hierarchy.*

III. *Constitutional justice is exercised by the Plurinational Constitutional Court.*

Article 191. 1. *The indigenous original peasant nations and peoples will exercise their jurisdictional functions and functions of their competence through their authorities, and will apply their own principles, cultural values, norms and procedures.*

2. *Indigenous original peasant jurisdiction respects the right to life and the other rights established in this Constitution.*

Article 192. I. *Indigenous original peasant jurisdiction will take cognizance of all types of juridical relations, as well as acts and deeds that may harm juridical goods realized within the indigenous original peasant territorial scope [ámbito]. Indigenous original peasant jurisdiction will make definitive decisions. Its decisions cannot be reviewed by ordinary or agroenvironmental jurisdiction and it will execute its resolutions directly.*

Article 193. I. *Every public authority or person will obey the decisions of indigenous original peasant jurisdiction.*

2. *For the fulfillment of the decisions of indigenous original peasant jurisdiction, its authorities may request the support of the State.*

3. *The State will promote and strengthen the administrative system of indigenous original peasant justice. A law will determine the mechanisms of coordination and cooperation between indigenous original peasant jurisdiction and ordinary and agroenvironmental jurisdiction.*

Article 197. I. The Plurinational Constitutional Court oversees [ve la por] the supremacy of the constitution, exercises the control of constitutionality, and safeguards the respect and fulfillment of the constitutional rights and guarantees.

Article 198. I. The Plurinational Constitutional Court will be composed of (male and female) judges chosen on criteria of plurinationality, with equal representation between the ordinary system and the indigenous original peasant system.

Article 199. The (male and female) judges of the Plurinational Constitutional Court will be elected by universal suffrage, according to the procedure, mechanism, and formalities of the members of the Supreme Court of Justice.

Article 200. II. Candidates for the Plurinational Constitutional Court will be proposed by *social organizations of the indigenous original peasant nations and peoples, and of civil society in general*.

Article 203. The attributions of the Plurinational Constitutional Court, besides those established in the constitution and the law, are to take cognizance of and resolve:

8. Consultations by indigenous original peasant authorities regarding the application of their juridical norms as applied to a concrete case. The decision of the Constitutional Tribunal is binding.

11. Conflicts of competence between indigenous original peasant jurisdiction and ordinary and agroenvironmental jurisdiction.

Article 204. The decisions and sentences of the Plurinational Constitutional Court are binding and of obligatory fulfillment, and there is no further ordinary recourse against them.

*Differences between the 2007 draft and the 2009 constitution are shown in italics.

Source: Asamblea Constituyente de Bolivia, Nueva Constitución Política del Estado. Aprobada en grande, detalle y revisión. Diciembre de 2007, available at <http://www.scribd.com/doc/6056118/Nueva-Constitucion-Politica-de-Bolivia-Texto-completo-aprobado-2007>

Table 5.
Provisions of the 2009 Constitution regarding indigenous community justice*

Article 119. *I. Parties in conflict will enjoy equal opportunities to exercise during the process the faculties and rights that attend them, whether by the ordinary or by the indigenous original peasant system.*

II. Every person has the inviolable right to defense. The state will provide accused or sued persons a defense attorney at no cost, in the cases in which they do not have the necessary economic resources.

Article 178. *The power to impart justice derives from the Bolivian people and is based on the principles of independence, impartiality, juridical security, openness, probity, speed, no cost, juridical pluralism, interculturality, equity, service to society, citizen participation, social harmony, and respect for rights.*

Article 179. *I. The judicial function is unique. Ordinary jurisdiction is exercised by the Supreme Court of Justice, the departmental courts of justice, the courts of sentence and the judges; the agroenvironmental jurisdiction by the agroenvironmental Court and judges; the indigenous original peasant jurisdiction is exercised by its own authorities; there will be specialized jurisdictions regulated by law.*

II. Ordinary jurisdiction and indigenous original peasant jurisdiction will enjoy equal hierarchy.

III. Constitutional justice is exercised by the Plurinational Constitutional Court.

Article 190. *1. The indigenous original peasant nations and peoples will exercise their jurisdictional functions and functions of their competence through their authorities, and will apply their own principles, cultural values, norms and procedures.*

2. Indigenous original peasant jurisdiction respects the right to life, the right to defense, and the other rights and guarantees established in this Constitution.

Article 191. *I. Indigenous original peasant jurisdiction is based on a particular link of the persons who are members of the respective indigenous original peasant nation or people.*

II. Indigenous original peasant jurisdiction is exercised in the following areas of personal, material, and territorial applicability:

1. Members of the indigenous original peasant nation or people are subject to this jurisdiction, whether they are plaintiffs or defendants, claimants or complainants, denounced or accused, appellants or petitioned [como actores o demandado, denunciados o querellantes, denunciados o imputados, recurrentes o recurridos].

2. This jurisdiction recognizes indigenous original peasant affairs in conformity with what is established in a Law of Jurisdictional Delimitation.

3. This jurisdiction applies to the juridical relations and facts that are carried on or whose effects arise within the jurisdiction of an indigenous original peasant people.
- Article 192. I. Every public authority or person will obey the decisions of indigenous original peasant jurisdiction.
- II. For the fulfillment of the decisions of indigenous original peasant jurisdiction, its authorities may request the support of *the competent organs of the State*.
- III. The State will promote and strengthen indigenous original peasant justice. *The law of jurisdictional delimitation* will determine the mechanisms of coordination and cooperation between indigenous original peasant jurisdiction and ordinary and agroenvironmental jurisdiction and all constitutionally recognized jurisdictions.
- Article 196. I. The Plurinational Constitutional Court oversees [vela por] the supremacy of the constitution, exercises the control of constitutionality, and safeguards the respect and fulfillment of the constitutional rights and guarantees.
- Article 197. I. The Plurinational Constitutional Court will be composed of (male and female) judges chosen on criteria of plurinationality, with *representation of the ordinary system and the indigenous original peasant system*.
- Article 198. The (male and female) judges of the Plurinational Constitutional Court will be elected by universal suffrage, according to the procedure, mechanism, and formalities of the members of the Supreme Court of Justice.
- Article 199. II. Candidates for the Plurinational Constitutional Court *may be proposed by social organizations of civil society and of the indigenous original peasant nations and peoples*.
- Article 202. The attributions of the Plurinational Constitutional Court, besides those established in the constitution and the law, are to take cognizance of and resolve:
8. Consultations by indigenous original peasant authorities regarding the application of their juridical norms as applied to a concrete case. The decision of the Constitutional Tribunal is binding.
11. Conflicts of competence between indigenous original peasant jurisdiction and ordinary and agroenvironmental jurisdiction.
- Article 203. The decisions and sentences of the Plurinational Constitutional Court are binding and of obligatory fulfillment, and there is no further ordinary recourse against them.

*Differences between the 2007 draft and the 2009 constitution are shown in italics.

Source: República del Bolivia/Republic of Bolivia, Constitución de 2009, available at <http://pdba.georgetown.edu/Constitutions/Bolivia/bolivia09.html>

statement that "its decisions cannot be reviewed by ordinary or agroenvironmental jurisdiction,"⁶⁴ though, like the draft constitution, it asserts that "the decisions and sentences of the Plurinational Constitutional Court are binding and of obligatory fulfillment, and there is no further ordinary recourse against them."⁶⁵ The right to a defense is mentioned in two places and spelled out in greater detail.⁶⁶ The draft calls for the Plurinational Constitutional Court to be made up of an equal number of judges from the ordinary and indigenous systems;⁶⁷ the final document simply says that both sectors will be represented.⁶⁸ The final document spells out limits to the "personal, material, and territorial applicability [*vigencia*]" of community justice in greater detail.⁶⁹ It also refers explicitly to a future "Law of Jurisdictional Delimitation" (as opposed to simply "a law") to define the boundary separating cases subject to indigenous and ordinary justice.⁷⁰ All these differences, while leaving a broad area of competence to community justice, clearly place limits on it.

The new constitution appears to assume that there is a consistent, homogeneous practice of community justice in and across communities. In fact, there is enormous variation between communities and over time. The system cannot claim to represent some "authentic" indigenous tradition handed down from the pre-Columbian epoch; it has been modified under the influence of colonial institutions and through accommodation to the ordinary justice system. Especially since the latter has always been the system of the more powerful, its influence on community practices is great. Donna Lee Van Cott shows that the closer a community is to the centers of power in a country, the more likely its local justice will be influenced by the ordinary system.⁷¹ René Orellana Halkyer describes the syncretism of indigenous and western law traditions in community justice as "interlegality."⁷² The legitimacy of indigenous communities' claim to create their own autonomous institutions is derived from their right to determine their own affairs, not from any presumed historical authenticity.⁷³

64. Compare Table 4, art. 192.1 (containing the quote) with Table 5, at art. 192.1 (not containing the quote).

65. See Table 5, art. 203.

66. See Table 5, arts. 119.2, 190.2.

67. See Table 4, art. 198 I.

68. See Table 5, art. 197.

69. See Table 5, art. 191 II.

70. It is perhaps significant that the 1994 amendment refers to a law making indigenous justice "compatible" with state power while the new constitution refers to "delimitation." Compare Table 2, art. 171 III with Table 5, art. 192.

71. Van Cott, *Dispensing Justice*, *supra* note 53, at 249, 252.

72. RENÉ ORELLANA HALKYER, *INTERLEGALIDAD Y CAMPOS JURÍDICOS* (2005); *cf.* Boaventura de Sousa Santos, *Law: A Map of Misreading Toward a Postmodern Conception of Law*, 14 J. L. & SOCIETY 279 (1987).

73. Manuela Carneiro da Cunha, *El Concepto de Derecho Consuetudinario y los Derechos Indígenas en la Nueva Constitución del Brasil*, in *ENTRE LA LEY Y LA COSTUMBRE: EL DERECHO*

Many issues regarding community justice remain unresolved by the new constitution. The law of delimitation and the establishment of the plurinational constitutional court, with a system for the election of judges, are to be decided by Congress. Further details of community justice will be worked out in practice over the long term.

V. COMMUNITY JUSTICE AND ORDINARY JUSTICE

The very existence of community justice challenges ordinary justice in important ways. It challenges the philosophical basis of the legal norms on which the ordinary system is grounded. Legal monism, which has long prevailed in Bolivia, as in all of Latin America, insists on a unitary state and claims that there can be only one system of law in a territory—specifically, a system derived from European civil law. The contrary claim of legal pluralism, allowing for two parallel and equally legitimate systems of law, is recent.⁷⁴ Though not itself a principle intrinsic to community justice, legal pluralism has been invoked to support the claims of community justice.

The norms of community justice also differ from those of ordinary justice. Authorities have wide discretion in attributing guilt and determining punishment. Ordinary justice emphasizes individual responsibility, punishment, and retribution rather than reconciliation as claimed by community justice.⁷⁵ In the name of reconciliation, however, community justice may be less protective than is ordinary justice (in principle at least) of the rights of the accused.

Some critics identify community justice with lynching. Lynching has been epidemic in Bolivia in recent years. There were fifty-seven lynchings and attempted lynchings in 2007 and forty in just the first two months of 2008.⁷⁶ The press treats incidents sensationally and often labels them as examples of community justice. Some scholars who study community practices for

CONSUETUDINARIO EN AMÉRICA LATINA 299, 301–02 (Rodolfo Stavenhagen & Diego Iturralde eds., 1990); cf. Jackson & Warren, *supra* note 53, at 555–59.

74. Yrigoyen Fajardo, *Constitutional Recognition*, *supra* note 54, at 198–99. Legal pluralism here designates a normative claim that two coexisting legal systems are of equal legitimacy. More commonly, it is an analytical category applied to any legal order in which there is more than one legal system. They may have equal legitimacy or, more commonly, as in colonial and postcolonial systems, a legal order imposed by a colonial power dominates a customary or indigenous order. See Sally Engle Merry, *Legal Pluralism*, 22 L. & SOCIETY REV. 829 (1988).

75. On the other hand, some retribution-based systems have adopted, on an experimental basis, programs of restorative justice or alternative conflict resolution, often involving attempts at reconciliation between parties in disputes, with goals similar to those of community justice.

76. Defensor del Pueblo, *Monitoreo sobre la Cobertura Noticiosa de los Casos de Linchamientos en Bolivia Durante 2007 y el Primer Trimestre de 2008*, La Paz: Defensor del Pueblo 7 (2008).

sanctioning offenses also call lynching community justice.⁷⁷ However, lynching is not part of Andean indigenous traditions. When it occurs, it does not follow on any community-sanctioned process of judgment; it is carried out by an enraged mob. It is not an exercise of indigenous community justice, but demonstrates the absence of any justice system, community or ordinary. It is most common on urban peripheries in recently settled poor communities without stable institutions and often without police protection.⁷⁸

In the campaign around the referendum on ratification, a television advertisement from opponents showed scenes of violence and threatened that the constitution would legalize lynching. The ad was so inflammatory that it was banned by the National Electoral Court.⁷⁹

Community authorities sometimes refer cases to ordinary authorities rather than judging them themselves, especially for the most serious crimes like murder and rape, and also in cases of recidivism. When an offender repeats an offense despite the pledge to reform (always exacted in community proceedings), the community authorities may conclude that he has escaped the community's influence and the offense can only be dealt with punitively.⁸⁰

Community authorities often seek to improve their practice by learning about the ordinary justice system and understanding the constitutional limits placed on the indigenous system. Community justice has, gradually and in piecemeal fashion, adopted some of the systematization present in the formal system, with written records of deliberations and training for authorities. Codification necessarily modifies indigenous justice, transforming it from a pragmatic set of procedures to something more like a juridical code.⁸¹

Differences between community justice and ordinary justice are evaluated differently by different commentators. For some, the two are incom-

77. Rudi Collredo-Mansfield, *Don't be Lazy, Don't Lie, Don't Steal: Community Justice in the Neoliberal Andes*, 29 AM. ETHNOLOGIST 637 (2002); Daniel M. Goldstein, "In our own Hands": *Lynching, Justice, and the Law in Bolivia*, 30 AM. ETHNOLOGIST 22 (2003).

78. ALBÓ, CIUDADANÍA ÉTNICO-CULTURAL EN BOLIVIA, *supra* note 32, at 60; Defensor del Pueblo, *supra* note 76; Carlos M. Vilas, *Lynchings and Political Conflict in the Andes*, 35 LATIN AM. PERSP. 103, 104–09 (2008); Interview with Ramiro Molina, Director, National Museum of Ethnography and Folklore, in La Paz (24 June 2009); Interview with Ramiro Orías, Subdirector, Compañeros para Las Americas, in La Paz, (29 Jan. 2008).

79. *CNE Suspende Spot que Denigra a Justicia Comunitaria y Llama a Votar No a Nueva CPE*, FM BOLIVIA, 17 Dec. 2008, available at <http://www.fmbolivia.com.bo/noticia6347-cne-suspende-spot-que-denigra-a-justicia-comunitaria-y-llama-a-votar-no-a-nueva-cpe.html>.

80. Molina & Arteaga, *supra* note 34, at 56, 79.

81. ORELLANA HALKYER, INTERLEGALIDAD Y CAMPOS JURIDICOS, *supra* note 72, at 47; Van Cott, *Dispensing Justice*, *supra* note 53, at 253; Donna Lee Van Cott, *The Intercultural Construction of Public Authority in Latin America*, in *IDENTITY CONFLICTS: CAN VIOLENCE BE REGULATED?* 281, 286 (J. Craig Jenkins & Esther E. Gottlieb eds., 2007).

mensurable and incompatible.⁸² Defenders of community justice argue for legal pluralism and the harmonization of the two systems.⁸³ Some see an empirical tendency for the two systems to converge in what has been called “hybridism” or “interlegality.”⁸⁴ Ramiro Molina and Ana Arteaga, noting the frequency with which community authorities refer cases to ordinary justice, see the relation as a “sequence” rather than one of opposition.⁸⁵ Orellana Halkyer argues that, in practice, the two systems are thoroughly interpenetrated and subject to mutual influence, though the influence of the ordinary system on the community system is greater than the reverse.⁸⁶

VI. COMMUNITY JUSTICE AND HUMAN RIGHTS

The practice of community justice can also be compared to the international human rights regime, embodied in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and later instruments.⁸⁷ The human rights regime is often held up as a standard by which community justice can be judged; and by that standard, community justice is frequently found wanting. I will argue that there is a fundamental harmony between the two sets of principles that should not be ignored even as their differences are acknowledged. I will further argue that while community justice must indeed be exposed to the light that human rights standards cast on it, the judgment should not be too hasty and the universalism of human rights itself must be subject to the criticisms of community justice.

In several ways, the legitimation of community justice represents the fulfillment of the international human rights standards. First, just like the UN standards, community justice expresses a belief in the inherent dignity of

82. Gustavo Espinoza Antezana, *Derechos Indígenas: Justicia Comunitaria, ¿Avance o Retroceso?* EL DIARIO (Bolivia), 9 Feb. 2007.

83. Interview with Xavier Albó, Anthropological Researcher, Center for Research and Promotion of the Campesino (CIPCA), in El Paso, Depto. de Cochabamba (4 Feb. 2008); Germán Gutiérrez Gantier, *Complementación Entre la Justicia Ordinaria y Justicia Consuetudinaria: Sistematización en el Marco de la Asamblea Constituyente*, in JUSTICIA ORDINARIA Y JUSTICIA CONSUETUDINARIA: ¿UN MATRIMONIO IMPOSIBLE? 119 (La Paz: Konrad Adenauer Stiftung 2007).

84. Xavier Albó, *Derecho Consuetudinario: Posibilidades y Límites* 16 (paper presented at XII Congreso Internacional, Derecho Consuetudinario y Pluralismo Legal: Desafíos en el Tercer Milenio, Arica: Universidad de Chile y Universidad de Tarapacá, 1998); ORELLANA HALKYER, INTERLEGALIDAD Y CAMPOS JURIDICOS, *supra* note 72.

85. Molina & Arteaga, *supra* note 34, at 79.

86. ORELLANA HALKYER, INTERLEGALIDAD Y CAMPOS JURIDICOS, *supra* note 72, at 39–40.

87. Bolivia has ratified both covenants, as well as the Convention against Torture, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination Against Women.

every human being and represents the same aspirations to free and equal participation in the human community. Second, the worldwide spread of awareness of and adherence to the international human rights regime has been an important inspiration and buttress for the rights claims of indigenous people. It is on the basis of their entitlement to be recognized as human beings equal in dignity to their former colonial masters that indigenous people insist on their rights to be treated equally and to practice their culture. Finally, as discussed below, it has been forcefully argued that the main international human rights instruments uphold a claim to collective rights.

There are significant differences between the international human rights standards and the principles of community justice, just as there are with ordinary justice. In most interpretations, human rights are exclusively the rights of individuals, and most of the rights established in the Universal Declaration of Human Rights and the two major covenants are clearly attributed to individuals. The premise of the liberal democratic theory of rights is that all human beings are entitled to equal treatment and that any differential treatment violates the rights of some, if not of all. Some go further to argue that recognizing ascribed, socially defined statuses inevitably leads to invidious distinctions and is a mechanism for excluding some from the full benefits of society, or to hostility between groups that prevents social harmony.⁸⁸ Differential treatment of people on the basis of belonging to specific groups, then, is a *prima facie* violation of human rights.

This argument is clearly untenable in its most sweeping form, because fairness to people in different circumstances will often require treating them differently, according to their circumstances.⁸⁹ Advocates of indigenous rights argue that the premise of equal treatment is fallacious and “deliberately conceals” the oppression to which indigenous people are subject.⁹⁰

Discrimination against subordinate groups clearly violates their human rights. Many advocates of human rights acknowledge that justice may require special attention to all members of a subordinate group. That attention can take several forms, which I will call nondiscrimination, special rights, and collective rights.⁹¹ Human rights clearly require nondiscrimination against

88. James A. Graff, *Human Rights, Peoples, and the Right to Self-Determination*, in *GROUP RIGHTS* 186 (Judith Baker ed., 1994); AMARTYA SEN, *IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY* (2006).

89. Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Citizenship*, 99 *ETHICS* 250, 251 (1989).

90. Diego A. Iturralde G., *Democracia, Ciudadanía y Pueblos Indígenas en Bolivia*, 1 *DERECHOS HUMANOS Y ACCIÓN DEFENSORIAL* 95, 102 (2006); cf. Rosario C. Baptista, *Derechos Humanos: ¿Individuales o Colectivos? Propuestas para la Nueva Constitución desde Diferentes Miradas*, 2 *DERECHOS HUMANOS Y ACCIÓN DEFENSORIAL* 15, 24 (2007).

91. I base this discussion on Hurst Hannum, *Self-Determination in the Post-Colonial Era*, in *SELF-DETERMINATION: INTERNATIONAL PERSPECTIVES* 12, 25 (Donald Clark & Robert Williamson eds., 1996) [hereinafter Hannum, *Self-Determination*]; Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century*, 55 *WASH. & LEE L. REV.* 773 (1998)

subordinate groups that have suffered unfair treatment. Many go beyond rejecting discrimination to call for special measures favoring such subordinates to redress the effects of subordination and historical discrimination against an entire group. They argue that such special treatment is consistent with the human rights tradition to the extent that it upholds the rights of each individual member of the group rather than of the group as a whole.⁹²

Others counter that the group cannot be reduced to its individual members; instead, the observance of human rights demands recognition of collective rights for some subordinate groups.⁹³ Collective rights are rights that are enjoyed not by individuals as individuals but by groups, usually large groups, and which must be enjoyed by the group as a whole or not at all.

The status of collective rights within the human rights system is controversial. Some find them incompatible with individual rights while, for others, collective rights are a necessary component of human rights. The controversy extends to the question of whether collective rights are recognized in international human rights instruments. The two covenants both endorse, in their common Article 1, the principle of “self-determination of peoples.” “Peoples” in the plural indicates that the right belongs to a people as a whole, and is therefore a collective right.⁹⁴ In practice, the right of self-determination was accorded to the peoples of colonized societies demanding independence in the post-World War II decolonization process.

From this standpoint, the indigenous peoples of the Americas are in an anomalous position because they live in states that achieved independence from the colonial power in the eighteenth or nineteenth century, but in which the European-descended population remains dominant.⁹⁵ Many indigenous groups have claimed that, under the covenants, they are entitled to self-

[hereinafter Hannum, *The Right of Self-Determination*]; Will Kymlicka, *Individual and Community Rights*, in *GROUP RIGHTS* 17, 19 (Judith Baker ed., 1994); JAMES W. NICKEL, *MAKING SENSE OF HUMAN RIGHTS* (2d ed. 2007). Their terminologies differ both with regard to the groups to be considered and the kind of treatment which observance of human rights demands. In particular, several authors speak of “minorities,” whereas I use the term “subordinate groups” because the groups making special claims are not necessarily numerical minorities, for example, women in most societies and the indigenous people of Bolivia. See *infra* note 98.

92. Hannum, *Self-Determination*, *supra* note 91; Hannum, *The Right of Self-Determination*, *supra* note 91; NICKEL, *supra* note 91, at 13.

93. Claire Charters, *The Legitimacy of the UN Declaration on the Rights of Indigenous Peoples*, in *MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 289 (Claire Charters & Rodolfo Stavenhagen eds., 2009).

94. In English, “people” can serve as the plural of “person” as well as the singular designation of a national cultural group. In the ICCPR and the ICESCR, it is clearly the latter sense that is meant. The possible confusion does not arise in the versions of the covenants in other languages, which have the same validity as the English. “Peoples” appears in Spanish, for example, as “pueblos.” It remains controversial exactly which cultural groups qualify as “peoples.”

95. Stavenhagen, *Indigenous Rights: Some Conceptual Problems*, *supra* note 28, at 154–56.

determination as well.⁹⁶ That claim need not necessarily extend to national independence, and most indigenous groups do not advocate secession. Recent developments in international law and human rights scholarship recognize that self-determination can (or *must*) be pursued without extending to sovereignty for the people claiming self-determination.⁹⁷ However, self-determination logically requires the acknowledgement of the rights of the people collectively, not as individuals.

S. James Anaya finds further warrant for group rights in the ICCPR: its Article 27 asserts that members of minority groups “shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”⁹⁸ Anaya argues that this right, although stated as a right of *members* of a group, in practice can be realized only if it pertains to the group as a whole. He argues that the core human rights principle of nondiscrimination demands that a group be allowed to nurture its cultural practices as long as they do not violate fundamental human rights.⁹⁹

More recent human rights instruments take different approaches to the treatment of subordinate groups. The Convention on the Elimination of All Forms of Racial Discrimination mainly calls for the elimination of discrimination, as its name implies, but also envisions “special measures . . . to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms” and that such measures shall not be considered racial discrimination.¹⁰⁰ The Convention on the Elimination of All Forms of Discrimination Against Women goes further in enumerating the special problems faced by women and claiming for women the right to relief of those problems.¹⁰¹ Neither convention, however, explicitly attributes collective rights to any subordinate race or to women as a group.¹⁰²

96. Hannum, *The Right of Self-Determination*, *supra* note 91, at 773–80; Rodolfo Stavenhagen, *Indigenous Peoples in Comparative Perspective- Problems and Policies*, UN Dev. Programme, Human Dev. Report Office Occasional Paper, Background Paper for HDR 2004 (2004).

97. Kymlicka, *supra* note 91; Carole Pateman, *The Settler Contract*, in *CONTRACT AND DOMINATION*, CAROLE PATEMAN & CHARLES W. MILLS 35, 73 (2007); Hannum, *Self-Determination*, *supra* note 91.

98. Though Article 27 refers to minority rights, and (as noted) indigenous people form the majority of Bolivia’s population, the article has been interpreted to apply to them as well. In its “Concluding Observations” on Bolivia’s 1997 report on its compliance with the ICCPR, the Human Rights Committee refers specifically to the rights of “indigenous groups” under Article 27. *Concluding Observations of the Human Rights Committee*, U.N. GAOR, Hum. Rts. Comm., 59th Sess., ¶ 25, 33, U.N. Doc. CCPR/C/79/Add.74 (1997).

99. Anaya, *supra* note 51, at 22.

100. International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* 21 Dec. 1965, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., art. 1.4, 660 U.N.T.S. 195 (*entered into force* 4 Jan. 1969), *reprinted in* 5 I.L.M. 352 (1966) [hereinafter CEFRD].

101. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., U.N. Doc. A/34/46 (1980), 1249 U.N.T.S. 13 (*entered into force* 3 Sept. 1981) [hereinafter CEDAW].

102. CEFRD, *supra* note 100; CEDAW, *supra* note 101.

The Declaration on the Rights of Indigenous Peoples goes much further, endorsing both individual and collective rights, as is clear from its attribution of some rights to “indigenous individuals,” some to “indigenous peoples,” and others to both.¹⁰³ It calls for nondiscrimination and for special measures for individuals, but also protects the collective rights of indigenous peoples as groups, including the rights to self-determination, land, language, and traditional customs and institutions. The world’s surviving indigenous peoples, unlike women and racial groups, are corporate entities. The declaration protecting their rights must be different from the conventions on racial discrimination and discrimination against women because their survival—and hence the human rights of their members—depend on protection of their corporate status.¹⁰⁴ The right to practice community justice must be a collective right, because it is a practice of whole communities.

But individual rights and collective rights can conflict. I will address five issues, some relevant to indigenous community justice specifically and the others to collective rights in general. They involve (1) the existence of two parallel systems of justice in the same political space; (2) community justice’s informality and lack of codification; (3) the specific rules and outcomes in particular cases; (4) the validity of ascribed identity; and, (5) the possible conflict between justice for the individual and community harmony.

The first issue is legal monism, which raises the question of parallel and competing systems. If universalism is central to the idea of human rights, then due process of law implies that there must be a single system of law uniformly applied to all people in a single political space. But enforcing the hegemonic legal system upon a subordinate group promotes assimilation of that subordinate group and potentially the extermination of its unique culture.

The international human rights regime established by the UN system is state-centered, focused on formal legislation and international treaties and accountability systems. Community justice establishes itself apart from the state, and claims to be closer to the needs and interests of people in communities. It necessarily entails a plural legal system.

The second issue is the informality of community justice as conventionally practiced—for example, its lack of codified principles, the wide discretion allowed to authorities, and the fact that these authorities are not required to justify either their judgments or their reasoning by broader principles. Communities often assumed to be homogeneous may, in fact, be rent by internal conflicts; when authorities have broad discretion, they may use it to

103. UNDRIP, *supra* note 59.

104. The legal status of the declaration, however, is much weaker than that of a convention. A convention is open for ratification by member states and constitutes a treaty obligation for those that ratify it, while a declaration, adopted by the General Assembly but not submitted to ratification by the member states, does not impose the same degree of obligation. As noted earlier, however, Bolivia has incorporated the Declaration on the Rights of Indigenous People into national law. UNDRIP, *supra* note 59.

promote their own interests in opposition to those of competing subgroups. Low levels of literacy and lack of bureaucratic control undoubtedly reinforce idiosyncratic judgments, so that like cases are not necessarily treated alike. The emphasis on reconciliation over individually-defined justice also suggests that the outcomes will be variable and subjective.

Third, the decisions and sanctions of community justice can conflict with individual rights in several ways. First, the protection of *usos y costumbres* (traditional practices and customs) can violate what some individual members of the collectivity see as their rights. Gender norms are a clear example: the decisions of community justice have often reflected *usos y costumbres* that subordinate women by validating their subjection to spouses or discriminatory inheritance practices, or in general, because their rights have not even been taken into account or because women, accustomed to behaving submissively, accept inferior treatment.¹⁰⁵

In one of the cases reviewed by the Bolivian Constitutional Court under the 1994 amendments, discussed above, the court rejected an indigenous claim to communal property on the grounds that it violated the right of private property, ruling that "customary law . . . is not applicable to resolve a possible conflict of the right of property over land."¹⁰⁶ If community justice is accepted as legitimate, some may believe that it tramples on their rights as individuals in favor of the claimed good of the community.

The physical punishments of community justice may violate restrictions imposed by human rights norms. For example, violators are sometimes publicly whipped. In a case that became notorious, Marcial Fabricano, a former leader of the Trinitario Mojeño people of the department of Beni, was whipped in May 2009, in punishment for a number of alleged abuses of his office.¹⁰⁷ Like lynching, whipping is especially controversial because physical abuse violates the integrity of the body. But lynching, as I have shown, is a perversion of community justice. Whipping, on the other hand, is indeed an accepted form of punishment within community justice.

Defenders of the punishment argue that whipping is a symbolic act of authority, and the Constituent Assembly's Community Justice Subcommittee classified it not as a physical punishment but as a moral punishment.¹⁰⁸ In

105. Baptista, *supra* note 90, at 27; Molina & Arteaga, *supra* note 34, at 71–74; Interview with Beatriz Chambilla & Lucila Cosina, members, Taller de Historia Oral Andina, in La Paz (28 Jan. 2008).

106. Chivi Vargas, *supra* note 57, at 66.

107. *Azotaron a Marcial Fabricano por las Fechorías que Cometió*, BOLPRESS, 15 May 2009, available at <http://www.bolpress.com/art.php?Cod=2009051502>.

108. Albó Corrons, *¿Cómo Manejar la Interculturalidad Jurídica en un País Intercultural?*, *supra* note 32, at 88; Asamblea Constituyente, *supra* note 44, at 10; Interview with Jennifer Guachalla Escóbar, Coordinator of the Indigenous Peoples Program, Defensoría del Pueblo, in La Paz (29 June 2009).

Colombia, the constitutional court, which has appellate jurisdiction, ruled in 1997 that whipping may be imposed as a punishment in indigenous justice and that it does not constitute torture because in the context it is intended to facilitate the recuperation of the accused persons.¹⁰⁹ But many outsiders find whipping inhumane and degrading, possibly qualifying as torture, violating the prohibitions of the ICCPR and the Convention against Torture.

Some practices associated with the indigenous *cosmovisión* depend on belief in supernatural powers that people outside of indigenous communities do not generally share. Some indigenous groups have executed or expelled from their communities men and women condemned as witches.¹¹⁰ Defendants can be convicted for some offenses based on a shaman's (*yatiri*) reading of coca leaves.¹¹¹ Authorities guided by the *cosmovisión* of a particular community may, of course, reach the same conclusions as those drawing on the western liberal view that underlies human rights, but they will not necessarily do so.

A fourth issue is the possible violation of human rights if indigenous identity and accompanying obligations are imposed on people who reject identification with the ascribed status. Indigenous identity, like any other ethnic identity, is subjective. It is fluid and not strictly defined by birth,¹¹² and therefore should be freely chosen rather than ascribed. But those who claim collective rights implicitly claim the right to define who is a member of the collectivity. In such cases, community membership is not freely chosen. Those who are placed in the category against their will may feel that their individual rights are violated. A particular identity becomes coercive if imposed on people who choose to identify with a larger (or different) collectivity.

This is a practical issue for a plural legal system, because jurisdiction over particular cases must be allocated to the indigenous system or the ordinary system. Some who are subject to the indigenous system may prefer to be judged in the ordinary justice system because they do not identify as indigenous or because they hope to get a more favorable judgment from ordinary justice.

More theoretically, because identity is constructed, everyone is potentially a member of multiple communities and one may want to be free to

109. ALBÓ, CIUDADANÍA ÉTNICO-CULTURAL EN BOLIVIA, *supra* note 32, at 60; VAN COTT, THE FRIENDLY LIQUIDATION OF THE PAST, *supra* note 10, at 114–15.

110. Albó, *Derecho Consuetudinario*, *supra* note 84, at 15; Albó Corrons, *¿Cómo Manejar la Interculturalidad Jurídica en un País Intercultural?*, *supra* note 32, at 104–05; Van Cott, *A Political Analysis of Legal Pluralism*, *supra* note 5, at 229–30.

111. FERNÁNDEZ OSO, *supra* note 26, at 38, 255; Interview with René Orellana Halkyer, Centro de Estudios de la Realidad Económica y Social, in Cochabamba (4 Feb. 2008).

112. Agustín Grijalva, *The Status of Traditional Indian Justice in Ecuador*, 2 TRIBAL L. J. 1 (2001–2002), available at http://tlj.unm.edu/tribal-law-journal/articles/volume_2/agustin/index.php.

choose which one(s) with which to identify. For example, a Bolivian with indigenous ancestry may choose to identify as indigenous or as *mestizo*. Not only does ascribed group membership raise the possibility just mentioned that people may, in effect, be forced to conform to practices that they do not endorse; it also raises questions about the legitimacy of the claims of any collectivity for recognition of its rights. If those who claim the identity do not represent the whole group, claims made on the basis of their particularistic identity must be suspect.

A final difference between the human rights regime and indigenous community justice has to do with their purposes. Though they are related, they are not identical. For community justice, as I have shown, the good of the community as a whole takes priority over the protection of individual rights as generally understood in western legal and moral systems. This means, among other things, that defendants may not enjoy the presumption of innocence or the procedural guarantees accorded in ordinary justice.

Sanctions can also be imposed on people who would be regarded as bystanders in ordinary justice, such as real or fictive family members.¹¹³ In the view of the indigenous communities, that practice derives from and reinforces the strength of community ties, whereas the attribution of collective responsibility for an individual's acts is a violation of human rights as generally understood. In general, the "good of the community" is subject to interpretation, and even if there is a consensus, this communitarian perspective elevates the interest of the community over the rights of the individual.

VII. CONCLUSION

Many issues in the theory and practice of community justice are open. They will only be resolved by experience during the coming years. Still, I maintain that concern for human rights in the twenty-first century compels us to recognize the claims of indigenous communities to pursue justice in their own way. First, the individualist tradition is deficient because it does not recognize that we all live, grow up, and develop in groups. We are not completely autonomous individuals, and the rights of any one of us cannot be protected independently of the protection of everyone else's rights. Second, the individualist tradition assumes equality before the law. That assumption, however, is systematically violated in the case of Bolivia's indigenous people.

One could counter these two arguments by calling for the full and sincere guarantee of individual rights to all members of such a group. But is that enough? When people are discriminated against and oppressed by virtue of their membership in a subordinate group, that discrimination can only be solved by remedies that take account of the status of the group as

113. See text accompanying *supra* note 42.

a whole. Some rights cannot logically be enjoyed by individuals; they must be enjoyed by the group as a whole or not at all. In other cases, the rights of individuals will suffer if the claims of a community or people are not recognized.¹¹⁴ Territorial integrity is a clear example. The right to territorial integrity cannot be satisfied by assuring that each person possesses a plot of land; it requires a large contiguous territory preserved as the homeland of the whole group. Any threat to a group's territorial integrity, whether by dispossession or environmental degradation, may indeed threaten the group's survival. For many indigenous groups in the Americas, moreover, the spiritual significance of their territory and of particular locations within it means that its appropriation or despoliation by outsiders is a threat to the whole culture.

There are elements of community justice that clearly violate human rights: the use of physical punishments, the subordination of women, and, potentially, invidious discrimination based on ethnicity, to name the most egregious. The Declaration of the Rights of Indigenous Peoples subjects the exercise of those rights to the human rights of the international human rights regime. For example, Article 46 establishes that the rights set forth in the Declaration must be exercised "in accordance with international human rights obligations."¹¹⁵ The Bolivian constitution binds both the ordinary and the indigenous justice systems to honor human rights. The constitution already proscribes the death penalty, formerly imposed by both systems.¹¹⁶ Other practices may have to be reviewed in light of the commitments in the constitution and the declaration.

Still, the recognition of indigenous justice is necessary to repair a history of oppression. Where conflicts arise, they must be resolved in a way that respects both the rights of the individual and those of the group. It is difficult to envision how a people that has been oppressed for so long can free itself of that oppression and achieve equality without insisting on recognition of its group status. Because the hegemony of the western, individualist tradition has gone without questioning, its defects have not been examined and its superiority over any rival system has been taken for granted. It must not be exempt from questioning.

Official validation of the culture and practices of Bolivia's indigenous people is important, both for overcoming historical subordination and for exercising political power today. Indigenous rights deserve protection and human rights norms must take them into account. Where the two conflict, it is necessary to balance the competing claims. But the history of oppression that indigenous people have suffered means that any objection to their claims should be subject to special scrutiny.

114. Stavenhagen, *supra* note 31, at 151–52.

115. UNDRIP *supra* note 59, art. 46.

116. NUEVA CONSTITUCIÓN POLÍTICA DEL ESTADO DE BOLIVIA, art. 15 (2009).