

Indigenous peoples' rights and the law in Latin America

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Since the late 1980s, legal innovations at international, continental and national levels have converted indigenous *peoples* into subjects of rights. This means that they are now recognized not only as individual citizens of the countries they live in, but also as collectives with specific group rights that are different from those pertaining to the rest of the population. Indigenous peoples' rights to continue living in a manner different from dominant society imply that governments must respect spheres of autonomy for indigenous government and legal jurisdiction. According to current international human rights law, these autonomy rights are based on the principle of self-determination that underpins the contemporary system of sovereign nation-states.²

Throughout the history of Latin America, indigenous people have figured amongst those groups whose human rights have been most systematically denied and violated. Yet, in contrast to other regions of the world where acceptance of the concept of 'indigenous peoples' has been much more problematic and contested, most countries of the region have accepted the existence of their native populations and have slowly come to accept—at least in theory—that they should exercise some degree of 'internal self-determination' (Stavenhagen 2002) within the existing boundaries of the nation-state. However, in recent years the consolidation and deepening of an economic model based on direct foreign investment and commodity exports has revealed the limitations and challenges of such legal protections and reforms. Multicultural and pluri-national constitutional recognitions and efforts to demarcate indigenous lands have been followed by violent backlash and unwillingness on the part of governments to ensure that indigenous peoples' territorial and autonomy rights are upheld and respected in practice. A plethora of domestic and transnational economic actors now compete to control and benefit from the surface and subsoil natural resources on ancestral indigenous lands, competition endorsed by governments through licenses, concessions and the approval of large-scale infrastructural projects. The accelerated exploitation of oil, minerals, timber and biogenetic resources, the construction of roads and hydro-electric dams, and the development of agroindustry have had hugely negative impacts on indigenous ways of life, to the point where the physical survival of many groups is gravely endangered. For example, in Brazil, despite the demarcation of indigenous territories, tropical rainforests and savannah have been stolen and converted into vast cattle ranches, soya fields and sugar cane plantations. Hydroelectric dams and mining projects threaten the lands and livelihoods of thousands of native peoples; many communities live

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in overcrowded reserves, while others have been expelled from their homelands altogether. Those mobilizing to defend their lands are frequently assassinated by gunmen hired by ranchers or other private interests.³ Lack of legal security, land grabs and violent evictions have also led to unprecedented suicide rates amongst some indigenous groups.⁴

According to the most recent national census data, Latin America's indigenous population comprises approximately 45 million people in 2010 and is growing.⁵ In some countries the indigenous population comprises millions of people, such as Mexico (almost 17 million) and Peru (7 million). At the other extreme, Costa Rica's indigenous population numbers some 100,000 people, and Uruguay's a mere 80,000 (CEPAL 2014, 43). More than 800 different indigenous peoples survived the catastrophe of conquest by European powers in the 16th and 17th centuries. Today some 305 peoples are found in Brazil, 102 in Colombia, 85 in Peru and 78 in Mexico. At the other extreme, Costa Rica and Panama have just nine indigenous peoples each in their national territories, while El Salvador has three and Uruguay two (CEPAL 2014, 44). In some countries, such as Argentina, Brazil and Uruguay, they now represent less than 3% of the total population, whereas in others, such as Bolivia and Guatemala, they are over 40%. Mexico is the country with the largest indigenous population in numerical terms: some 15% of the total population. Some native languages – such as Aymara, Quechua, Nahuatl or K'iche' – are spoken by millions of people, whereas amongst many of the smaller lowland groups autochthonous languages are rapidly disappearing. Yet in many countries the overall trend is towards an increase in those people self-identifying as indigenous.

According to all social indicators, indigenous populations in Latin America are amongst the most impoverished of the region's citizens. As a consequence of the historical dispossession of

Table 27.1 Indigenous Peoples in Latin America, estimated population 2010

<i>Country</i>	<i>Total population</i>	<i>Total indigenous population</i>	<i>Indigenous percentage of population</i>
Bolivia	9,995,000	6,016,026	62.2
Guatemala	14,334,000	5,881,009	41.0
Peru	29,272,000	7,021,271	24.0
Mexico	112,336,538	16,933,283	15.1
Panama	3,405,813	417,559	12.3
Chile	16,341,929	1,805,243	11.0
Nicaragua	5,813,000	518,104	8.1
Ecuador	14,483,499	1,018,076	7.0
Honduras	7,619,000	536,541	7.0
Colombia	46,448,000	1,559,852	3.4
Venezuela	27,227,930	724,592	2.7
Costa Rica	4,301,712	104,143	2.1
Argentina	40,117,096	955,032	2.4
Uruguay	3,251,654	76,452	2.4
Paraguay	6,232,511	112,848	1.8
Brazil	190,755,799	896,917	0.5
El Salvador	6,281,000	14,408	0.2
Total	538,153,481	44,791,456	8.3

Source: CEPAL 2014: 43.

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their lands and their enslavement and exploitation at the hands of colonial and republican elites, native peoples suffer from acute economic, social, political and cultural marginalization. Although only 11% of Latin Americans are indigenous, they constitute some 20% to 25% of the 40% of the region's population living in poverty and an even higher percentage of the 17% living in extreme poverty. More than half of all Bolivians and Guatemalans are poor, but nearly three-quarters of indigenous people in those countries live below the poverty line. In Ecuador more than 80% of indigenous people live in poverty, and in the rural highlands this figure rises to 90%. In Peru more than 40% of all families below the poverty line are indigenous (UNDP 2009). A breakdown of the statistics shows even worse social indicators for indigenous women and children. Indigenous people are the victims of racism and discrimination in society, and especially within state institutions such as schools, hospitals or courts. This particularly affects the growing number who live in Latin America's urban areas: currently more than half of the overall indigenous population of 11m. people. Indigenous peoples also suffer from multiple forms of violence associated with current patterns of economic development, including the accelerated exploitation of natural resources (such as oil, minerals, timber and biogenetic resources), the construction of roads and hydroelectric dams, and agro-industrial development, all of which have a highly negative impact on indigenous ways of life, threatening the physical survival of many groups.

Constitutional transformations and the impact of international law

Compared to other regions in the world, Latin America is characterized by its 'high porosity to human rights norms and institutions' (Rodríguez-Piñero 2007: 185). This is because of a series of historical factors, including the circulation of ideas about citizenship and rights since colonization in the 16th century and the role that law has played in the constitution of Latin American nation-states and their diverse imaginaries, something which continues to be reflected in recent processes of constitutional reform (Goodale 2008). It is also a result of the strength of trans-regional human rights and social movements in Latin America (Sikkink 2005). Latin American countries have been global front-runners in the legal recognition of indigenous peoples' rights. The International Labour Organization's Convention 169, approved in 1989 (hereafter ILO 169), the first international convention setting out the collective rights of indigenous peoples, was ratified by most countries in the region during the 1990s. This convention replaced the earlier ILO Convention 107, which dated from 1957 and which—in contrast to ILO 169—was characterized by an integrationist ideology, reflected in public policies towards indigenous populations in countries such as Mexico and Peru between the 1930s and 1970s. The regionwide adoption of ILO 169 can be understood as part of the 'norms cascade', whereby elected democratic governments ratified numerous international human rights instruments as a means of staking their global democratic credentials following extended periods of military and authoritarian rule (Finnemore and Sikkink 1998). Ratification was also a reaction to the growing continental mobilization of indigenous peoples' social movements, which reached its apogee in 1992, centring on rejection of official celebrations of the Spanish quincentenary (Bengoa 2008; Brysk 2000; Stavenhagen 2002). ILO 169 establishes the obligation on states party to the convention to protect and promote the social, economic and cultural rights of indigenous peoples who live within their national territories, respecting their social and cultural identity and their specific customs, traditions and institutions. Amongst its most important articles are those stating that indigenous peoples have a right to make decisions about development projects that affect them⁶ and to be adequately consulted about these prior to their approval and initiation.⁷ The promise of 'prior consultation' subsequently became a

lightning rod for indigenous mobilizations against the operations of extractive development industries in their historic territories.

Although the constitutional changes approved in Latin American countries during the 1990s varied in the degree to which they recognized indigenous rights, all were profoundly influenced by ILO 169 (Assies *et al.* 1999; Sieder 2002; Van Cott 2000; Yrigoyen 2011). This first phase of multicultural constitutional reforms has been interpreted by some authors as a means to try and shore up the legitimacy of governments and as an extension of rights (Van Cott 2000). Others have viewed the turn to multicultural constitutions and policies as a new form of regulation that reflects contemporary forms of neo-liberal rule (Hale 2004; Hernández *et al.* 2004). Certainly these constitutional changes led to a wave of policy measures across the continent in fields such as health and education aimed specifically at indigenous people. These measures were supported by the Inter-American Development Bank and the World Bank (Plant 2002; Davis 2002; Andolina *et al.* 2010). In some countries these reforms and programmes opened important spaces for indigenous professionals to participate in the elaboration and implementation of public policies, creating new institutions such as the Project for the Development of Indigenous Peoples and Afro-Ecuadorians in Ecuador, known as PRODEPINE (Andolina *et al.* 2010). However, this first wave of reforms failed to respond fully to indigenous peoples' demands that their historic territories and livelihoods be protected.

In Ecuador and Bolivia, indigenous peoples' mobilization and their incursion in electoral politics contributed to a second round of 'plurinational' reforms in the 2000s, leading to the approval of new constitutions in 2008 in Ecuador and 2009 in Bolivia. These ostensibly aimed to 'decolonize' those nation-states, heralding more pluralist arrangements recognizing greater degrees of political and legal autonomy for indigenous peoples. They even incorporated Kichwa and Aymara concepts of 'good living' ('buen vivir') into the constitutions, which presuppose forms of development premised on harmony with different ecosystems. Yet despite the new constitutions the left-of-centre governments of Rafael Correa and Evo Morales continued to pursue extractivist models of economic development premised on the exploitation of natural resources including oil, minerals, water and timber. Indigenous peoples' organizations in both countries have increasingly mobilized to oppose these development policies and protest their impacts (Weinberg 2010). In February 2012 the National Confederation of Indigenous Nationalities of Ecuador (CONAIE), the largest indigenous confederation in the country and one of the strongest in Latin America, called on its members to increase their protests against the Correa government in Ecuador following the approval in 2011 of a new mining law favouring transnational corporations and the government's continued support for oil exploration in the Amazon region (Ortiz 2012). In Bolivia, massive protests in 2011 over government plans for the construction of a transnational road through the protected Indigenous Territory of Isiboro Sécure National Park (TIPNIS), home to the Moxeño, Yurakaré and Chimán indigenous groups, led to clashes between protestors and police and an eventual suspension of the project by the Morales administration (Chavez 2011). Subsequently, however, in February 2012 President Morales approved a new law providing for consultation with TIPNIS inhabitants aimed at securing approval from them to resume work on the controversial road project (Herrera Farrell 2012).

The Judicialization of Indigenous Claims

The limitations of the constitutional changes approved and the lack of official political will to guarantee indigenous peoples' rights in practice generated different responses. In some

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countries, such as Mexico, Guatemala and Colombia, indigenous peoples' organizations turned to strengthening de facto forms of territorial, political and legal autonomy: for example, the autonomous Zapatista municipalities in the state of Chiapas, Mexico or the indigenous *cabildos* in the northern Cauca region of Colombia (Baronnet *et al.* 2012; Padilla 2009). Indigenous organizations have also invoked constitutional and international norms judicializing alleged abuse of their collective rights. Issues including discrimination, control over territories and natural resources, abuse of due process rights and systematic state violence against indigenous peoples have all been contested in Latin American courts. The judicialization of indigenous rights was particularly marked in Colombia during the 1990s (in part due to the extensive guarantees established in the Consitution of 1991), and that country's Constitutional Court went the furthest in the region in establishing new jurisprudence guaranteeing their collective rights (Rodríguez-Garavito and Arenas 2005; Sánchez Botero 2010). In other countries, however, it was difficult to present legal appeals in defence of collective rights: constitutional formulations for rights protections were often weak or imprecise, the status of international law vis-à-vis domestic law was disputed by many jurists, effective support structures for legal mobilization (Epp 1998) were not always in place, and mechanisms for presenting constitutional writs or actions were restricted.⁸ Even when legal appeals were successfully mounted, the high courts were usually less than receptive to indigenous peoples' claims and in the rare instances when they did find in their favour judgements were frequently unenforced in practice. For example, in the case of the Yaqui tribe in Sonora, Mexico, whose rights to prior consultation about illegal use of water resources on their historic territories have been repeatedly confirmed by the Mexican Supreme Court with little or no practical effects to date.⁹

In the face of their limited success before national courts, indigenous peoples and their allies have taken their claims to extranational forums such as the International Labour Organization and the Inter-American Commission and Court.¹⁰ During the 2000s the Inter-American Court of Human Rights developed its jurisprudence on the collective rights of indigenous peoples and the obligations of the member states of the Inter-American human rights system to uphold them in practice (Morris *et al.* 2009). A number of cases set important precedents, including that of *Awás Tingni vs. the State of Nicaragua* (see Morel, this volume). The sentence of the Court in August 2001 developed an 'evolutionary interpretation' of article 21 of the American Convention, which protects property rights, extending this to include the communal property of indigenous peoples administered according to their own forms of law (Anaya and Crider 1996; Rodríguez-Piñero 2007). Advances in the jurisprudence of the inter-American human rights system are transforming the basis for the defence of indigenous peoples' collective rights in Latin America, with the Inter-American court's decisions generally conforming to the principles set out in the UNDRIP.¹¹ However, although the decisions of the court have set important legal precedents, in most instances governments have failed to respect them in practice.

Consultation for Free, Prior and Informed Consent

One of the most contentious social and legal issues is that of prior consultation and consent around development projects. ILO 169 states that indigenous peoples have the right to make decisions about development projects that affect them (article 7.1), and to be adequately consulted about these prior to their approval and initiation (article 15) (Carvajal *et al.* 2009; see also Barelli, this volume). As the National Organization of Indigenous Peoples of Colombia (ONIC) has stated, the objectives of consultation are (1) to protect the life and integrity of indigenous peoples, avoiding the threats that can negatively affect them, provoking their cultural or physical

extermination, and; (2) to ensure they participate effectively as full subjects of rights in processes of decision making that affect them. Colombia's Constitutional Court has identified prior consultation as a fundamental right, deriving from the constitutional protections extended to the cultural and ethnic identity of the country's indigenous peoples (CEPAL 2014, 28). In a stronger legal formulation, the UNDRIP sets out an emergent right of indigenous peoples to decide their own forms of development (article 32.1), establishes that their free, prior and informed consent (FPIC) must exist before the start of any project which will affect their territories or resources (article 32.2), and that the impacts of economic development on indigenous peoples must be mitigated or compensated for (article 32.3). Yet Latin American governments have approved massive infrastructure projects and extended licenses or concessions to multinational corporations to prospect for and exploit oil, minerals and other natural resources on indigenous peoples' ancestral lands without consulting them. For example, more than 75% of the Peruvian Amazon is now effectively leased to the international oil industry; in Brazil more than 250 hydroelectric dams are planned for development in the Amazon region, despite a lack of adequate environmental safeguards or consultation with Amazonian indigenous peoples.¹² Throughout the 2000s the promise of prior consultation became a lightning rod for indigenous mobilizations against the operations of extractive development industries. Rights to free, prior and informed consent were invoked in specific cases before the Inter-American human rights system even prior to 2007, and the UNDRIP has become a point of reference in indigenous organizations' campaigns and attempts to generate national and regional jurisprudence in Latin America (Morris et al. 2009). Long and bitter struggles have been waged before the courts over what constitutes 'prior informed consultation in good faith,' for example, in Colombia surrounding the struggle of the U'wa people to prevent oil exploitation on their territories (Rodríguez-Garavito and Arenas 2005; Rodríguez-Garavito 2011), or in Guatemala by indigenous peoples opposed to gold mining (Fulmer, Godoy and Neff 2008; Sieder 2007).

The jurisprudence of the Inter-American Court of Human Rights has begun to reflect the substance of the UNDRIP, particularly with respect to the issue of prior consent. In the case of the Saramaka people vs. Suriname, resolved in November 2007, the court stipulated that the state is obliged not adopt any measure without the consent of the community.¹² In its landmark 2012 judgment on the case of the Kichwa indigenous people of Sarayaku vs. Ecuador,¹³ the Court analysed developments in international norms and jurisprudence and concluded that the obligation on states to consult with indigenous peoples is now a general principle of international law. In its ruling the Court set out the minimal standards for free, prior and informed consent (FPIC), including: (1) states must actively consult and must inform; (2) consultations must be carried out in accordance with the customs and traditions of the communities affected; (3) consultations must be carried out in good faith, through culturally adequate procedures with the expressed purpose of reaching an agreement; (4) consultation should be effected in the first stages of a development or investment plan, and not simply when the need arises to obtain the community's consent; (5) the state must ensure that the members of a people or community are aware of the possible benefits and risks of the proposed development.¹⁴

In the hope of defusing and controlling increasing socio-environmental conflicts involving indigenous people, Latin American governments opted to draft legislation and administrative guidelines to regulate processes of prior consultation (Rodríguez-Garavito 2011). For example, the Peruvian government adopted a Law of the Right to Consultation in 2011, following the massacre in June 2009 at the town of Bagua involving indigenous protests against oil exploitation in the Peruvian Amazon. However, legislation alone has not solved the problem: state authorities tend to emphasize procedural aspects and define the content of the right to consultation without reference to indigenous peoples or the international standards set out in ILO

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169, the UNDRIP and the jurisprudence of the Inter-American Court. Funds allocated are often insufficient to ensure meaningful processes of consultation; information and transparency are insufficient; and confusion often persists about which public institutions are responsible for ensuring the consultations are carried out. At the same time private actors and state police and army forces continue to use systematic violence to quell protests; villagers, indigenous rights activists, human rights defenders and environmental campaigners are regularly assassinated, beaten, detained or jailed when they try to defend the rights of communities.

Future Prospects

Indigenous peoples' rights are by their very nature indivisible and collective. Respect by governments for such rights means not only implementing policies to tackle marginalization and discrimination, or recognizing cultural rights, but also involves profound questioning of the dominant models of political organization and economic development. This explains why the collective rights of indigenous peoples are so controversial and why governments repeatedly continue to violate them, despite proclaiming their commitment to improving conditions for their indigenous citizens.

Evidently normative advances in national, regional and international law affirming the collective rights of indigenous peoples have been an important element in their struggles for inclusion and respect for their cultural difference. These legal changes are in large part a consequence of decades of indigenous struggle and lobbying at the grassroots, nationally and internationally. Yet constitutional provisions without secondary legislation and coherent technical rules, and economic development policies that conflict with measures for protection of indigenous lands, mean proclamation of indigenous rights are empty promises. Law alone cannot resolve indigenous peoples' multiple claims, and legal mobilization is only one aspect of their broader political strategies. Given the globalized nature of economic development, securing guarantees for indigenous peoples' collective rights will require action not just within nation-states but also internationally. However, effective international action to guarantee indigenous rights does not exist, and recent developments in Latin America suggest that resistance to indigenous claims on land and natural resources is only likely to become more entrenched in the forthcoming period.

Notes

- 1 An earlier version of this essay was published in César Rodríguez-Garavito (ed.) *El derecho en América Latina: los retos del siglo XXI*, Buenos Aires: Siglo XXI, 2011.
- 2 UN Declaration on the Rights of Indigenous Peoples, article 3: 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development', www.un.org/esa/socdev/unpfiu/documents/DRIPS_en.pdf (accessed March 2012).
- 3 'In the south many tribes such as the Guarani live in appalling conditions under tarpaulin shacks along the roadside. Their leaders are being systematically targeted and killed by private militias of gunmen hired by the ranchers to prevent them occupying their ancestral land.' Survival International, at www.survivalinternational.org/tribes/brazilian (accessed 16 May 2015).
- 4 The Guarani-Kiowah people in the state of Mato Grosso do Sol, Brazil, had a suicide rate of thirty times the national average in 1995 (Valenta 2003, 654).
- 5 Estimates for indigenous population vary considerably and are hotly contested: the widely cited 1994 study on indigenous poverty by Pscharopoulos and Patrinos estimated an indigenous population of 34 million or 8% of the region's population. In 2005 an Inter-American Development Bank document cited in Perafán and Moyer (2006) estimated some 52 million people, or 11% of the population. The

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- more recent 2010 CEPAL study cited here estimates 45 million people or 8% of the total Latin American population.
- 6 Article 7 (1) of the Convention establishes that 'The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly', at www.ilo.org/ilolex/cgi-lex/convde.pl?C169 (accessed March 2012).
 - 7 Article 15 of the Convention states that '1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources. 2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities', at www.ilo.org/ilolex/cgi-lex/convde.pl?C169 (accessed March 2012).
 - 8 In Colombia, for example, presenting an acción de tutela is relatively straightforward and low cost, whereas in Mexico the obstacles to presenting an amparo are numerous (Cepeda 2005; Domingo 2005)
 - 9 See Alejandra Leyva, 'Una sentencia fallida: el caso de la Tribu Yaqui', *Animal Politico*, 16 March 2015, at www.animalpolitico.com/blogeros-verdad-justicia-reparacion/2015/03/16/una-sentencia-fallida-el-caso-de-la-tribu-yaqui/ (accessed 7 May 2015).
 - 10 See Sieder 2007; Fulmer *et al.* 2008; Sierra *et al.* 2013; Padilla 2009.
 - 11 Pasqualucci argues that until 2009 at least, the Inter-American Court charted a middle ground in the area of state expropriation of natural resources on indigenous ancestral lands, allowing the State some residual rights in the development of those resources to the detriment of the indigenous peoples (2009, 54).
 - 12 'Amazonian Tribes Unite to Demand Brazil Stop Hydroelectric Dams', Jonathan Watts, *The Guardian*, (30 April 2015), at www.theguardian.com/world/2015/apr/30/amazonian-tribes-demand-brazil-stop-hydroelectric-dams (accessed 7 May 2015).
 - 13 The Court ruled that '[the state of Suriname must] adopt legislative, administrative and other measures necessary to recognize and ensure the right of the Saramaka people to be effectively consulted, in accordance with their traditions and customs, or when necessary, the right to give or withhold their free, informed and prior consent, with regards to development or investment projects that may affect their territory, and to reasonably share the benefits of such projects with the members of the Saramaka people, should these be ultimately carried out. The Saramaka people must be consulted during the process established to comply with this form of reparation. The State must comply with this reparation measure within a reasonable time,' *Saramaka People v. Suriname*, Judgment of 28 November 2007, Series C No. 172, art.194 (d) p. 57.
 - 14 In 1996 the Ecuadorian government authorized operations by Argentine oil company CGC in the Ecuadorian Amazon, in the ancestral lands of the Sarayaku people. In 2003 representatives of the Sarayaku presented their case to the Inter-American Commission, alleging that the Ecuadorian state had violated their rights to prior consultation.

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