

The Status and Rights of Indigenous Peoples in Latin America

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1. Introduction

Latin America has traditionally been and continues to be one of the regions of the world with the greatest diversity of indigenous cultures. The autochthonous populations living in Central and South America vary considerably in tradition, outlook and size. Although the criteria used in the definition of indigenous communities lack uniformity and the census data are often unreliable, it is estimated that today more than four hundred different groups live in Central and South America, with a total population of approximately 40 million people.¹ The distribution of these groups across Latin America is highly uneven. The largest indigenous populations are still to be found in the areas where the most advanced Indian civilizations flourished at the time of the arrival of the Spaniards, i.e. in central and southern Mexico, the northern regions of Central America and in the Andean countries. Mexico possesses not only the numerically most important indigenous population (which according to estimates totals roughly ten million²) but also the greatest variety of different ethnic groups.³ In terms of demographic weight of indigenous groups with regard to their share of the total population, however, Mexico is surpassed by a number of other countries. In Guatemala and Bolivia, Indians represent the majority, in Ecuador and Peru they account for almost half of the

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¹ Rodolfo Stavenhagen, *Los organizaciones indígenas: actores emergentes en América Latina*, in: Comisión Nacional de Derechos Humanos, *Guía para pueblos indígenas*, Mexico 1997, 28.

² Comisión Interamericana de Derechos Humanos, *Informe sobre la situación de los derechos humanos en México*, para. 507. This number would account for 12 to 15 per cent of the total population, see Stavenhagen (note 1), *ibid.* Other estimates put the number of Indians in contemporary Mexican society much higher, somewhere between 20 to 25 million, or approximately 30 per cent of the population, see Tim Merrill/Ramón Miró, *Mexico – a Country Study*, 4th ed., Washington 1997, xxiv. It is extremely difficult to apply precise criteria to the identification of indigenous groups in societies which, like the countries in Latin America, have been marked by a century-old tradition of miscegenation, a tradition which has inevitably blurred the distinction between the Indian and non-Indian sectors of society along racial lines. It is therefore widely accepted today that the concept of Indian is a cultural, not primarily a racial one. Given the cultural use of the term, it would be unrealistic to expect the official census to count the number of Mestizos and Indians based on racial criteria. Nevertheless, in measuring how many people speak an indigenous language, the census can at least be used to identify a minimum number of racially unmixed Indians which form the core of a country's indigenous population, see Merrill/Miró, pp. 95–96 and *infra* III. 2. a). In Chile, legislation still requires the census to establish the size of the Indian population living on the national territory, see *Ley Indígena* 19.253, Art. 6.

³ The Mexican National Indigenous Institute (*Instituto Nacional Indigenista*) has identified 56 different ethnic groups, see Jorge A. Vargas, *NAFTA, the Chiapas Rebellion, and the Emergence of Mexican Ethnic Law*, 25 *California Western International Law Journal* (1994), 45.

total population. At the other end of the spectrum the indigenous groups in the Amazon basin in Brazil are numerically insignificant, living in tiny tribes which often face the imminent threat of extinction.⁴

When the Spaniards arrived in Central and South America at the beginning of the sixteenth century, they discovered a wide range of Indian societies with fundamentally different social and economic structures.⁵ They naturally gravitated towards those societies which possessed a developed agriculture and a stratified social structure based upon the extraction of tribute and labour, thus offering ideal conditions for economic exploitation by the conquerors once their military power had been annihilated and their political independence destroyed. Among these the highly integrated imperial states of the Aztecs in Mexico and the Incas in the Andes with their seemingly unlimited resources were the prime targets of Spanish colonization. The policies which the Spanish Crown adopted in the course of the sixteenth century with regard to the indigenous population in the Indies were primarily aimed at these sedentary societies with complex social structures. By contrast, the Spaniards sought to by-pass the semi-sedentary and nomadic tribes which possessed no stratified social and economic systems and therefore had little to offer in terms of easy economic gain, except where they occupied lands with valuable resources, as in the case of the silver-bearing regions of north-central Mexico. These tribes were largely ignored or, if hostile, kept under control by military garrisons, like the belligerent Araucanians of southern Chile. Finally, there remained vast areas in which there was scarcely any Spanish presence at all. In South America, virtually the whole of the interior remained unsettled for over four centuries. The indigenous groups living in these regions were mostly hunter-gatherers, combining fishing and hunting with slash-and-burn agriculture on easily exhaustible soil cleared from the forest. It was precisely the encounter with this kind of indigenous population which would shape the colonial experience of the Portuguese in Brazil and lead to adoption of indigenous policies quite different from those pursued in the Spanish Indies.

1. Indigenous Communities in Colonial Latin America: Divergent Spanish and Portuguese Approaches

a) Indian societies under Spanish rule: the concept of the two Republics

The encounters of the Spanish and Portuguese with the indigenous peoples of Central and South America in the early sixteenth century were to establish a pattern of conquest and subjugation which would persist throughout the colonial period. Although native tribes would occasionally ally themselves with the Spaniards

⁴ Stavenhagen (note 1), 28.

⁵ For an overview of the numerous Indian cultures which existed on the arrival of the European conquerors see Leslie Bethell (ed.), *The Cambridge History of Latin America*, vol. I, *Colonial Latin America*, Cambridge 1984, 3–143; Edwin Williamson, *The Penguin History of Latin America*, London 1992, 37–54.

in order to rid themselves of the dominance of rival Indian groups,⁶ this did not result in any form of contractual or reciprocal relationship that would have placed these tribes outside the colonial order, the sole exception being the Araucanians in southern Chile who could not be decisively defeated by the Spanish forces and in 1641 signed the Treaty of Quilin which officially confirmed the Bio-Bio as the southern border of the Spanish Empire.⁷ In the conquered territories, the Indians were nominally subjects of the Crown in much the same way as the *conquistadores* who had occupied the land in the name of their monarch.⁸ This formal bond with the Crown, however, did not of itself resolve the question of the legal status of the Indians in relation to the politically and socially dominant new class of conquerors and settlers who depended for the economic success of their colonial enterprise on easy access to Indian tribute and labour. In order to tackle this problem, Nicolás de Ovando, the first royal governor of Hispaniola, introduced the *encomienda* system, which was then extended to the new colonies in Mexico and Peru and became a distinctive feature of Spanish rule in the whole of Latin America.⁹ Under this scheme, the indigenous people were required to provide tribute and free labour to the Spanish colonizer, the *encomendero*, who in turn was responsible for their welfare, their assimilation into Spanish culture and their Christianization. *Encomienda* was a device to ensure the subordination of the conquered people and the use of their labour by the Spanish as well as a means to reward Spanish subjects for services rendered to the Crown.¹⁰ The debate about the limits of *encomienda* was to provide the focus for the wider discussion on Indian rights and the Spanish title to rule the Indies during the first half of the sixteenth century.¹¹

In this controversy, two conflicting views with regard to the legal status of indigenous groups within the colonial order emerged.¹² Most eloquently defended by Juan Ginés de Sepúlveda, an eminent humanist scholar of the time, the first school of thought argued that the Indians of America were a barbarous race, possessing inferior rational capacities to the Europeans, and therefore could be legitimately subordinated to the Spaniards.¹³ This view was opposed by Bartolomé de las Casas, a former *encomendero* who eventually became a Dominican friar and

⁶ Most famously in the case of the Tlaxcalans who helped Cortés to crush the Aztec empire, see Nathan Wachtel, *The Indian and the Spanish Conquest*, in: Bethell (note 5), 210–211.

⁷ Jorge Calbucura, *El proceso legal de abolición de la propiedad colectiva: el caso Mapuche*, <http://www.Linux.soc.uu.se/mapuche/mapunit/calbu01.htm> (site last visited on 12–03–1999).

⁸ Already in 1500 Queen Isabella had declared the Indians “free and not subject to servitude”, see J.H. Elliott, *The Spanish Conquest and Settlement of America*, in: Bethell (note 5), 163.

⁹ On the origins of *encomienda* and its function in the colonial system of the Indies see Elliott, *ibid.*, 165–166, 192–196.

¹⁰ Rodolfo Stavenhagen, *Derecho indígena y derechos humanos en América Latina*, México 1988, 21; Guillermo Floris Margadant, *Official Mexican Attitudes Towards the Indians: An Historical Essay*, 54 *Tulane Law Review* (1980), 967.

¹¹ Williamson (note 5), 112.

¹² J.H. Elliott, *Spain and America in the Sixteenth and Seventeenth Centuries*, in: Bethell (note 5), 309.

¹³ Stavenhagen (note 10), 16.

the *spiritus rector* behind the attempts undertaken by the Crown in the first half of the sixteenth century to provide for an effective defence of Indian rights in the colonies. Las Casas declared that the Indians were creatures of God who shared in all human attributes and had been endowed with intelligence, thus having the right to live as free persons within a civil society.¹⁴ He and his followers could point to the position adopted on the issue by the Church in the papal Bull *Sublimus Deus* of 1537, in which Pope Paul III had proclaimed that the Indians were "truly men" and that they should "freely and legitimately enjoy their liberty and the possession of their property".¹⁵

The Spanish Crown did not subscribe explicitly to one side of the argument or the other. It did, however, in the course of the sixteenth century pass a number of laws which had the effect to limit the economic exploitation of the Indians by means of the *encomienda* system and at the same time thwarted the ascendancy of a feudal aristocracy in the Indies capable of challenging royal authority. The Laws of Burgos of 1512 maintained the system of forced labour but tried to eradicate its abuses by unscrupulous *encomenderos* through detailed provisions for fair wages and decent conditions of work for the Indians.¹⁶ The New Laws enacted in 1542 went even further and envisaged to phase out the system of *encomienda* completely. No new *encomiendas* would be granted, and the rights of inheritance associated with the privileges of *encomienda* were withdrawn. Upon the violent reaction by the Spanish settlers in the colonies, these provisions had to be suspended. This temporary setback, however, did not prevent the Crown from further attempts to undermine the institution. In later times, Indian tribute was required to be delivered directly to the Crown, which would then distribute it in monetary form to the *encomenderos*, thus greatly reducing direct contacts between the Indians and the *encomenderos* in theory.¹⁷ Moreover, the Crown took direct responsibility for rationing Indian labour among Spaniards through the device of *repartamiento*, a system of rotary labour drafts organized by royal officials.¹⁸

The policy followed in the matter of *encomienda* was to establish a pattern for the indigenous legislation in general. This legislation rested on the recognition of two distinct societies in the colonies, the society of the Spaniards and that of the Indians, with the Spanish monarchy acting as the supreme mediating institution between them. It was intended to protect the Indians from exploitation by the Spanish settlers and to allow them to retain their culture in so far as this did not

¹⁴ Williamson (note 5), 112.

¹⁵ Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 *Georgetown Law Journal* (1942), 12.

¹⁶ Elliott (note 8), 167.

¹⁷ *Ibid.*, 194–196, 387.

¹⁸ Charles Gibson, *Indian Societies under Spanish Rule*, in: Leslie Bethell (ed.), *The Cambridge History of Latin America*, vol. II, *Colonial Latin America*, Cambridge 1984, 402–404.

conflict with Catholicism.¹⁹ The special legal regime created for this purpose required Indians to live in their own villages (*congregaciones* or *reducciones*) or in special sections of the colonial cities.²⁰ Although the traditional Hispanic pattern of provincial government was reproduced, the authority of dynastic ethnic chieftains was preserved in the Indian *cabildo*, which became a sort of council of tribal elders.²¹ Indians had to pay tribute and to perform labour services for the Spanish settlers but these were – at least in theory – to be controlled and limited by the officials of the Crown.²² Indian land tenure which remained predominantly communal in nature enjoyed special legal protection.²³ Separate courts, *juzgados de indios*, were created to hear civil and criminal cases involving disputes between Indians or between Indians and non-Indians.²⁴ This special legal status accorded to the indigenous communities, however, did not rest on any real recognition of their equality in relationship to the white settlers but rather reflected the paternalistic feelings of the Crown towards its Indian subjects. Important rights which were traditionally considered as attributes of Spanish power, like horse riding or the carrying of arms, were generally refused to the Indians²⁵.

One of the most important objectives of the indigenous policies of the Spanish – as well as the Portuguese – Crown in the newly conquered territories was the evangelization of the Indians. After all, the conversion of pagan peoples to Christianity had been one of the principal justifications for the Spanish conquest of America. The task of conversion was entrusted to missionaries like the Franciscans, Dominicans and – most importantly – the Jesuits. The missionaries often became dedicated to the defence of native rights, as the famous example of Bartolomé de las Casas illustrates, and started to study Indian history, culture and language, an endeavour which remains an important source for modern research into pre-Colombian civilizations.²⁶ In some regions, where the Indians were too dispersed or their villages had been destroyed by the wars of Conquest, the missionaries adopted a policy of resettling the indigenous population in *congregaciones*, specially designed villages where the natives could be nurtured and protected from a hostile outside world in well-ordered Christian communities, the most spectacular of these missions being the ones established by Spanish Jesuits among the Guaraní Indians in Paraguay. So central was the role of the missionaries in dealing with the Indians, that sometimes the task of “civilizing”

¹⁹ Adolfo Triana Antorveza, *El estado y el derecho frente a los indígenas*, in: Rodolfo Stavenhagen/Diego Iturralde, *Entre la ley y la costumbre*, México 1990, 281; Williamson (note 5), 137.

²⁰ Triana Antorveza (note 19), 281.

²¹ Williamson (note 5), 138.

²² Margadant (note 10), 973.

²³ Ibid.

²⁴ Williamson (note 5), 139.

²⁵ Margadant (note 10), 974.

²⁶ Williamson (note 5), 99–100.

them was left in their hands even after independence.²⁷ On the whole, the missionary orders never could get completely rid of their tutelary and paternalistic attitude towards the native peoples. As an institution, however, the Church did adopt a consistent stance in favour of the humane treatment of the American Indians and the respect of their basic rights.²⁸

In the long run, the Crown policy of the dual society did not succeed. As a result of the terrible epidemics which had depleted the size of the native population dramatically during the sixteenth century,²⁹ Indians were increasingly unable to put up with the demands of labour imposed upon them³⁰ or to resist the illegal occupation of their fallow land by the Spaniards.³¹ The protective policies of the Crown were undermined by the local elites of *encomenderos* and rich settlers acting in collusion with corrupt royal officials.³² In the last analysis, the Crown could not afford to alienate the ruling class in the Indies if it was to collect the revenues on which Spain was dependent for the pursuit of its ambitious goals in Europe. Due to these inherent weaknesses, the concept of a just society comprising two republics held in balance by a wise monarch in practice degenerated into a form of unequal racial segregation.³³ In this situation, the protective legislation of the Crown had the unforeseen consequence of reinforcing the isolation of the most vulnerable sectors of the colonial society and increasing their political and economic marginalization.³⁴

b) Colonial rule and indigenous rights in Brazil

In Brazil, the Portuguese did not face the same legal and moral problems with regard to the definition of the status and rights of the indigenous population as had the Spaniards in Mexico and in the Andes. In the eyes of the sixteenth-century Europeans, the nomadic and cannibalistic hunter-gatherers of Brazil lent themselves more easily to the classification as savages than the highly developed sedentary societies in the Spanish colonies.³⁵ Nevertheless, the Portuguese Crown

²⁷ In Venezuela, the indigenous policy of the state has rested until fairly recently upon the *Ley de Misiones* of 1915 which entrusted the Catholic Church with the task of integrating the native population into the modern society, see René Kuppe, *Recent Trends in Venezuela's Indigenist Law*, 8 *Law & Anthropology* (1996), 162.

²⁸ Williamson (note 5), 102–103.

²⁹ Between the arrival of the Spaniards and the end of the sixteenth century, the number of Indians living on the Mexican plateau and in the Andes fell by more than 80 per cent, according to numbers given by Wachtel (note 6), 212.

³⁰ Gibson (note 18), 404.

³¹ Margadant (note 10), 971.

³² *Ibid.*, 970.

³³ Williamson (note 5), 113–115.

³⁴ When Alexander von Humboldt visited New Spain at the end of the colonial era, he observed that the Indians constituted a separate nation, "privileged by law but humiliated by everyone, with no communication with Spaniards or mestizos because of the laws", see Stavenhagen (note 10), 19.

³⁵ Williamson (note 5), 170.

tried, although belatedly and finally in vain, to limit the unfettered economic exploitation of the natives which had taken hold during the first decades of colonization with the practice of slave-hunting expeditions in the bush, by stressing the need for a missionary policy of evangelization. In 1570, the king issued a decree which declared that the Indians were born free and could be enslaved only if they practised cannibalism or were taken as prisoners in a "just war".³⁶ The royal legislation, however, was ignored virtually completely in the colony, establishing a pattern which was to repeat itself throughout the whole colonial period. When the Crown, mostly at the instigation of the Jesuits who were in charge of the evangelization of the natives until the middle of the eighteenth century, enacted laws which put an end to slavery³⁷ or awarded land to the Indians,³⁸ these measures met with often violent reactions from the settlers who feared an end of their economic domination, and did rarely produce any tangible results.

The same happened to the Law of Liberties of 6 June 1755 which put an end to missionary tutelage and declared Indians to be free citizens, enjoying all the rights and privileges that went with citizenship. The law put the Indians in control of their villages and threatened those who invaded Indian land or tried to exploit "Indian simplicity" with punishment. The practical effect of the legislation, however, was crippled right from the start by the establishment of a scheme called *Diretório de Índios* which put laymen in charge of the "freed" Indians, who in theory should instruct them how to live in a civilized society, but in practice exploited them ruthlessly for their own economic advantage.³⁹ As a result of the failure to establish an effective legal protection for Indians, the native population at the end of the colonial era had been reduced by as much as three quarters, and those of its members who had not managed to retreat deeper into the jungle before the advancing Portuguese had largely been relegated to the bottom of society.⁴⁰

2. Indigenous Rights after Independence

The breakup of the Spanish Indies into separate republics at the beginning of the nineteenth century put an end to the existence of a separate *República de los Indios* with its own body of law and distinct system of local government. Its very notion was alien to the new order which rejected any alternative method of rec-

³⁶ Ibid., 172.

³⁷ Royal decrees on the prohibition of all forms of Indian slavery were issued on various occasions during the seventeenth century (1609, 1655, 1680) but all failed to achieve their main goal, see John Hemming, *Indians and the Frontier in Colonial Brazil*, in: Bethell (note 18), 533–534; Williamson (note 5), 177.

³⁸ E.g. the law of 1 April 1680 which explicitly recognized that the Indians were the "original and natural lords" of the land, see Hemming (note 37), 534.

³⁹ Hemming (note 37), 543–544.

⁴⁰ Ibid., 545; Williamson (note 5), 174.

ognizing, legally and politically, a separate way of life for the Indians.⁴¹ Especially to the liberals, the existence of a special body of law for Indians represented a civic aberration of the same type as the legal privileges of the clergy. The distinct legal status which the indigenous communities had enjoyed during the colonial era was therefore abolished in law in most countries during the first half of the nineteenth century.⁴² Typical of this liberal approach was the new constitution of Argentina of 1819 which in its Art. 28 proclaimed: "Siendo los indios iguales en dignidad y en derechos a los demas ciudadanos, gozarán de las mismas preminencias y serán regidos por las mismas leyes".

The legal emancipation of the Indians, however, was implemented less than half-heartedly in areas where it collided with vital financial and economic interests of the state. Although Indian tribute was formally abolished in any of the new countries (and had in fact already been banned by the Spaniards towards the end of their rule), it was reimposed in countries like Colombia, Ecuador, Peru and Bolivia in the form of a "contribution" from the Indian communities when it became clear that its abolition had depleted the revenues of already impoverished states.⁴³ At the same time, systems of forced labour were allowed to persist until the end of the century and beyond in certain Andean mining regions.⁴⁴

The colonial institution which was attacked most violently by liberal reformers was the concept of community rights over land. It was considered not only as detrimental in economic terms since it impeded the incorporation of land and labour into a market economy but was also seen as a formidable obstacle to the integration of the Indians into the new political order.⁴⁵ In some countries laws mandating the privatization of communal lands were enacted as early as the 1820s. These liberal property laws like the *Ley Lerdo* in Mexico tended to treat the community as a landlord from whom the individual peasant was to be liberated. Legislation deprived communities of their juridical personality, and thus of the capacity to defend land claims through litigation.⁴⁶ Unfamiliar of the operations of the market economy, many Indians lost their land to the expanding *haciendas*. The most important effect of republican land policy thus was to dispossess many Indian communities and push their members into the rural proletariat, thereby strengthening the system of *latifundia*, the vast estates held by the creole magnates.⁴⁷ The dis-

⁴¹ Tulio Halperin Donghi, *Economy and Society in Post-Independence Spanish America*, in: Leslie Bethell (ed.), *The Cambridge History of Latin America*, vol. III, *From Independence to c. 1870*, Cambridge 1985, 324.

⁴² Williamson (note 5), 244. Art. 12 of the Plan of Iguala of February 24, 1821, which paved the way for Mexican Independence, formally declared that all Mexican nationals were citizens without further distinctions, see Madargant (note 10), 976.

⁴³ Donghi (note 41), 323.

⁴⁴ Williamson (note 5), 245.

⁴⁵ Donghi (note 41), 324.

⁴⁶ See Jennie Purnell, *Popular Resistance to the Privatization of Communal Lands in 19th Century Michoacán*, <http://www.lanic.utexas.edu/project/lasa95/purnell.htm> (site last visited on 12-03-1999).

⁴⁷ Madargant (note 10), 978-979; Triana Antorveza (note 19), 283.

content with the dire consequences of the liberal land reform was to be one of the main elements in the participation of Indians in the revolutionary conflicts in Mexico in the 1910s and 1920s which led to the reintroduction of a version of communal landholding in the Constitution of 1917.⁴⁸

At the same time, independence and the new drive for economic expansion especially in the second half of the nineteenth century increased the pressure on the semi-nomadic and nomadic tribes which had largely been left to themselves during the colonial period because the territories they occupied were deemed to be of little economic value. From the 1860s successive governments of Argentina sent armies into the pampas and Patagonia to win the frontiers for settlement and cultivation. In Chile, the territories of the Araucanians were gradually taken over by Creole and European settlers. As this process continued, tribe cultures were pushed to the margin in order to make way for ranches, immigrants and railways, the bases for the economic progress of modern republics like Chile and Argentina.⁴⁹

Nevertheless, the twentieth century witnessed a renewed interest in literary circles, among intellectuals and in certain sectors of the political class in "the Indian question". At a general level, the positive evaluation of the Indians and their contribution to the history of their respective countries became an important aspect of attempts by the intellectual elite and the political leadership to create a sense of national identity especially in states like Mexico and Peru which still possessed a strong indigenous population and could point to a glorious pre-Colombian past.⁵⁰ In a more political perspective, it was increasingly recognized, at least by populist movements and leftist politicians, that the economic and social marginalization of the indigenous groups from the dominant culture constituted a serious obstacle to the establishment of a successful modern nation state. The movement of *indigenismo* reached its peak with the first Inter-American Indigenista Congress in Pátzcuaro, Mexico, under the government of Lázaro Cárdenas (1934–1940) with the participation of delegates from the whole continent. The Congress decided that special institutions should be created in each country which should represent the Indian population, lobby for protective laws and promote and implement progressive social, economic and educational programmes. The meeting resulted in the foundation of the *Instituto Indigenista Interamericano*, which has promoted research and discussion on Indian problems, and the creation of similar institutes or offices in many individual countries.⁵¹

The institutionalization of *indigenismo* had several important drawbacks, however. Its adoption as official policy by national governments meant that *indige-*

⁴⁸ Vargas (note 3), 40–41.

⁴⁹ Williamson (note 5), 246–247.

⁵⁰ Marc Becker, *Indigenismo and Indian Movements in Twentieth-Century Ecuador*, <http://www.lanic.utexas.edu/project/lasa95/becker.htm> (site last visited on 12–03–1999).

⁵¹ Guillermo de la Peña, *Rural Mobilization in Latin America since 1920*, in: Leslie Bethell (ed.), *The Cambridge History of Latin America*, vol. VI, *Latin America since 1930 – Economy, Society and Politics*, Part 2, Cambridge 1994, 435.

nismo was often used to advance the agenda set by the Mestizo politicians who dominated the political stage in the countries concerned. At the first Inter-American Indigenista Congress in Pátzcuaro no Indian group was formally present, and this picture was not to change for several decades to come.⁵² The primary objective of *indigenista* policies promoted by national governments remained the incorporation of the rural indigenous masses into the mainstream of the Mestizo culture. This objective was explicitly incorporated into the national legislation of a number of countries which dealt with the status of their native population.⁵³ *Indigenista* policies based on the goal of integration often reinforced the tendency to mix up the struggle of the Indians for the preservation of their traditional ways of life with the wider issue of the fight of the peasant population against economic exploitation. By conceiving the "Indian question" in terms of class struggle, its cultural and ethnic implications were deliberately neglected.⁵⁴ A typical example of this approach is provided by the government of Velasco Alvarado in the late 1960s and early 1970s which, though implementing important reforms in the agrarian sector and elevating Quechua to the status of official language, banned the word *indigena* from official legal terminology and replaced it with the term "peasant".⁵⁵ The insistence on assimilation often suggests that Indians could not be treated as full citizens before they had not adopted as their own the individualistic attitudes of their Mestizo surroundings. In this perspective Indians were either to be treated as minors or incompetents whose existence and behaviour should be monitored or controlled, or as individuals sophisticated enough to be assimilated and detribalized, and therefore not entitled to any special protection. In either alternative, the status as Indian appeared as an anomaly in a society of free and equal citizens.⁵⁶

It was only from the 1960s onwards that the Indians themselves emerged as actors on the political stage. Beginning in Ecuador, indigenous peoples began to organize themselves into groupings and confederations to defend their native cultures, traditional lands and human rights.⁵⁷ Indigenous self-organization increasingly replaced the need to have outsiders and intermediaries intervene on behalf of

⁵² *Ibid.*, 435.

⁵³ The Brazilian Statute of the Indian of 1973 subdivides indigenous persons into three categories: "isolated", "undergoing the process of integration", and "integrated", thus emphasizing the necessity to overcome the "isolation" of Indians through the successful completion of the integration process. See also Art. 1 of the Argentinian Law on Indigenous Policy of 1983: "Declárase de interés nacional la atención y apoyo a los aborígenes y a las comunidades o tribus indígenas existentes en el país, y su defensa y desarrollo por su plena participación en el proceso socioeconómico y cultural de la nación, respetando sus propios valores y modalidades."

⁵⁴ On this aspect see Stavenhagen (note 1), 35, 40–41.

⁵⁵ *Ibid.*, 328.

⁵⁶ Stephen Conn, Inside Brazilian Indian Law: a Comparative Perspective, in: Bradford Morse/Gordon Woodman, *Indigenous Law and the State*, Dordrecht 1988, 270–271; Kuppe (note 27), 162–164.

⁵⁷ The Shuar Federation in the Upper Amazon basin was one of the first indigenous organizations devoted to the defence of the collective interests of its member tribes, see Stavenhagen (note 1), 29–30.

their interests. These organizations have spread from the regional to the national level and ever more vigorously shaped the agenda on the status and rights of indigenous peoples at home as well as in the international arena.⁵⁸ This development, combined with other factors, has provoked significant changes in the way in which the problem of indigenous rights is defined in most Latin American legal systems today.

II. Constitutional and Legal Protection of Indigenous Rights in Contemporary Latin America: a Survey

1. General Trends

Starting with Guatemala in 1985, a number of Latin American countries have included special provisions dealing with the status and rights of indigenous communities in their constitutions.⁵⁹ Only the constitutions of Chile, Uruguay, El Salvador and Costa Rica do not contain any explicit reference to the status of indigenous peoples at all. Of these countries, Uruguay possesses virtually no Indian population, while the percentage of Indians living in Costa Rica is comparatively minor.⁶⁰ Both Costa Rica and El Salvador have incorporated the Convention No. 169 of the International Labour Organization dealing with the status and rights of indigenous and tribal peoples in independent countries.⁶¹ In addition, Costa Rica has recognized by special legislation the right of indigenous peoples to organize themselves in a traditional community structure within their territories.⁶² In Chile, the *Ley Indígena* 19.253 adopted by Congress establishes a comprehensive framework for the recognition, protection and development of the Indians living on Chilean territory.

It would therefore seem that the lack of specific constitutional provisions dealing with indigenous rights does not necessarily imply a disregard for the special needs of indigenous groups and the distinct character of their cultures. It raises, however, difficult questions with regard to the effectiveness of the protection granted through ordinary legislation. In the absence of constitutional reforms recognizing the pluricultural and multiethnic character of the nation and the need for the protection of Indian culture and identity, statutory schemes which establish a special legal regime for indigenous peoples remain vulnerable to arguments questioning their conformity with those traditional principles of constitutional law

⁵⁸ Ibid., 20–32.

⁵⁹ For an overview of the different constitutional provisions see Isabelle Schulte-Tenckhoff, *La question des peuples autochtones*, Brussels 1997, 34–36.

⁶⁰ The indigenous population in Costa Rica equals one per cent of the total population (source: U.S. Department of State, Background notes).

⁶¹ Bartolomé Clavero, *Ley nacional y costumbre indígena: enseñanza de Costa Rica*, 102 *Estudios Políticos* (1998), 187.

⁶² Indigenous Law No. 6172.

which give legal expression to the concept of the homogenous nation state, most notably national unity and equality before the law.

Of those Latin American constitutions which formally acknowledge the existence of indigenous communities on their national territory, the constitution of Venezuela, which was enacted in 1961 and amended for the last time in 1983, adopts a highly conservative approach. The goal of "progressive incorporation" of the Indian population into the life of the nation is explicitly reaffirmed, while the task of creating the legal regime necessary for the protection of the indigenous communities is left entirely to the legislature.⁶³ The Supreme Court of Venezuela, however, has used this provision in a recent decision in a creative and imaginative way to strengthen the position of Indians with regard to political decisions which directly affect their rights and conditions of living. The Court ruled that an essential element of the protective regime referred to in Art. 77 of the Constitution is the right to an effective participation in the political process which is recognized as a necessary element of a democratic society in the various international human rights instruments to which Venezuela is a party, particularly in Art. 25 of the International Covenant on Civil and Political Rights, Art. XX of the American Declaration on Human Rights and Art. 23 of the Inter-American Convention on Human Rights. According to the Court, the right to an effective political participation is of special significance to the Indian population since Indians belong to the most vulnerable sectors of society whose vital interests in the maintenance of their traditional habitat are subject to various and often harmful outside pressures. The Court therefore declared null and void a law of the federal state of Amazonas which had purported to fix the boundaries of the administrative and municipal districts in that state without sufficient consultation of the indigenous communities living there. It instructed the state legislature to seek the approval of the indigenous groups for the enactment of a new law on this issue.⁶⁴

By contrast, most Latin American constitutions nowadays explicitly acknowledge the distinct ethnic character and the special culture of the indigenous peoples.⁶⁵ The constitutional recognition, however, takes different forms. While some constitutions refer in rather general terms to the status of the indigenous peoples, others contain elaborate provisions on the different rights connected with this status.⁶⁶ An example of the first type of constitutional regulation can be found in the Constitution of Honduras which only briefly mentions the obligation of the state "to preserve and stimulate the native cultures" and the genuine expressions

⁶³ Art. 77: "El Estado propenderá a mejorar las condiciones de vida de la población campesina. La ley establecerá el régimen de excepción que requiera la protección de las comunidades de indígenas y su incorporación progresiva a la vida de la Nación."

⁶⁴ Sentencia de la Corte Suprema de Justicia de Venezuela de 5-12-96, 26 Revista IIDH (1998), 110.

⁶⁵ Art. 75 No. 17 of the Constitution of Argentina; Art. 1 of the Constitution of Bolivia; Art. 1 of the Constitution of Ecuador; Art. 7 of the Colombian Constitution; Art. 66 of the Constitution of Guatemala; Art. 4 of the Mexican Constitution.

⁶⁶ María Gómez Rivera, *El derecho indígena frente al espejo de América Latina*, 26 Revista IIDH (1998), 49.

of national folklore and popular arts and crafts.⁶⁷ By contrast, the constitutions of Nicaragua,⁶⁸ Colombia⁶⁹ and Brazil⁷⁰ all regulate various aspects of Indian life, in particular land rights and the administrative status of indigenous communities, in a detailed manner.

In those countries with a specific constitutional regulation of indigenous rights these are often placed in different contexts. In Panama⁷¹ and Bolivia,⁷² the provisions on indigenous communities form part of the constitutional framework for the agrarian sector of the national economy, thus subsuming the Indian problem under the question of the status of the rural population at large. Other constitutions include indigenous rights in those chapters which are devoted to the nation in general (Mexico) or the territorial organization of the state (Nicaragua). Finally, the constitutions of Paraguay⁷³ and Ecuador⁷⁴ deal with indigenous rights in the context of fundamental rights by recognizing them as collective rights enjoyed by particular sectors of society.

Even in countries with an explicit constitutional recognition of the special status of indigenous groups the task of defining indigenous rights more precisely is usually left to the legislature. The constitution of Argentina mentions indigenous rights as part of the legislative competences of Congress.⁷⁵ Other constitutions emphasize that the social, economic, and cultural rights of the indigenous peoples are recognized, respected and protected subject to the law (*en el marco de la ley*)⁷⁶. In a similar vein, the Mexican constitution formulates a general mandate for the legislature to establish the framework for the development of Indian language, culture and tradition and the application of indigenous customs in agrarian law suits, without fixing any precise guidelines for the accomplishment of this task.⁷⁷

2. Specific Issues

a) Definition and legal status of Indians

With the recognition of the distinct ethnic and cultural character of indigenous groups in contemporary Latin American legal systems the question arises who counts as an indigenous person and is therefore entitled to claim the specific rights conferred upon indigenous communities either directly in the Constitution or by ordinary legislation. This question is of special significance in societies which have

⁶⁷ Art. 173 of the Constitution of 1994.

⁶⁸ Arts. 89–91, 180, 181 of the Constitution of 1987/1995.

⁶⁹ Arts. 10, 63, 68, 72, 171, 176, 246, 286, 329, 330 of the Colombian Constitution.

⁷⁰ Art. 231 of the Constitution of Brazil. Compare its text in Annex, X., in this issue.

⁷¹ Arts. 119, 122, 123 of the Constitution of 1972.

⁷² Art. 171 of the Constitution of 1967/1994.

⁷³ Title II, Chap. V.

⁷⁴ Chapter 5, Section 1.

⁷⁵ Art. 75 No. 17 of the Constitution of Argentina.

⁷⁶ Art. 171, para. 1 of the Bolivian Constitution.

⁷⁷ Art. 4 of the Mexican Constitution.

been marked by a long history of miscegenation and as a result possess a large population of intermediate ethnicity. In many Latin American countries persons with mixed European and indigenous ancestors today form the dominant ethnic element. Although in colonial times ethnic gradations were of consuming interest since they determined not only the social rank but also the juridical status of an individual, they have increasingly lost their importance with the efforts of Latin American political leaders and intellectuals to build modern nation states on the basis of racially integrated societies. The terms Mestizo and Indian gradually lost their previous racial connotation and are nowadays used entirely to designate cultural groups. Mestizo and Ladino have become synonyms for people either with a solely European or with a mixed European-indigenous background who are culturally Hispanic. At the same time, members of indigenous groups also may be called Mestizos or Ladinos if they adhere to the dominant Hispanic cultural values.⁷⁸

This leaves the question to be answered whether the identification of persons as Indian should be left to the individuals concerned and to the group to which they claim to belong or whether it should be carried out by some third party presumably possessing a special expertise on the issue, i.e. the government institution which is in charge of administering Indian affairs. In the past, it is the latter system which has frequently been applied by national governments. It is open to abuse, since considerations of administrative expediency and the political requirements of the day may unduly impinge on the decision of the competent state body to grant or to refuse the recognition as Indian. Indigenous organizations therefore generally claim today the right to self-definition (*derecho de autodefinición*).⁷⁹

Current legislation in Latin American countries seems to rely upon a combination of both objective and subjective criteria. For example, Art. 3 of the Brazilian Statute of the Indian of 1973 prescribes that any individual of pre-Colombian origin and ancestry who identifies himself and is identified as belonging to an ethnic group whose cultural characteristics distinguish it from the mainstream society is an Indian. The objective criteria are stressed in the definition given by the Chilean *Ley Indígena* of 1993. According to Art. 2 of this law, an individual is to be considered an Indian a) if he or she has at least one parent of Indian origin, i.e. a parent who is a descendant of the original inhabitants of the land recognized by the law as traditionally being occupied by one of Chile's indigenous communities, b) if he or she descends from one of the indigenous ethnicities which live on the national territory, provided he/she has at least one Indian family name, c) if he or she adheres to the cultural traditions of an indigenous community by practising a way of life, a manner of clothing or a type of religion which is traditionally upheld by the community in question, and identifies himself or herself as Indian. The status

⁷⁸ Merrill/Miró (note 2), 95.

⁷⁹ Stavenhagen (note 1), 42.

as Indian is certified by the National Corporation for Indigenous Development. A refusal to deliver the certificate can be challenged in the courts.⁸⁰

b) Indigenous land rights

The issue of land rights is central to the cultural and physical survival of the Indians in Latin America. Indigenous groups do not only rely upon the land to provide them with the natural resources they need for their subsistence, they are also frequently tied by spiritual links to the lands of their ancestors which are pivotal in shaping their identity as a group. This special relationship with the land excludes in the Indian view the acceptance of the individualistic concept of property rights which plays such a prominent role in modern market economies governed by the principle of free circulation of economic and financial assets. The protection of their traditional lands and of the established forms of collective ownership and exploitation has been high on the agenda of indigenous organizations ever since they emerged as actors in the political arena during the 1960s.

Indian efforts to defend their traditional lands received official recognition, albeit in an indirect manner, as early as 1917 when the Mexican Constitution established collective property of communal lands in the form of *ejidos* firmly as a part of the domestic legal system.⁸¹ While this was done without direct reference to the specific needs of the Indian population, some of the Latin American constitutions adopted or amended over the last decade explicitly recognize the right of indigenous communities to keep the land they have traditionally occupied. One of the most advanced provisions in this respect is contained in the Brazilian Constitution of 1988 which speaks of the "original rights" of the Indians to their traditional lands, thus making it clear that these rights do not stem from an act or grant of the State, but from the historical status of occupancy and ancestral utilization of the land.⁸² In most countries, Indian lands enjoy a special legal status which includes the imprescriptible character of Indian rights and prohibits the alienation or division of communal lands.⁸³ Moreover, the legal personality of indigenous communities is generally recognized by law, which allows these communities to acquire property rights in their own name and to appear as parties in administrative and legal proceedings which impinge on their collective rights.⁸⁴

The effective implementation of Indian claims to preserve their ancestral lands have in the past met with numerous obstacles. Difficult problems arise from the

⁸⁰ *Ley Indígena* 19.253, Art. 3.

⁸¹ Rubén Valdez Abascal, *Reformas al artículo 27 de la Constitución Política de los Estados Unidos Mexicanos en materia agraria*, in: Instituto de Investigaciones Jurídicas, *Modernización del derecho mexicano – Reformas constitucionales y leyes 1992*, México 1993, 57–58.

⁸² Art. 231 of the Brazilian Constitution.

⁸³ Art. 75 No. 17 of the Constitution of Argentina; Art. 231 No. 4 of the Brazilian Constitution; Art. 63 of the Colombian Constitution; Art. 123 of the Constitution of Panama; Art. 64 of the Constitution of Paraguay; Art. 89 of the Peruvian Constitution.

⁸⁴ Art. 75 No. 17 of the Argentinian Constitution; Art. 171, para. 2 of the Bolivian Constitution; Art. 286 of the Colombian Constitution; Art. 89 of the Constitution of Peru.

need to harmonize Indian customs concerning the possession and exploitation of land with the general legislation on the right to acquire and own real property and the granting of title.

Most legal systems require a registered title to prove ownership of land, and often proceed on the assumption that land which is not registered in this way belongs to the state.⁸⁵ This makes it difficult for indigenous groups to receive a legally valid title to lands they have traditionally occupied or to obtain the return of territories of which they have been illegally dispossessed by white settlers or government authorities. Although in some Latin American countries, notably in Mexico and Colombia, this problem has received some attention early in this century, even there Indian groups have encountered massive resistance from government officials and the courts when trying to gain legal recognition for their communal land rights. Where their claims have not been roundly rejected, they have often given rise to interminable legal proceedings in the courts. Especially in Mexico this impasse has repeatedly turned into brutal confrontation between indigenous groups on the one side and private landowners and government authorities on the other when the Indians, tired of waiting to obtain their lands and discouraged by unanswered petitions, resorted to violent means and occupied lands in the vicinity which were legally owned by others.⁸⁶ Promises to regularize the legal situation of communal possession of lands and to speed up the settlement of land disputes therefore feature prominently in recent efforts of Latin American governments to meet the basic economic and social needs of their indigenous population.⁸⁷ Measures designed to achieve this objective include the establishment of procedures and mechanisms to take into account Indian customary norms in administrative and legal proceedings dealing with land rights⁸⁸ and the compensation of Indian communities whose lands have been plundered and cannot be restored with lands acquired for that purpose.⁸⁹ It is too early to assess whether the solemn declarations of intent included to this end in recent constitutional amendments and peace accords will result in any notable improvement of the highly unsatisfactory situation of indigenous groups with regard to land rights persisting to this day in the countries concerned.

⁸⁵ This is the case in Ecuador, see Comisión Interamericana de Derechos Humanos, Informe sobre la situación de los derechos humanos en Ecuador, OEA/Ser. I/VII.96, doc. 10 rev. 1, cap. IX.

⁸⁶ Vargas (note 3), 48–49; Thomas Benjamin, *A Rich Land, a Poor People*, University of New Mexico 1989, 229.

⁸⁷ They are part of the peace accords concluded by the Guatemalan Government and the guerrilla movement between 1994 and 1996, see the Agreement on Identity and Rights of Indigenous Peoples, Doc. A/49/842 – Doc. S/1995/256, sec. F; see also the Joint Proposals of the Federal Government of Mexico and the Zapatista National Liberation Army (EZLN) for consideration by the competent national authorities of January 18, 1996, <http://www.spin.com.mx/~floresu/FZLN/dialogo/documento-2.html> (site last visited on 05–03–1999).

⁸⁸ Art. 4 of the Mexican Constitution and sec. V. b) of the Joint Proposals (note 87).

⁸⁹ Sec. IV. F. 7. of the Agreement of 31 March 1995 on Identity and Rights of Indigenous People between the Government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca.

Attempts to secure a comprehensive and effective recognition of Indian land rights also conflict frequently with the broader approach adopted by national governments to the development of rural areas which accords priority to settlement and the full use of the land. Even some legal systems which in principle recognize the need for a special protection of communal lands hesitate as to the extent of this protection. Already before Chile became a model for the virtues of free market policies under military rule, Law 17729 of 1972 provided for the division of indigenous lands either at the request of the absolute majority of the community labourers or with the approval of the competent national body for indigenous development policies, the *Instituto de Desarrollo Indígena*.⁹⁰ A similar provision has been incorporated into the *Ley Indígena* of 1993.⁹¹ In the same vein, the Agrarian Development Law of Ecuador of 1994 allows for the division or alienation of communally held indigenous lands when two thirds of the communal assembly so decide. This provision has attracted considerable criticism from indigenous organizations which claim that it puts the preservation of indigenous lands at risk.⁹²

Even more complicated is the question of land rights with regard to the non-sedentary tribes living in the South American interior. Since they often live as hunter-gatherers with no permanent settlement the demarcation of their traditional lands raises more problems than in the case of the sedentary agrarian societies of the Andes or Mexico.⁹³ The most advanced South American constitutions explicitly recognize the right of the indigenous communities to the development of their ethnic and cultural identity within their respective habitat.⁹⁴ Moreover, the Brazilian constitution bestows constitutional rank upon the concept of "original domain" in the field of Indian land rights, based on the status of the Indians as the initial occupants of their lands. The demarcation of their lands is assigned to the federal government and thus removed from direct local pressures. The Constitution itself establishes the criteria which are to be used in deciding whether lands are to be considered as having been traditionally occupied by Indians. These are the lands on which they have established a permanent residence; those used for their productive activities; those which are indispensable for the preservation of the environmental resources necessary for their well-being or their physical and cultural reproduction in accordance with their usages, customs and traditions.⁹⁵ In accordance with the constitutional objective of an effective protection for indigenous lands, it has to be assumed that the aforementioned criteria are to be applied alternatively, so that indigenous groups can claim lands even if they have not

⁹⁰ See Stavenhagen (note 10), 68.

⁹¹ *Ley Indígena* No. 19.253, Art. 16: The judge decides on the division of the indigenous territory on the request of the absolute majority of the people living there who can claim hereditary rights to the land.

⁹² Comisión Interamericana de Derechos Humanos, Informe sobre la situación en Ecuador (note 85), cap. IX.

⁹³ Schulte-Tenckhoff (note 59), 37.

⁹⁴ Art. 63 of the Constitution of Paraguay; Art. 231 of the Brazilian Constitution.

⁹⁵ Art. 231 No. 1, para. 11.

established a permanent residence there – a requirement difficult to meet for non-sedentary tribes⁹⁶ – provided they need it for one of the other purposes listed in Art. 231.

Lands traditionally occupied by Indians, although technically remaining the property of the Union⁹⁷, are earmarked for their permanent possession, which means that they are entitled to the exclusive usufruct of the resources of the soil, the rivers and the lakes existing on such lands.⁹⁸ In practice, the process of demarcation consists of the identification of the area concerned by the National Indian Authority (FUNAI), the establishment of its borders by a decree of the Ministry of Justice, its physical demarcation, the ratification by presidential edict and the registry in the real property cadastral office.⁹⁹ Between 1990 and 1995, the portion of indigenous lands in Brazil on which legal documentation has been completed has increased considerably.¹⁰⁰ However, the rights of indigenous peoples with regard to their lands have constantly been challenged by individuals and groups interested in the unrestrained economic exploitation of the Amazon forest and its natural resources. This challenge has been advanced by illegal means – like the unlawful intrusion on Indian land for the purpose of lumbering, mining or agricultural operations – as well as by legal devices. Starting in 1993, Brazilian courts especially in the South and the Northeast have begun to issue judgements contrary to the rights of the indigenous peoples on the ground that the government decree establishing the procedures for demarcation of indigenous lands did not grant an adequate right of defence to third parties whose rights were possibly affected by the decision. To avoid the possibility of such a challenge, the government issued a new decree enabling private individuals and local or state government officials to contest the creation or demarcation of indigenous areas by submitting evidence which repudiates the claim of prior occupancy or attests to the rights of third parties, a measure harshly criticized by indigenous groups.¹⁰¹

The recognition of indigenous lands rights in general does not imply an exclusive title to exploit the natural resources which are to be found in Indian territory. In most cases, the State retains ownership of subsurface minerals and oil on community lands. Those constitutions which address the issue limit themselves to granting the indigenous population living on the territory a fair share of the economic benefits reaped from the exploitation of non-renewable natural resources in their lands.¹⁰² They also provide for some form of participation and consultation of the Indians in the decision-making process leading to the establishment of

⁹⁶ Schulte-Tenckhoff (note 59), 37.

⁹⁷ Art. 20 XI of the Brazilian Constitution.

⁹⁸ Art. 231 No. 2.

⁹⁹ Comisión Interamericana de Derechos Humanos, Informe sobre la situación de los derechos humanos en Brasil, OEA/Ser. L./V/II.97 Doc. 29 rev. I, cap. VI., para. 31.

¹⁰⁰ Ibid., cap. VI., para. 32.

¹⁰¹ Ibid., cap. VI., paras. 34–37.

¹⁰² Art. 84 No. 5 of the Constitution of Ecuador; Art. 231 No. 3 of the Brazilian Constitution.

exploitation plans and the granting of concessions¹⁰³ and – in the case of the Constitution of Ecuador of 1998¹⁰⁴ – recognize their right to receive indemnization for the social and ecological damages caused in the course of the projects. They stop short, however, of conceding the indigenous communities the right to veto the exploitation of non-renewable resources in their area. The final decision on these matters rests with the competent national authorities.¹⁰⁵ Only the Constitution of Nicaragua which was amended to this effect in 1995 makes the exploitation of national resources in the territories of the communities on the Atlantic Coast dependent on the approval of the Autonomous Regional Council.¹⁰⁶ A similar principle has been enshrined in the Agreement on Identity and Rights of Indigenous People of 31 March 1995 concluded between the government of Guatemala and the leadership of the country's guerrilla movement in their bid to end the country's seemingly interminable civil war. The Guatemalan government undertakes to secure the approval of the indigenous communities prior to the implementation of any project for the exploitation of natural resources which might affect the subsistence and way of life of the communities.¹⁰⁷ However, these rules have not yet been implemented.

Recent Latin American constitutions explicitly prohibit the resettlement of indigenous communities¹⁰⁸ or make its admissibility dependent on the express consent of the community concerned.¹⁰⁹ This is in accordance with the requirements contained in Art. 16 of the Convention No. 169 of the International Labour Organisation as well as the view expressed on the issue by the Inter-American Commission on Human Rights (see below IV.1.). The most detailed regulation of this question is to be found in the constitution of Brazil. The constitution of 1988 takes great care to identify the conditions in which removal of the indigenous groups from their territory against their will may be justified. A resettlement is only admissible where a catastrophe or an epidemic threatens the existence of the indigenous population or for reasons of Brazilian sovereignty, i.e. where the resettlement is necessary in order to defend the country against foreign aggression. The resettlement can only be decided by Congress and is of a temporary nature, the

¹⁰³ Art. 75 No. 17 of the Constitution of Argentina; Art. 231 No. 3 of the Brazilian Constitution; Art. 330 of the Colombian Constitution.

¹⁰⁴ Art. 84 No. 5.

¹⁰⁵ See Art. 231 No. 3 of the Brazilian Constitution: the decision to authorize the exploitation of subsurface minerals in indigenous territories is taken by the National Congress in the form of a statute after giving the indigenous communities which are going to be affected by the decision the opportunity to present their views. Art. 330 of the Colombian Constitution is less specific: In taking decisions which concern the exploitation of national resources in Indian territories, the government "will promote" the participation of representatives of the respective Indian communities.

¹⁰⁶ Art. 181: "Las concesiones y los contratos de explotación racional de los recursos naturales que otorga el Estado en las Regiones Autónomas de la Costa Atlántica deberán contar con la aprobación del Consejo Regional."

¹⁰⁷ Sec. IV, F. 6 (c).

¹⁰⁸ Art. 84 No. 8 of the Constitution of Ecuador; Art. 231 No. 5 of the Brazilian Constitution.

¹⁰⁹ Art. 64 of the Constitution of Paraguay.

Indians being granted the constitutional right to return immediately to their original lands once the danger has passed.¹¹⁰

The issue of resettlement has to be distinguished from the problem of expropriation of communal lands in the public interest. The seizure of collective land-holdings is generally allowed in cases of public necessity¹¹¹ or where the land has been previously abandoned by the original occupants (a formula which is likely to give rise to frequent disputes).¹¹² Art. 231 No. 6 of the Brazilian constitution envisages the possibility of recognizing acts of occupation or exploitation of indigenous lands as legally valid in cases pertaining to the public interest of the Union, leaving the details of the regulation to the implementing legislation.

The problem of compensation for lands which have been lost in the past due to illegal occupation is hardly ever addressed in these terms in the relevant constitutional or statutory legislation. Most official texts gloss over the issue by referring to the need to endow the indigenous groups with adequate land in order to allow for their proper development. One of the few documents squarely confronting the problem is the Agreement on Identity and Rights of Indigenous People between the government of Guatemala and the leadership of the national guerrilla movement. The Agreement acknowledges that the indigenous communities of Guatemala have historically been the victims of land plundering, and obliges the government to institute proceedings to settle the claims to communal lands and to restore or pay compensation for these lands. To this end, the government shall suspend the statute of limitations in respect of any action involving the plundering of the indigenous communities. Where this is not possible because the statute of limitations has already expired, the government shall establish procedures to compensate the communities which have been plundered. The Agreement establishes the principle of compensation in kind, i.e. with lands acquired for that purpose.¹¹³

c) Administration of justice and indigenous law

Indigenous groups possess a great variety of social structures and customary norms which are distinct from the institutions and norms governing the political, economic and social life of the white and Mestizo sectors of society. The question therefore arises to which extent these norms should be recognized by or even formally incorporated into the national legal systems of their respective countries. It is significant not only for the organization of social relations within the different communities, but also for their and their members' relationship with the outside world. Since independence, however, indigenous customary law has been ignored by most legal systems in Latin America. The concept of two separate jurisdictions for the Spaniards and the Indians was replaced by the principle of equality before

¹¹⁰ Art. 231 No. 5.

¹¹¹ E.g. in Art. 84 No. 2 of the Constitution of Ecuador.

¹¹² Art. 89 of the Peruvian Constitution.

¹¹³ Sec. IV. F. 7. of the Agreement.

the law, according to which Indians were considered as free citizens who enjoyed the same rights and duties as everybody else, regardless of their race, creed or social background.¹¹⁴ In places where it was all too obvious that Indians did not fit into the prevailing legal and social structure they were accorded a special status, a measure which was usually considered to be of a merely temporary character since it would prepare the ground for the full integration of the Indians into mainstream of national life. To this end they were treated as persons lacking full legal capacity within the meaning of the relevant private and criminal law provisions.¹¹⁵

Even today recognition of indigenous customary law is largely confined to intra-community matters. In some Andean countries and Colombia, the constitution explicitly grants the established authorities of the indigenous communities the right to exercise jurisdictional functions in community affairs. The exercise of this power is subject to the limits established by the Constitution, especially by its fundamental rights provisions, and by the general laws. The accommodation of the jurisdictional powers exercised by indigenous authorities within the general framework of judicial organization is regulated by statutory legislation.¹¹⁶

More difficult is the position of Indians in legal and administrative proceedings before the state authorities. The proceedings are generally conducted in Spanish, and government officials as well as judges are mostly unfamiliar with Indian customs and rules which could have a bearing on the case. The general position in the past has been to deny any legal value to Indian customary norms.¹¹⁷

A different debate concerned the question whether the Indians' lack of familiarity with the official legal order should be accommodated within the legal system through the creation of rules providing for a special treatment of Indians in ordinary private and criminal law cases. This question has not received a uniform answer throughout Latin America. One school of thought, which has been especially strong in Mexico, emphasizes the fundamental importance of the principle of equality before the law and denies any special legal treatment to Indians. The other view argues that Indians often live at the margin of societies dominated by whites and people of mixed descent and are unable to understand the official legal norms because they do not share the underlying moral and philosophical values which these norms reflect and which are those of the dominant Hispanic legal tradition, but adhere to a completely different set of values.¹¹⁸ It enjoys substantial support in countries like Brazil and Colombia where the indigenous population consists primarily of nomadic and semi-nomadic groups which possess social structures very different from those of the sedentary tribes in Mexico and in the Andean region and have lived isolated often for centuries from any form of His-

¹¹⁴ Stavenhagen (note 10), 85.

¹¹⁵ Kuppe (note 27), 162; Conn (note 56), 271.

¹¹⁶ Art. 171 of the Constitution of Bolivia; Art. 149 of the Constitution of Peru; Art. 246 of the Constitution of Colombia.

¹¹⁷ Rodolfo Stavenhagen, *Derecho consuetudinario indígena en América Latina*, in: Stavenhagen/Iturralde (note 19), 36.

¹¹⁸ Stavenhagen (note 10), 85.

panic civilization. The uniform application of rules designed for social and economic structures of a different kind to these peoples would appear to be wholly arbitrary. Legislation and jurisprudence in these countries therefore have often accorded a special legal status to Indians, with the intention of protecting them, depending on their respective degree of acculturation, by subjecting them to a relative legal incapacity which would prevent them from being abused for their inexperience in commercial matters or being brought to trial for crimes which on the basis of their cultural norms they are unable to perceive as such.¹¹⁹

During the last decade, however, the awareness of the need to take into account indigenous rules in legal proceedings to which Indians are a party has increased. The new Art. 4 of the Mexican Constitution expressly prescribes that in agrarian suits and proceedings involving indigenous communities the legal practices and customs of the communities shall be taken into account in the terms established by the law. The same provision guarantees the member of indigenous groups in general terms an effective access to the jurisdiction of the state. This would at least imply the obligation of the state to provide interpreters free of charge in proceedings in which one or more parties do not speak Spanish fluently.¹²⁰ Whether it also requires the taking into account of substantive indigenous norms outside agrarian proceedings wherever they might have a bearing on the decision of the particular case is rather doubtful. Unlike Paraguay,¹²¹ Mexico has not enacted a constitutional provision obliging the courts generally to give attention to Indian customary law. Besides, the application of customary norms is fraught with considerable practical difficulties, since the courts in general are not familiar with Indian customary law and therefore have to rely on expert witnesses who, belonging to the same community as the Indian party or the accused, often sympathize with him or her.¹²² This problem could only be avoided by the establishment of special courts with a thorough knowledge of indigenous customary law. For the time being, however, governments in Latin America are not prepared to consider the possibility of a genuine plurality of legal systems within one country which would go beyond the recognition of local dispute settlement mechanisms in intra-community matters and include the creation of state organs with special jurisdiction for the decision of disputes involving members of the indigenous communities by applying a separate body of law based on the relevant customary norms of the community concerned.

¹¹⁹ Ibid., 87–91; Comisión Interamericana de Derechos Humanos, Informe sobre la situación en Brasil (note 99), cap. VI, paras. 9–16.

¹²⁰ Corresponding changes have been implemented in the law of criminal proceedings: Every person who does not sufficiently speak or understand Castilian Spanish, regardless whether he is involved as suspect, as victim or as a witness, has the right to be assisted by an interpreter from the very start of the proceedings, see Art. 128 of the Federal Code on Penal Procedure.

¹²¹ Art. 63 of the Constitution of Paraguay.

¹²² Gómez Rivera (note 66), 76.

d) Right to cultural identity

The protection of their respective culture is central to the identity of the indigenous peoples, which nowadays is defined more in cultural than in racial terms. Although most Latin American constitutions contain some general references to the recognition and protection of native culture and identity, not all of those countries with a sizeable indigenous population have so far explicitly acknowledged the multicultural or pluricultural character of their nations.¹²³ The concept of indigenous identity is not defined in the constitutional and statutory texts dealing with the cultural rights of the native communities, but its main elements may be gathered from the Agreement on the Identity and Rights of Indigenous Peoples which the Guatemalan government concluded with the guerrilla movement in that country as part of a comprehensive peace settlement. According to this document, the identity of the indigenous peoples is a set of elements which define them and ensure their self-recognition. In the case of the Maya people, it is deemed to include (a) direct descent from the ancient Mayas, (b) languages deriving from a common Mayan root, (c) a specific view of the world based on the harmonious relationship of all elements of the universe, (d) a common culture based on the principles and structures of Mayan thought, and (e) a sense of their own identity.¹²⁴

It would appear from this definition that the constituent characteristics of Indian identity besides the ethnic element and the sense of self-recognition are to be found in a common language and a distinct cultural and spiritual tradition. Accordingly, the respect for Indian languages assumes a fundamental importance in the attempts to preserve the cultural identity of indigenous communities. Since the beginning of the nineteenth century, Castilian Spanish has been made the official language in all newly independent Spanish-speaking countries whereas the various Indian languages were considered as local or regional "dialects" unworthy of any official protection. As a result, the formal education in public and private schools and universities was predicated on the teaching of Spanish as the official language of the state. In legal and administrative proceedings, the use of indigenous languages was often prohibited.¹²⁵ Indians without sufficient knowledge of Spanish were excluded from any meaningful participation in the economic or social life of the majority sectors of society. This situation inevitably created a strong pressure to abandon their own language in favour of Spanish as the language of the dominant classes and to assimilate themselves into the mainstream Hispanic culture, thereby eroding the bases of their cultural distinctiveness.

¹²³ These countries include Bolivia (Art. 1 of the Constitution), Ecuador (Art. 1 of the Constitution), Colombia (Art. 7 of the Constitution) and Mexico (Art. 4 of the Constitution). Congress has approved in early 1999 a constitutional amendment which explicitly recognizes the pluricultural, multiethnic and multilingual character of the Guatemalan nation but this amendment has not been approved in the constitutional referendum of May 1999; by contrast, a reference to the multicultural nature of the nation is conspicuously absent from the text of the Constitution of Peru, one of the countries with the largest indigenous population.

¹²⁴ Agreement on the Identity and Rights of Indigenous Peoples (note 87), sec. I. 2.

¹²⁵ Stavenhagen (note 1), 43.

Recent legislation in Latin America tends to show a greater concern for the preservation of Indian languages. Nevertheless, the right to bilingual education, which is an indispensable prerequisite for the preservation of Indian language and culture, has received only limited official recognition so far.¹²⁶ Most national constitutions prefer to speak instead in fairly general terms of the duty of the state to protect and promote the development of Indian languages.¹²⁷

The same applies to the problem of the use of indigenous languages in official proceedings. Of those constitutions which address the question, the Nicaraguan and Ecuadorian constitutions recognize in principle that the languages of the indigenous communities may be used in official proceedings but leave the details to statutory legislation.¹²⁸ The Peruvian and Colombian constitutions declare the aboriginal languages to be official languages of the state in those areas of the country where they prevail.¹²⁹ By contrast, the Mexican constitution does not address the problem of the use of indigenous languages in administrative and legal proceedings explicitly. However, the right of the indigenous peoples to an effective access to the courts granted in Art. 4 of the Constitution would seem to imply that Indians can use their native language and have recourse to the services of an interpreter if they do not speak Spanish fluently. In Chile, the courts are legally obliged to permit the use of native languages either on request of an interested party or without request in proceedings in which the personal presence of the Indian is required by law (i.e. in criminal matters) and must avail themselves of the assistance of a competent interpreter to this end.¹³⁰

e) Right to political participation and self-determination

An important aspect of the recognition and protection of indigenous rights concerns the participation of the indigenous communities in the decision-making processes of the regional and national institutions of government since the policy decisions which are going to affect the everyday life of indigenous groups are mostly taken at this level. However, most constitutional systems in Latin America mention the rights of the Indians to develop their own institutions and forms of social organization only in general terms and do not envisage any specific participation of indigenous groups in political and administrative decisions beyond the local level. One notable exception to this general rule is the Colombian constitution of 1991 which reserves two senatorial posts and as many as five seats in the National Congress for representatives of indigenous peoples.¹³¹

¹²⁶ Most notably in the constitutions of Argentina (Art. 75 No. 17), Ecuador (Art. 84 No. 11) and Colombia (Art. 10).

¹²⁷ E.g., Art. 171 of the Constitution of Bolivia; Art. 231 of the Brazilian Constitution; Art. 4 of the Mexican Constitution.

¹²⁸ Art. 2 of the Constitution of Ecuador; Art. 11 of the Constitution of Nicaragua.

¹²⁹ Art. 48 of the Peruvian Constitution; Art. 10 of the Constitution of Colombia.

¹³⁰ *Ley Indígena* No. 19.253, Art. 54.

¹³¹ Arts. 171, 176 of the Colombian Constitution.

Moreover, it introduces the concept of indigenous territories which it regards as territorial entities on a par with departments, districts and municipalities. The indigenous territories are another regional configuration and may lie within the jurisdiction of one or several departments.¹³² Under the Constitution, they are autonomous for purposes of managing their interests, levy taxes and are entitled to a share of the national revenues.¹³³ The territories are governed by special councils established in accordance with the rules and customs of the community concerned. The councils shall be responsible, among other things, for making sure that the laws are observed, for designing economic and social development policies and helping to maintain law and order.¹³⁴ It is not quite clear, however, if they possess any direct executive powers of their own or are limited to mere controlling and coordinating tasks, which would severely limit their capacity to meaningful self-government and make them dependent on the support of the organs of the municipalities and departments in cases where binding executive decisions have to be taken. The latter interpretation of the competences of the local councils is more in line with the traditional view of Indian institutions in Colombia which has tended to restrict their role to that of a kind of moral authority, thus making them vulnerable to attacks or challenges of State institutions with parallel authority.¹³⁵

In Venezuela, where the Constitution does not contain any specific guarantee of political participation for indigenous groups, the Supreme Court has recognized such a right on the basis of the general mandate provided for in Art. 77 of the constitution to create a special legal regime for Indians and of the right to meaningful political participation granted in the international human rights instruments to which Venezuela is a party. According to the court, it requires their involvement in the demarcation of administrative and municipal boundaries by the competent state bodies when the demarcation affects territories where indigenous communities are living.¹³⁶

In most other states, however, the official acceptance of Indian rights to self-government is limited to the recognition of the existence of certain indigenous institutions with limited functions in intra-community matters at the municipal level. It is only in recent times that indigenous organizations in Latin American countries have pressed for the acknowledgement of their right to self-determination, an issue which is closely linked with their struggle for recognition as distinct peoples with their own history, languages and cultural traditions. The right to self-determination has played a prominent role in the negotiations between the EZLN (*Ejército Zapatista de Liberación Nacional*) and the national government in Mexico in the aftermath of the Chiapas uprising in early 1994. Demands for self-determination are generally met with suspicion by Latin American governments

¹³² Arts. 286, 329 of the Colombian Constitution.

¹³³ Art. 357 of the Constitution of Colombia.

¹³⁴ Art. 330 of the Constitution of Colombia.

¹³⁵ Comisión Interamericana de Derechos Humanos, Informe sobre la situación de derechos humanos en Colombia, OEA/Ser. L/V/II.84, cap. XI. B.

¹³⁶ See section III. 1. and note 64 above.

which fear that their acceptance would undermine the unity of state and nation.¹³⁷ Indigenous autonomy is limited to the right of Indian communities to choose their own forms of social organization, thereby excluding any reference to the free choice of political organization which would imply the acceptance of an Indian right to self-determination or even to independence. Recent constitutions which recognize the multicultural and multiethnic character of the nation take great care to avoid any notion of a multinational structure of the state. The provisions which acknowledge the multiethnic and/or multicultural character are frequently accompanied by solemn proclamations of the unity of the state.¹³⁸ Up to now, however, indigenous organizations have invoked the right to self-determination only in order to justify their claims for greater autonomy within the state, not as a tool to break up the state or deny its essential unity. In this regard, the right to self-determination has become the basis of calls for a genuine participation of the indigenous communities in the decision-making process at the regional and national level, a right which they do not claim in their role as marginalized minorities, but in their capacity as descendants of the early inhabitants of the country and thus as true representatives of the nation.¹³⁹

Statutes which grant indigenous groups a certain degree of autonomy outside the municipal context have rarely been a part of national legislation up to now. Several laws which create special districts for indigenous groups and recognize the authority of their representative institutions in matters concerning the use of indigenous lands have been enacted in Panama.¹⁴⁰ However, these statutes do not provide for any meaningful participation of the Indian institutions in the national decision-making process affecting conditions of life and the exploitation of the natural resources in the Indian territories which would go beyond mere consultation.¹⁴¹ In Nicaragua, the constitution expressly recognizes the right of the communities on the Atlantic Coast to maintain and develop the forms of social organization which correspond to their historical and cultural traditions. Art. 181 of the Nicaraguan constitution, which was introduced by constitutional amendment in 1995, explicitly envisages a special law on the autonomy of the indigenous peoples and ethnic communities on the Atlantic Coast, to be adopted with the

¹³⁷ Stavenhagen (note 1), 44.

¹³⁸ E.g., Art. 83 of the Constitution of Ecuador: "Los pueblos indígenas, que se autodefinen como nacionalidades de raíces ancestrales ... forman parte del Estado ecuatoriano, único e indivisible." Art. 89 of the Constitution of Nicaragua: "Las Comunidades de la Costa Atlántica son parte indisoluble del pueblo nicaragüense y como tal gozan de los mismos derechos y tienen las mismas obligaciones. Las comunidades de la Costa Atlántica tienen el derecho de preservar y desarrollar su identidad cultural en la unidad nacional."

¹³⁹ See the Joint Declaration of the Federal Government of Mexico and the EZLN submitted for consideration to the competent national authorities of 16 January 1996, para. 3, <http://www.spin.com.mx/~floresu/FZLN/dialogo/documento-1.html>.

¹⁴⁰ Law 16 of 1953 creating the District of San Blas (Kuna Yala); Law 22 of 1983 creating the Embera District of Darien; and Law 24 of 1996 creating the Kuna of Madungandi District.

¹⁴¹ Arecio Valiente, Do Indigenous People Have the Right to Decide about Their Own Natural Resources?, <http://www.ecouncil.ac.cr/indig/conventi/panam-eng.html> (site last visited on 12-03-1999).

majority necessary for constitutional amendments, which will regulate, among other things, the powers of their institutions of government, their relationship with the national executive and legislature and with the municipalities, and the exercise of their rights.¹⁴² It seems that this law has not yet been enacted. A special autonomy statute had already been passed, on the basis of the old constitution, in 1987. It gave the communities on the Atlantic Coast the right, through their administrative bodies, to participate in the elaboration of national development plans concerning their region and to administer within their territories a wide variety of public services.

The constitutional recognition of the autonomy of the indigenous communities living on the Atlantic Coast reflects the special position which these peoples, and the Miskitos, have enjoyed in the region since colonial times. The Miskitos have traditionally defined themselves as a distinct sovereign people which established its own territorial jurisdiction in the area, in the form of a monarchy, under the auspices of the British Crown as early as 1687.¹⁴³ The autonomy status was formally ended with the deposition of the Miskito king in 1894 and the signing of the Harrison-Altamirano Treaty of 1905 which abolished the Miskito region as a separate territorial entity to which the laws of the Nicaraguan state did not apply.¹⁴⁴ In practice, however, the national government left the Miskitos alone for most of the twentieth century. It was only under Sandinista rule that serious attempts were undertaken to merge them into the national mainstream and to eliminate their potential for resistance by forcibly relocating them.¹⁴⁵ The recognition of the administrative autonomy of the communities on the Atlantic Coast was meant to end this conflict, but it seems that very little real progress has been made, the Miskitos complaining that the national authorities proceed with the exploitation of the natural resources in their territory and the privatization of their lands regardless of their wishes. Their authorities in early 1998 appealed to the Organization of American States to intervene in order to prevent military confrontation and prevent their physical and cultural annihilation.¹⁴⁶

¹⁴² Art. 180 of the Constitution of Nicaragua.

¹⁴³ Marlen Ivette Llanes, *El Proceso de Autonomia de la Costa Atlántica Nicaragüense*, Managua 1995, 52.

¹⁴⁴ *Ibid.*, 54.

¹⁴⁵ Bernard Nietschmann, *The Unknown War – The Miskito Nation, Nicaragua, and the United States*, New York 1989, 26–37.

¹⁴⁶ Carta del Consejo de Ancianos de la Costa Atlántica al Representante de la OEA en Nicaragua, March 12, 1998, <http://www.puebloindio.org/moskitia/cartaoea.htm> (site last visited on 12–03–1999).

III. The Role of International Law in the Protection of Indigenous Rights in Latin America

1. The Inter-American Convention on Human Rights

The Inter-American Court on Human Rights has not yet had an opportunity to express its views on the protection of indigenous peoples under the Inter-American Convention.

By contrast, the Inter-American Commission had to address on a number of occasions questions specifically concerning the situation of indigenous people with regard to the fundamental rights guarantees contained in the Convention.¹⁴⁷ In its report on the situation of the Miskito Indians in Nicaragua is carried out its most comprehensive review of the legal status of indigenous groups under the Convention.¹⁴⁸ In this report the Commission argues that not every ethnic group can be qualified as a people in the sense of modern international law with the consequence that it is entitled to choose independently the form of its political organization. On the other hand, the fact that an indigenous group may not enjoy the right to self-determination under international law does not mean that its national government is free to pursue an unrestrained policy of total assimilation. Though ethnic groups may not be able to claim the right to self-determination, they are, nevertheless, entitled to special protection for the use of their language, their religious practice and in general for all aspects of life which are linked to the preservation of their cultural identity. Among these aspects, the Commission stresses the special ties of the indigenous peoples with their ancestral lands, which are for them not only of economic, but also of spiritual value and constitute the territorial basis for their sense of identity. The Commission therefore views the resettlement of Indians from the lands they have traditionally occupied with great suspicion, and underlines the importance of the consent of the affected community for the lawfulness of such a measure. At no point does the Commission define in abstract terms the difference between peoples on the one hand and ethnic groups on the other or address the question whether an ethnic group must not be qualified as a people in certain circumstances. On other occasions, however, it has sometimes referred explicitly to indigenous communities as peoples, notably in the case of the Mapuche.¹⁴⁹ This ambiguity notwithstanding, the Commission grants the indigenous groups most rights traditionally connected with the right to self-determination in the social, economic and cultural field, except the right to political in-

¹⁴⁷ A comprehensive survey of the jurisprudence of the Commission in respect of indigenous issues is provided by Ariel Dulitzky, *Los pueblos indígenas: jurisprudencia del sistema interamericano de protección de los derechos humanos*, 26 *Revista IIDH* (1998), 138–181.

¹⁴⁸ Comisión Interamericana de Derechos Humanos, *Informe sobre la situación de los derechos humanos de un sector de la población nicaragüense de origen miskito*, OEA/Ser.L/V/II.62, doc. 10 rev. 3.

¹⁴⁹ Comisión Interamericana de Derechos Humanos, *Informe Anual 1979–1980*, OEA/Ser.L/V/II.50 Doc. 13 rev. 1.

dependence.¹⁵⁰ It emphasizes the need for a special protection of indigenous groups.¹⁵¹ In this context, the Commission has had regard not only to the Convention, but also to the American Declaration of Human Rights and the provisions of the International Covenant on Civil and Political Rights, especially to Art. 27 of the latter.¹⁵²

At its 95th regular session, the Commission has approved the draft project of an American Declaration on the Rights of Indigenous Peoples following a recommendation of the General Assembly.¹⁵³ This instrument, which will be legally binding on the states which sign it, reaffirms, among other things, the right of indigenous peoples to freely preserve, express and develop their cultural identity in all its parts, free of any attempt at assimilation,¹⁵⁴ the right to freely determine their political status and the right to participate without discrimination in all decision-making, at all levels, with regard to matters that affect their rights, lives and destiny.¹⁵⁵

2. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights has gained practical significance for the recognition of indigenous rights in Latin America in two respects. At the international level, Art. 27 of the Covenant has been repeatedly quoted by the Inter-American Commission in support of its view that states are obliged to grant the indigenous groups living on their territories an effective protection of their language and religion, and more generally of all those elements which are essential to their cultural identity.¹⁵⁶ The legal basis for the application of the Covenant is provided by Art. 29 of the Inter-American Convention which stipulates that its provisions shall not be interpreted as restricting the enjoyment of a right recognized by virtue of another convention to which one of the member states is a party.¹⁵⁷

Moreover, the Covenant has been ratified by most Latin American countries and thus has become part of their domestic law. It can therefore be used by the courts to fill in any gaps left in the protection of indigenous rights by the national legislation. As has been mentioned above, the Supreme Court of Venezuela has invoked Art. 25 of the Covenant, which grants all citizens the right to participate either directly or through freely elected representatives in the political life of their

¹⁵⁰ Dulitzky (note 147), 148.

¹⁵¹ Caso 1756, Resolución N° 12/85 (Caso Yanomani), para. 8: "... special protection for indigenous populations constitutes a sacred commitment of the states."

¹⁵² Caso 1756 (note 151); Informe sobre la situación de los derechos humanos de un sector de la población nicaragüense de origen miskito (note 148).

¹⁵³ AG/Res. 1022 (XIX-O/89).

¹⁵⁴ Art. V of the Proposed Declaration.

¹⁵⁵ Art. XV of the Proposed Declaration.

¹⁵⁶ See note 152 above.

¹⁵⁷ Informe sobre la situación de los derechos humanos de un sector de la población nicaragüense de origen miskito (note 148).

nation, in support of its conclusion that indigenous communities in Venezuela enjoy a constitutionally protected right to be consulted in an adequate manner on legislative measures which may directly affect their rights and lives.¹⁵⁸

3. The ILO Convention No. 169

Among the international instruments which have featured prominently in the debate on the rights of indigenous peoples in Latin America, the Convention No. 169 of the International Labour Organisation concerning Indigenous and Tribal Peoples in Independent Countries¹⁵⁹ has been the most influential. The Convention has shaped the national discussions on issues related with the effective protection of indigenous rights in several ways. First of all, it offers a convenient way to establish a basic framework for the promotion of indigenous rights in countries which have hitherto lacked adequate national rules on the subject. This is the case in Costa Rica and El Salvador, where no elaborate constitutional or statutory schemes on the protection of indigenous rights have been enacted. However, in these countries national courts and government officials might be inclined to adopt a cautious interpretation of the Convention in order to avoid problems of constitutionality, as is illustrated by a ruling delivered by the Constitutional Chamber of the Supreme Court of El Salvador upon request of the Legislative Assembly of the country which stressed that the Convention, when construed correctly, contained no provisions which would contradict the fundamental principles of the national Constitution.¹⁶⁰ In Guatemala, Congress issued a formal declaration when it ratified the Convention that the provisions of the Guatemalan Constitution precede the Convention and that the latter does not produce any retroactive effects or affect well established rights.¹⁶¹

Secondly, the Convention has served as a model in a number of countries which have introduced detailed constitutional provisions on the protection of indigenous rights. The influence of the Convention is visible in the new constitutions of Colombia (1991), Paraguay (1992), Bolivia (1994) and Ecuador (1998). It has also inspired, although to a minor degree, the amendment of Arts. 4 and 27 of the Mexican Constitution in 1992.

Finally, the Convention serves as point of reference for the indigenous organizations in many Latin American countries in their struggle for greater autonomy and a more effective protection of their economic, social and cultural rights. It has helped to shape the agenda of the EZLN rebels in the negotiating process with the federal government in Mexico, culminating in the agreement of San Andres, which focuses on the central issues of self-determination and domestic autonomy.¹⁶² The

¹⁵⁸ See note 64 above.

¹⁵⁹ Compare its text in Annex, I, in this issue.

¹⁶⁰ Clavero (note 61), 188.

¹⁶¹ Gómez Rivera (note 66), 53.

¹⁶² Héctor Díaz-Polanco, *Derechos indígenas en la actualidad*, <http://www.Linux.soc.uu.se/mapuche/mapuint/memo981101/htm> (site last visited on 12-03-1999).

Agreement on the Identity and Rights of the Indigenous Peoples signed by the government and the guerrilla movement of Guatemala as part of the peace process in that country is based mainly on the principles set forth in the Convention.¹⁶³ It has equally inspired the proposals of the indigenous organizations in Ecuador for the constitutional recognition of a number of fundamental rights of the indigenous peoples which have found their way into the new Constitution of 1998.¹⁶⁴

IV. Conclusion

The history of indigenous rights in Latin America has been a history of neglect and abuse. Although the fundamental quality of Indians as human beings entitled to the respect of their life and property was recognized in the early stages of Spanish colonial policy, all official attempts to limit the exploitation of Indians through the establishment of two separate jurisdictions for the Republic of the Spaniards and the *República de los Indios* were bound to fail in view of the economic and political realities in the Spanish colonies. After independence the marginalization of the indigenous sectors of society continued in the name of national unity, economic progress and equality before the law. For most of the twentieth century, a policy of assimilation has prevailed which was based on the view that Indians had to lose their Indian identity first before being integrated into the mainstream of society, a process which was not only seen as a necessary condition for the creation of a "unified nation state", but also considered to be in the best interest of the indigenous peoples themselves.

It is only since the 1980s that the policy of forced assimilation has been increasingly abandoned by most national governments. This reversal is due to a variety of concurrent factors. The movement towards pluralism and democracy which has accelerated in Latin America during the last decade increased the opportunities for minorities which had hitherto been the prime targets for political repression and economic exploitation to voice their complaints and concerns. At the same time, indigenous organizations created for the purpose of the defence of Indian rights in various parts of Latin America since the beginning of the 1960s have steadily grown in number and strength and presented their views and claims with renewed self-confidence at the national level as well as in the international arena. Finally, the international environment itself changed significantly, a shift which was marked by the adoption of the Convention No. 169 of the International Labour Organisation. The Convention replaced the paternalistic view of indigenous rights which had characterized the preceding Convention No. 107 in favour of an approach that put much stronger emphasis on the right of indigenous communities to genuine participation in all decisions which affect their living conditions.

To this day, however, protection of indigenous rights in many parts of Latin America remains rudimentary at best. Only a minority of countries have so far

¹⁶³ Gómez Rivera (note 66), 53.

¹⁶⁴ Ibid.

adopted an elaborate constitutional framework for the protection of indigenous rights. This situation reflects a deeply felt unease by many governments in the region which fear the negative impact the recognition of real Indian autonomy could have on the unity of the state and the prospects for economic progress and therefore try to limit the practical effects of indigenous rights to the minimum. Even in those countries with an advanced legislation on Indian issues – like Brazil, Colombia, Paraguay or, most recently, Ecuador – its implementation is often undermined by the indifference of public officials and/or the fierce opposition of powerful economic interests.¹⁶⁵ Indian titles to their ancestral lands or to reservation territories are often ignored by the competent state authorities.¹⁶⁶ Even in cases where their rights have been recognized by the courts, they are frequently subject to the permanent threat of unlawful intrusion or usurpation.¹⁶⁷

The same development which has led to the democratization of Latin American societies has also increased the pressure for economic expansion as an indispensable condition for the successful integration of these countries into the world economy. This trend could reinforce the view of indigenous peoples as an obstacle to progress which has traditionally been strong in Latin America. The Mexican example shows that this danger is not merely of a theoretical nature. In 1992, shortly after adopting the constitutional amendment recognizing the multiethnic character of the Mexican nation, the government pushed through major reforms of the agrarian sector in order to prepare Mexico for NAFTA membership. These reforms allow individuals and companies to acquire full ownership rights over what were formerly communally owned lands (*ejidos*) and permit the formation of joint ventures between individuals in *ejidos* as well as direct foreign investment in the *ejido* sector.¹⁶⁸ While these reforms make perfectly good sense in the context of economic modernization, they are contrary to the interests of the indigenous sectors of society which rely heavily on communal lands for their forms of agricultural activity and are unlikely to benefit from the extended commercial liberties with regard to land.¹⁶⁹ To reconcile the often conflicting goals of economic modernization and of effective protection for indigenous rights will be one of the main challenges of indigenous policy in Latin America in the years to come.

¹⁶⁵ Comisión Interamericana de Derechos Humanos, Informe sobre la situación en Colombia (note 135), cap. XI. E.

¹⁶⁶ See the proposal of the Inter-American Commission for a friendly settlement in the case No. 11.713 where a court decision recognizing land rights of certain indigenous communities in Paraguay had remained unenforced for five years.

¹⁶⁷ Comisión Interamericana de Derechos Humanos, Informe sobre la situación en Brasil (note 99), cap. VI., paras. 40–47.

¹⁶⁸ Guillermo Marrero/Douglas J. Renert, The Long and Winding Road: An Overview of Legislative Reform on Mexico's Road to a Global Economy, *Southwestern Journal of Law and Trade in the Americas* 1994, 90–91.

¹⁶⁹ See Schulte-Tenckhoff (note 59), 39, who points out the similarities existing in this respect between Mexico and Chile.